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Stambeno je političko: reforma poreskih politika u oblasti prometovanja stambenih nekretnina u Gradu Beogradu

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Sažetak

Rad ima za cilj da istraži načine za povećanje socijalne i ekonomske pravde u kontekstu stanovanja u Beogradu. Istraživanje je usmereno na analizu efekata postojeće poreske politike koja se odnosi na izgradnju, kupovinu, posedovanje i upotrebu stambenih jedinica u glavnom gradu. Istraživanje ima tri grane: prvo, rad analizira postojeći institucionalni okvir poreza na kupoprodaju nekretnina i poreza na imovinu; drugo, autori nude kvalitativno istraživanje kroz intervjue agenata za nekretnine i kupce nekretnina da bi utvrdili motive za kupovinu njihove prve, odnosno svake sledeće nekretnine; treće, rad nudi model determinanti cena nekretnina u Gradu Beogradu. Ukrštanjem rezultata empirijskog istraživanja, rad teži razvijanju alternativnih modela oporezivanja koji bi doprineli promeni podsticaja u okviru stambene politike, čime bi ih učinili delom sistema socijalne pravde. Promena podsticaja treba da dovede do toga da stambene jedinice postanu dostupnije i pristupačnije za ljude koji u njima

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žele zapravo da žive, a progresivno skuplje za vlasnike koji koriste stambene jedinice kao poslovni prostor, investicionu ili štednu imovinu.

Ključne reči: stambena politika, socijalna pravda, nekretnine, porezi, Beograd.

Uvod

Gradovi u Srbiji su postali prostori sukoba između interesa tržišta za uvećanjem profita i potreba građana i građanki za ispunjenjem životnih planova.[1] Takva dinamika sukoba karakteristična je za evropske životne prostore i odvija se između dve socijalne sile: profitno orijentisane i svakodnevnog života (Brenner et all. 2012). Sukob u urbanim sredinama ima svoju materijalizaciju u *stambenom pitanju*. U demokratskim društvima, stambeno pitanje, odnosno pitanje posedovanja nekretnine, jeste deo demokratske političke kulture, odnosno deo značenja ideje odgovornog građanina i građanke, pripadanja zajednici, kao i materijalnog pokazatelja ličnog napretka (White & Nandedkar 2021).

Srbija, kao i druge postkomunističke zemlje, prošla je intenzivan proces privatizacije stanova nakon 1989. godine. Možemo govoriti o najmanje procesa koji prate privatizaciju stambenog prostora u postkomunističkim društvima. Prvo, proces privatizacije stanova dovršio je transformaciju životnog prostora iz *političkog i javnog u polje privatnog* interesa. Drugo, privatizacija nekretnina generisala je nove klasne i socijalne *nejednakosti*. Oba problema manifestuju se u nedostatku životnog prostora i prenaseljenosti postojećih stambenih jedinica (Tsenkova 2014). Standardni tržišni mehanizam za rešavanje stambenog pitanje je tzv. „strategija izlaza" (exit strategy), odnosno prodaja nekretnine, tj. selidba u sredine koje nose sa sobom manje životne troškove. Time dolazimo i do ideologije sna o posedovanju nekretnine koja se zasniva na spekulativnoj ideji da su vlasnik ili vlasnica kupovinom nekretnine uložili u kapital čija vrednost nikako ne može da padne, već samo vremenom da raste (Marcuse 2012). Nekretnine se, u finansijskoj strukturi, transformišu iz investicije u štednju, što vodi u hronični nedostatak životnog prostora, nerealan rast cena nekretnina, stanarina i cena turističkih boravaka (Gurran & Phibbs 2017). Dugoročno gledano, životni prostor lišen ideje javnog dobra dovodi do oštrih podela na one koji mogu sebi da obezbede kvalitet života na osnovu ličnih talenata, i onih koji to ne mogu.

1 Ovaj rad je rezultat istraživanja na projektu „Srbija i globalni izazovi: po pravednijim i demokratskim javnim politikama", koji su sprovodili Univerzitet u Beogradu – Institut za filozofiju i društvenu teoriju i Fondacija za otvoreno društvo Srbija.

Cilj istraživanja je analiza stambenog pitanja u Srbiji, sa fokusom na studiju slučaja investitorskog urbanizma na teritoriji Grada Beograda. Polazimo od analitičkog okvira lanca stambenog zbrinjavanja (*The housing provision chain*), koji je dizajnirao P. J. Ambrose (1991). Ukratko, dobre stambene politike zbrinjavanja su one koje u procesu izgradnje stanova pronalaze balans između inputa „demokratski odgovornog javnog sektora" i „nedemokratski odgovornog privatnog sektora" (Ibid., 94). Stambeno zbrinjavanje se, prema ovom analitičkom modelu, sastoji iz 5 sektora i to: promocija, investicije, izgradnja, tržišna alokacija/vladina redistribucija, i naknadno upravljanje.[2] Naša pretpostavka je da je na tržištu Srbije neravnoteža u stambenom zbrinjavanju stvorena u drugom sektoru, investicijama, gde su se javne investicije značajno povukle iz sektora stanogradnje, dajući punu prednost privatnim investitorima.[3] Posledica neravnoteže je stvaranje svojevrsne *rentijerske kulture* u Srbiji, gde se ulaganje u nekretnine kao forme investicije smatra poželjnim ponašanjem, iako ima štetan uticaj po socijalnu pravdu.

Takvu tvrdnju zasnivamo na trendu poslednje decenije koja je obeležena rastom stanogradnje na teritoriji čitave Srbije, gde se Beograd izdvaja kao čvorište u kome je u pretkriznoj 2019. godini izgrađeno oko 41% ukupne vrednosti zgrada u zemlji ili 49% vrednosti svih stambenih zgrada, dok je prometovano 26% svih nekretnina u zemlji (Republički zavod za statistiku 2020). Takva situacija je direktno uzrokovana opredeljenjem Vlade Republike Srbije i Grada Beograda da se olakša proces dobijanja građevinskih dozvola, relaksiranom politikom ozakonjenja i upisa objekata, kao i menjanjem urbanističkih planova gde se parcele preimenuju u građevinsko zemljište.[4]

2 Četvrti sektor je preveden tako da bi odgovarao duhu srpskog jezika. Ambrose (1991, 93–94), koristi sintagme „tržišna alokacija" za inpute privatnog sektora, i „netržišna alokacija", za inpute iz javnog sektora. Peti sektor, „naknadni menadžment", Ambrose razlaže u modelu na „održavanje, popravku, konverziju, realokaciju", da bi u daljem tekstu koristio sinonimno termin koji mi usvajamo.

3 Iako nije isključeno da i drugi sektori izazivaju napetosti između privatnog i javnog, predmet rada će se usmeriti ka problemu investitorskog urbanizma, koji dovoljno dobro opisuje (ne)ravnotežu stambenih politika u Srbiji.

4 Prema metrici Svetske banke (World Bank 2017), Srbija se tokom 2016. uvođenjem elektronskog sistema izdavanja građevinskih dozvola i relaksiranjem pravnog okvira plasirala među top 10 reformskih privreda, skrativši proces izdavanja građevinskih dozvola sa 327 na 157 dana. Takođe, Zakon o ozakonjenju objekata (Službeni glasnik RS, br. 96/2015, 83/2018, 81/2020, 1/2023) sadrži liberalne odredbe za izgradnju bez građevinske dozvole pošto predviđa jako niske naknade za ozakonjenje. Generalni urbanistički plan Grada Beograda je tokom prethodne dve decenije u svojim novim verzijama predviđao povećanje građevinskog područja na teritoriji Grada Beograda, sa 53.850 ha u 2003. na 55.560 ha u 2009. i 56.540 ha u 2021. (GUP Grada Beograda, Službeni glasnik Grada Beograda, br. 27/03, 25/05, 34/07, 63/09, 70/14, 11/16).

Grad Beograd je primer generisanja nejednakosti putem stambenog pitanja. Sve više građana i građanki Beograda će morati da traže svoj životni prostor u dotrajalim zgradama, na rubnim delovima gradova ili u susednim mestima, što je posebno problematično u slučaju nefunkcionalne i preopterećene saobraćajne infrastrukture u Beogradu. U socio-ekonomskom smislu, to će dovesti do neravnopravnog položaja prilikom iskorišćenja poslovnih i životnih prilika. Konačno, u političkom smislu, takav trend će generisati nezadovoljstvo, koje se neće rešavati participativnim demokratskim odlučivanjem, već kroz proteste manjine angažovanih, dok se kod ostalih rizikuje povećavanje apatije i propast solidarnosti među ljudima.

Rad je podeljen u pet delova. U prvom delu bavimo se analizom postojećih teorijskih rešenja vezanih za stambeno pitanje i socijalnu pravdu. Drugi deo posvećen je postojećim institucionalnim rešenjima za stambeno pitanje i povezanih poreza u Republici Srbiji relevantnim za Grad Beograd. Treći deo posvećen je ekonomskoj analizi kretanja cena na tržištu nekretnina u Gradu Beogradu, kao i određivanju determinanti koje utiču na rast nekretnina. U okviru ovog dela dato je i istraživanje (intervjui) sprovedeno za potrebe ovog rada među kupcima prvog stana, kupcima koji štede kroz nekretnine i agentima nekretnina, a u cilju istraživanja faktora koji stambeno pitanje čine (ne)pravednim u Gradu Beogradu. Konačno, analizom ekonomskih pokazatelja kretanja cena i davanjem smisla brojevima kroz stavove učesnika na tržištu nekretnina, rad će u poslednjem delu ponuditi preporuke kako da poreske politike budu socijalno pravedne i usmere ponašanje relevantnih aktera u pravcu shvatanja *stana kao životnog prostora, a ne investicije koja nosi profit*.

Analitički okvir: od rentijerske kulture ka pravednom stanovanju

U postkomunističkim društvima stambeno pitanje omašilo je šansu da se transformiše kao deo demokratskih politika, odnosno politika jednake dostupnosti životnog prostora, i svelo se na odnos investicija i profita. Sva evropska postkomunistička društva privatizovala su stambene jedinice, u najvećem broju slučajeva simbolično ih prodajući već postojećim stanarima (Turner & Elsinga 2005). Vlasnici nekretnina, građani i građanke, u tranzicionim društvima nisu samo vlasnici životnog prostora, oni su i vlasnici *kapitala*. Srbija tu nije izuzetak.

Kako navode Vranić, Vasilevska i Haas (2016, 1265), tržište nekretnina u Srbiji se odlikuje visokim udelom privatnog vlasništva, deregulacijom državne intervencije, kao i odsustvom ograničenja prilikom kupoprodaje stanova. Kao i druge zemlje bivše SFRJ, Srbija spada u red bivših komunističkih država koje su imale manje restriktivan odnos prema posedovanju stanova, odnosno države u kojima je neka forma privatnog

vlasništva bila moguća još za vreme komunizma (Soaita & Dewilde 2019, 49). To će reći da je nakon 1989. godine u Srbiji sasvim zamisliva situacija (i često je slučaj) da neki ljudi imaju i po nekoliko stanova, dok drugi ne mogu doći ni do svog prvog stana. Posledica je da je Srbija (kao i druge zemlje Zapadnog Balkana) u evropskom vrhu prenaseljenosti po metru kvadratnom, odnosno da skoro duplo više ljudi živi u prenaseljenim stanovima u odnosu na evropski prosek od 17,8% (Eurostat 2020).

Ulazak banaka na tržište nekretnina nije učinio stanovanje dostupnijim kupcima prvog stana. U svim postkomunističkim državama, trend finansiranja stambenih kredita uvek ima slične faze, gde u prvoj banke nastupaju s dosta opreza, odnosno s visokim kamatama i ekstenzivnim instrumentima obezbeđenja. Takvom politikom poslovanja, krediti su uskraćeni za veliki broj onih koji nemaju rešeno stambeno pitanje. Kako se situacija na tržištu uravnotežuje tako i banke popuštaju kriterijume i smanjuju kamate, što povećava tražnju za stanovima. Paradoksalno, umesto da čine stanovanje dostupnim kupcima prvog stana, banke doprinose rastu cena samih nekretnina, odnosno one „takođe pomažu ljudima da naduvaju cene nekretnina" (Bowman at al. 2021).

Samim tim, razvija se *rentijerska kultura*, ili, kako je Piketi (2015, 448) naziva, „društvo malih rentijera". U rentijerskim kulturama česte su društvene napetosti između potreba za sopstvenim stanom i hroničnim nedostatkom stambenog prostora. Piketijeva istraživanja kulture nasledstva u Francuskoj pokazuju da se rentijerstvo razvija kao posledica koncetracije nekretnina preko nasleđivanja, i da u renti nema ničeg lošeg i „nedemokratskog", niti tržišno manjkavog (Ibid., 455). Naše istraživanje pokazuje da problem koncentracije nekretnina u rukama rentijera postaje politički i kulturni problem onda kada se dobit od rente koristi kao osnova za dalja ulaganja u nekretnine, što dovodi do nedostatka životnog prostora za one koji nemaju šta da naslede. Problem postaje transgeneracijski jer se spirala nenasleđivanja širi vremenom, dok se rentijerstvo i život pod kirijom smatra kao deo naučenog kulturnog obrasca (više o ovome videti u kvalitativnom delu istraživanja).

Rentijerska kultura u stambenom pitanju baca novo svetlo kako na otvorene tako i skrivene nejednakosti, čime ulazi u interakciju sa *strukturnim problemima društva* (Bowman at al. 2021). Otvorene nejednakosti svode se na nedostatak stambenog prostora, kroz visoke cene kvadrata. Pored toga, postoji izražena nejednakost između onih koji poseduju stan iz komunističkog perioda (stara gradnja) i onih koji mogu sebi da priušte nov stan, ili im je kupovina novog stana jedina opcija. Stara gradnja je često neadekvatno održavana, skupa za popravku i manje vredna na tržištu jer se u renoviranje mora često previše uložiti (Soaita & Dewilde 2019, 54). Čest problem je što su politike stanovanja suštinski decentralizovane, odnosno

prepuštene lokalnim samoupravama (Tsenkova 2014, 94), koje imaju pravo prikupljanja poreza na imovinu, ali ne i obavezu ulaganja u održavanje zgrada, programa za sanaciju i slično.

Skrivene nejednakosti su strukturno dublje postavljene i za njihovo otklanjanje je potrebno usmeravati ponašanje, ne samo donositi strategije i politike stanovanja. Ako stanovanje shvatamo prostorno, ono se ne svodi samo na stambenu jedinicu u kojoj živimo, već i na širi prostor koji nam postaje (ne)dostupan. Tako, postoji bitna razlika da li nam je posao na 5 minuta od kuće, da li su nam dostupni parkovi, biciklističke staze, rekreacioni centri, kulturni sadržaji, obrazovne institucije. Takvo prostorno „udaljavanje sadržaja" stanovanja vodi kako smanjenju produktivnosti građana tako i opštem kvalitetu života.

Stambeno pitanje jeste pitanje socijalne pravde. U konsolidovanim demokratijama, socijalna pravda oko stambenog pitanja vezana je za zbrinjavanje marginalizovanih grupa, manjina, izbeglica, beskućnika, žrtava rodnog i identitetskog nasilja, itd. Međutim, u tranzicionim društvima, stambeno pitanje širi se i na druge klase, a posebno je vezano za procese oblikovanja srednje klase kao dominantnog sloja u demokratskim društvima. Jedan deo literature vezuje ideju socijalne pravde s stambenim pitanjem najčešće pozivajući se na modele rolsovskog tipa, prema kojoj država ima moralno pravo da uređuje preraspodelu na način da se uvek poboljša status najugroženijih (Uitermark 2012). Pored toga, u nešto manjoj meri, stambeno pitanje se oblikuje kroz postavke distributivne pravde, što ima izrazito demokratsku dimenziju. Ključno pitanje je „ko dobija šta" (Jonkman 2020), dok je u demokratskim društvima potrebno još dodatno osigurati egalitaristički princip da „svako dobije" ili makar „niko ne izgubi" (Martin 2005).

Istraživanje koje smo sproveli na primeru Grada Beograda služi nam kao osnova da zastupamo argument da bi stambene politike koje bi kratkoročno dale najbolje efekte u domenu socijalne pravde bile vezane za tzv. prihodno neutralne poreze (*revenue neutral*) koji se naplaćuju ljudima koji vrše neku društveno nepoželjnu aktivnost (npr. dolaze automobilom u centar grada), ali država prinos od tog poreza ne uzima sebi, već ga raspodeljuje ljudima koji ne vrše tu aktivnost. Na taj način institucije, odnosno poreska politika, preusmeravaju ponašanje ljudi u cilju društveno i ekonomski željenih ishoda (Frank 2020). U kontekstu stambenih politika, to bi značilo progresivno oporezivanje onih koji poseduju više nekretnina (što se bi se tretiralo kao investicija) i preraspodelu onima koji imaju samo nekretninu u kojoj žive, u cilju podizanja kvaliteta života ili različitih olakšica. Poslednji model ujedno zalazi i u sferu državne intervencije na tržištu.

Poslednji, ali i ne najmanje važan razlog za poresku reformu je sprečavanje takozvanog zaraznog ponašanja (behavioral contagion) (Frank 2020). Pod time se smatra individualno ponašanje koje je štetno za zajednicu iz dva razloga. Prvi je taj što je štetno samo po sebi, a drugi zato što ljudi oponašaju jedni druge, pa vaše ponašanje može da utiče na mene da se ja ponašam na isti način, što za posledicu daje još veće zbirne negativne efekte. Postoji puno primera takvog zaraznog i štetnog ponašanja. Na primer, pušenje. Istraživači u SAD su došli do zaključka da je najveća šteta koju pušači čine svom okruženju povećanja verovatnoća da će ljudi u njihovom društvu i sami početi da puše, a ne tzv. sekundarno pušenje, kako se doskora mislilo (Chassin et al. 1986, 327–334; Ali & Dwyer 2009, 402–408).

U Srbiji, i posebno u Beogradu, ideja da je najbolje uložiti novac u kupovinu stana je opšte mesto i predstavlja štetno zarazno ponašanje. Ne ulazeći u ostale razloge zašto ljudi ne ulažu u druge vidove poslova i investicija, važan razlog predstavlja činjenica da mnogi to rade i da im se cela stvar isplatila i još uvek se isplaćuje. Da bi se takva situacija preokrenula i da bismo se rešili tog društveno štetnog zaraznog razmišljanja potrebno je da gomilanje stanova učinimo skupim i pri kupovini i za posedovanje. Na taj način bi ljudi prestali da razmišljaju o kupovini dodatnih stanova, već bi počeli da razmišljaju o prodavanju nagomilanih stanova i načinima da produktivnije i društveno poželjnije ulože svoj novac.

Stambeno pitanje u Gradu Beogradu: analiza institucionalnog okvira i poreskih zakona

U ovom odeljku bavimo se institucionalnim uređenjem stambene i poreske politike i podsticajima koje te politike stvaraju na tržištu. Ukratko, zagovaramo stanovište da su ove politike zastarele, međusobno neusklađene, razdvojene od stvarnosti i naposletku štetne za stanovnike Republike Srbije. Zakonodavni okvir pruža skromnu pomoć na tom putu građana da dođu do svoje prve nekretnine. Najviše što građani mogu da očekuju je da budu oslobođeni poreza na prenos apsolutnih prava ili da dobiju povraćaj PDV pri kupovini stana i na poreski kredit ukoliko žive u stanu u kome su prijavljeni. Međutim, zakonodavni okvir im posredno čini više štete nego koristi zato što ne štiti tržište stambenog prostora od učesnika koji su na tom tržištu zbog potreba za investiranjem ili štednjom. Osnovni pokazatelj nepravičnosti postojećeg sistema pronalazimo u slučaju poreza na imovinu, koji je dizajniran tako da porez na vrednije stanove može biti veći za fizičko lice nego za pravno lice.

Naš predlog je da poresku politiku treba ustrojiti tako da olakšava, odnosno pojeftinjuje, kupovinu i posedovanje stambenog prostora za ljude koji u tom prostoru žive, a otežava, odnosno poskupljuje kupovinu i pose-

dovanje stambenog prostora za ljude koji stambeni prostor koriste kao poslovni prostor, investicioni kapital ili štednju. Na taj način bi se stambena politika i poreska politika stavile u službu srednje klase, tako što bi osnovni sloj demokratskog društva zaštitile od nefer tržišne utakmice sa kompanijama, investicionim fondovima, stranim kapitalom, nelegalnim izvorima novca i slično.

Najpre ćemo predstaviti trenutni institucionalni okvir koji čine Zakon o stanovanju i održavanju[5] (u daljem tekstu ZoS), Zakon o porezima na imovinu[6] (u daljem tekstu ZoPI) i Zakon o porezu na dodatu vrednost[7] (u daljem tekstu ZoPDV) i njihove podsticaje. Nakon toga, govorićemo o ponudi i tražnji, odnosno cenama stambenog prostora i njihovog odnosa sa platežnim sposobnostima stanovništva u Srbiji. Naposletku ćemo ponuditi reformu poreske politike koja bi dovela do boljih ishoda za stanovnike i olakšala kupovinu i posedovanje nekretnina u Srbiji.

Porezi na kupovinu stana

Zakonodavni okvir u Republici Srbiji poznaje poreske olakšice za kupce prvog stana i poreske olakšice za stanare. Kada je u pitanju kupovina stanova kupci su dužni da plate porez na prenos apsolutnih prava (u daljem tekstu PAP) (ZoPI, član 23, stav 1, tačka 1) u iznosu od 2,5% (ZoPI, član 30). Od ovog pravila postoje dva značajna izuzetka.

Prvi je situacija u kojoj je predmet kupoprodaje stan u novogradnji. U tom slučaju kupci su oslobođeni plaćanja poreza na prenos apsolutnih prava (ZoPI, član 24a, stav 1, tačka 1), već su u obavezi da plaćaju porez na dodatu vrednost (u daljem tekstu PDV) od 10%, (ZoPDV, član 23, stav 2, tačka 14). Treba naglasiti da je PDV u Republici Srbiji po pravilu 20% (ZoPDV, član 23, stav 1), te da kupovina stambenih objekata oporezuje po posebnoj (nižoj) stopi od 10%, poput hrane, lekova, medicinskih pomagala, udžbenika, knjiga, novina i sl. (ZoPDV, član 23, stav 2). Država na taj način želi da omogući ljudima da povoljnije dođu do stambenog prostora. Na nenameravane negativne posledice ovakvog institucionalnog rešenja vratićemo se u nastavku.

5 Zakon o stanovanju i održavanju zgrada – *Sl. glasnik RS*, br. 104/2016 i 9/2020.

6 Zakon o porezima na imovinu – *Sl. glasnik RS*, br. 26/2001, *Sl. list SRJ*, br. 42/2002 – odluka SUS i *Sl. glasnik RS*, br. 80/2002, 80/2002 – dr. zakon, 135/2004, 61/2007, 5/2009, 101/2010, 24/2011, 78/2011, 57/2012 – odluka US, 47/2013, 68/2014 – dr. zakon, 95/2018, 99/2018 – odluka US, 86/2019, 144/2020 i 118/2021.

7 Zakon o porezu na dodatu vrednost – *Sl. glasnik RS,* br. 84/2004, 86/2004 – ispr., 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 – usklađeni din. izn., 68/2014 – dr. zakon, 142/2014, 5/2015 – usklađeni din. izn., 83/2015, 5/2016 – usklađeni din. izn., 108/2016, 7/2017 – usklađeni din. izn., 113/2017, 13/2018 – usklađeni din. izn., 30/2018, 4/2019 – usklađeni din. izn., 72/2019, 8/2020 – usklađeni din. izn. i 153/2020.

Drugi značajan izuzetak nastaje kada budući vlasnik kupuje svoj prvi stan. U tom slučaju kupci su oslobođeni dela PAP, odnosno imaju pravo na povraćaj PDV, koji se odnosi na 40m² stambenog objekta za kupca, i dodatnih 15 m² za svakog od članova domaćinstva koji nisu ostvarili pravo na oslobađanje/povraćaj za kupovinu prvog stana (ZoPI, 31a; ZoPDV, 56a). Dakle, ukoliko stan kupuje četvoročlana porodica, čiji članovi nisu imali stan u svome vlasništvu ili suvlasništvu, kupac će biti oslobođen poreza za 40+15+15+15=95 m². Prema tome, neće morati da plate PAP, odnosno imaće pravo na povraćaj PDV ukoliko kupuju stan površine do 95 m². Ukoliko, međutim, kupuju veći stan platiće porez samo na površinu koja prevazilazi pomenutih 95 m². Treba naglasiti da se ovo pravo može iskoristiti samo jednom u životu. Tako da se roditelji mogu odlučiti da ne iskoriste ovo pravo za svoju decu, kako bi deca, kada odrastu, imala pravo na oslobađanje od PI ili povraćaj PDV za 40 m² pri kupovini sopstvenog umesto za samo 15m2 u roditeljskom stanu.

Porezi na posedovanje stana

Nakon što postanu vlasnici stana, građani su dužni da plaćaju porez na imovinu (ZoPI, član 2). Zakon lokalnim samoupravama nalaže kako da utvrde poresku osnovicu i vrednost nepokretnosti na osnovu kojih se vlasnici oporezuju (ZoPI, članovi 5, 6, 6a, 6b, 7 i 7a). Ovde nećemo ulaziti u detalje u vezi sa parametrima za formiranje poreske osnovice, nego ćemo se usredsrediti na poreske stope (član 11).

Zakon predviđa da poresku stopu, kao i poresku osnovicu, određuju lokalne samouprave u okviru zakonskih ograničenja (ZoPI, član 11, stav 2). Kada su u pitanju nepokretnosti, lokalna samouprava može propisati poresku stopu do nivoa od 0,4% za poreske obveznike koji ne vode poslovne knjige (ZoPI, član 11, stav 2).[8] Međutim, kada je u pitanju porez na imovinu za nepokretnosti u vlasništvu fizičkih lica[9] poreska stopa se određuje progresivno. To znači da se poreska stopa povećava sa povećanjem vrednosti nepokretnosti, odnosno sa povećanjem poreske osnovice. U nastavku prikazujemo tabelu navedenu u Zakonu (ZoPI, član 11, stav 1, tačka 3).

8 Tu potpadaju pravna lica, preduzetnici, fondovi i sl. (ZoPI član 4, stav 7).

9 I drugi poreski obveznici koji ne vode poslovne knjige (ZoPI član 4, stav 6).

Tabela 1. Progresivne stope poreza na imovinu za nepokretnosti poreskog obveznika koji ne vodi poslovne knjige, osim na zemljištu

Poreska osnovica	Poreska stopa
(1) do 10.000.000 din.	Do 0,40%
(2) od 10.000.000 do 25.000.000 din.	Porez iz podtačke (1) + do 0,6% na iznos preko 10.000.000 din.
(3) od 25.000.000 do 50.000.000 din.	Porez iz podtačke (2) + do 1,0% na iznos preko 25.000.000 din.
(4) preko 50.000.000 din.	Porez iz podtačke (3) + do 2,0% na iznos preko 50.000.000 din.

Šta to konkretno znači? Na primer, ukoliko lokalna samouprava odredi poresku osnovicu za nekretninu u iznosu od 26.000.000 dinara (oko 220.000 evra), na nju bi se primenjivala tačka podtačka (3) iz tabele. Ona, naravno, uključuje i prve dve podtačke. Jednostavnosti radi, uzećemo slučaj da je lokalna samouprava odredila zakonom najveće dozvoljene poreske stope. Tako bi suma od 26.000.000 dinara bila oporezovana na tri dela. Prvi deo bi iznosio 10.000.000, drugi 15.000.000 i treći 1.000.000 dinara. Kada saberemo ta tri dela dobijamo ukupnu poresku osnovicu od pomenutih 26.000.000.

Prvi deo od 10.000.000 bio bi oporezovan po stopi od 0,40%, pa bi iznos prvog dela poreza bio:

(1) 10.000.000 * 0,004 = 40.000 dinara.

Drugi deo, od 15.000.000 dinara bio bi oporezovan po stopi od 0,6%, pa bi iznos drugog dela poreza bio:

(2) 15.000.000 * 0,006 = 90.000 dinara.

Naposletku, treći deo od 1.000.000 bio bi oporezovan po stopi od 1%, pa bi iznos trećeg dela poreza bio:

(3) 1.000.000 * 0,01 = 10.000 dinara.

Prema tome, zbir ova tri dela (1)+(2)+(3) bi iznosio 140.000 dinara i to bi predstavljalo godišnji porez na imovinu za pomenutu nekretninu.

Progresivno oporezivanje povećava iznos poreza na skuplje nekretnine za fizička lica. Međutim, to ne važi za pravna lica. Pravna lica, kao što smo videli iznad, plaćaju porez na imovinu po stopi koja može ići isključivo do 0,04%. Tako bi nekretnina iz prethodnog primera, čija

poreska osnovica iznosi 26.000.000 dinara, iziskivala drugi, značajno niži iznos poreza i to:

26.000.000 * 0,004 = 104,000 dinara.

Prema tome, trenutni zakonski okvir čini da nekretnine čija je poreska osnovica viša od 10.000.000 dinara (oko 85.000.000 evra) budu skuplje za posedovanje od strane fizičkih lica nego za posedovanje od strane pravnih lica. Na primer, ukoliko dva identična stana u istoj zgradi kupi porodica koja tu planira da živi i advokatska kancelarija koja tu želi da prima klijente veći porez će platiti porodica, *ceteris paribus*.

Poreski krediti

Da bi umanjio poresko opterećenje poreskog obveznika za stanovanje u kući ili stanu obveznika u kome je prijavljeno njegovo prebivalište, zakonodavac je propisao da se porez u tom slučaju umanjuje za 50%, a najviše za 20.000 dinara (ZoPI, član 13, stav 1).[10]

Primenimo ovaj poreski kredit na prethodni primer. Videćemo da u slučaju tako skupe nekretnine, čija je poreska osnovica 26.000.000 dinara, fizičko lice umesto pomenutih 140.000 dinara sata treba da plaća 120.000 dinara. Međutim pravno lice, bez ikakvih poreskih olakšica još uvek plaća manji porez koji iznosi 104.000 dinara.

Stambena podrška – stambena politika kao socijalna pomoć

Pojam i principi stambene podrške definisani su Zakonom o stanovanju i održavanju zgrada (ZoSOZ). Zakon stambenu podršku definiše kao „svaki oblik pomoći za stanovanje licu koje iz socijalnih, ekonomskih i drugih razloga ne može sopstvenim sredstvima da reši stambenu potrebu po tržišnim uslovima za sebe i svoje porodično domaćinstvo" (član 88, stav 1). Nažalost, zakon se suštinski ne bavi tržišnim odnosima, ponudom i potražnjom, osim u par navrata u kojima pominje tržište, kao u ovom članu.

Stoga je stambena podrška svedena na socijalnu komponentu, odnosno dizajnirana je tako da u teoriji podržava stanovnike Republike Srbije koji su u suštini socijalni slučajevi, poput beskućnika, žrtava elementarnih nepogoda ili porodičnog nasilja ili lica bez stana različitih kategorija (član 89, stav 4). Dodatna prepreka za korišćenje stambene podrške je zahtev da

10 Ovaj poreski kredit je još veći za lica starija od 65 godina, pa se u njihovom slučaju porez umanjuje za 75% (ZoPI, član 13, stav 3).

podnosilac zahteva i članovi njegovog domaćinstva nemaju u svojini stan na teritoriji Republike Srbije (član 89, stav 4).

Kada čitalac zakona pomisli da su pomenute prepreke dovoljno isključujuće i ograničavajuće, on nailazi na granice prihoda koje predstavljaju dodatni uslov za ostvarivanje prava na stambenu podršku (član 91). Na primer, zemljotres vam sruši kuću, i na taj način postanete lice koje ima pravo na stambenu podršku, ona vam još uvek može biti uskraćena ukoliko ste imali zaradu koja je veća od 1,2 prosečne zarade u jedinici lokalne samouprave, za jednočlano domaćinstvo (član 91, stav 1, tačka 3). Iako zakon propisuje da stambenu podršku ne mogu dobiti ljudi koji su „bogatiji" od ograničenja koja propisuje zakon, u praksi je moguće da ljudi budu odbijeni zato što su previše siromašni.[11]

Sledeći problem je što se stambena podrška ne isplaćuje automatski ljudima koji za nju ispune uslove, već se čeka raspisivanje javnog poziva za dodelu stambene podrške (član 91, stav 6). Naposletku, najveći problem ovog pristupa je nepostojanje stalnih izvora prihoda za finansiranje stambene podrške. Tako da raspisivanje pomenutog javnog poziva za dodelu stambene podrške uopšte nije izvesno. Ono zavisi od različitih transfera i donacija koje lokalna samouprava može da dobije iz Republičkog budžeta, kredita međunarodnih finansijskih institucija, donacija, fondova Evropske unije i slično. Naposletku, raspodela jednom dobijenih sredstava zavisi od političke volje i predstavlja veliki izvor za koruptivne radnje, nepotizam i netransparentno trošenje sredstava. Primera ima previše. Od konkursa za dodelu stanova pripadnicima vojske i policije od perioda SFRJ do današnjih dana, preko obnove kuća posle poplava 2014. godine, kada su neka pogođena domaćinstva dobijala duplu pomoć, dok druga pomoć nisu dobila (Milivojević & Pavlović 2015).

Modelovanje determinanti cena stanova u novogradnji

Napravili smo model determinanti cena stanova u novogradnji, sa željom da procenimo uticaj pojedinačnih nezavisnih varijabli na rast nekretnina u Srbiji. Model popunjava praznine nedovoljno razvijene literature i istraživanja na ovu temu u Srbiji. Jedini rad na ovu temu jeste objavljen u seriji stručnih radova Narodne banke Srbije (Nikolić 2015). Naša studija imala je kao cilj da ponovi ovakvo istraživanje na dužem vremenskom periodu, imajući u vidu da su podaci postali dostupni, kao i da je prethodno istraživanje izvršeno na podacima koji su prethodili rastu nekretnina u zemlji

11 Krajem decembra 2021. godine u Nišu jednoj porodici prijava za zakup socijalnih stanova nije bodovana zato što iznos zakupnine ne sme da prelazi 40 odsto primanja podnosioca prijave, a porodica ne ispunjava ovaj uslov zato što njeni članovi nisu zaposleni. (Nova.rs 2021)

(zabeleženo nakon 2017). Takođe, imalo smo želju da testiramo hipotezu da li je uticaj investicione tražnje za nekretninama značajan za rat cena stanova, prvenstveno u Beogradu.

U našem istraživanju, kao zavisnu varijablu koristili smo podatke o prosečnim cenama stanova u novogradnji (2011–2018) dobijene od Republičkog zavoda za statistiku; kao nezavisne varijable uvrstili smo one koje su standardne u sličnim empirijskim istraživanjima koja se tiču određivanja determinanti cena nekretnina:

- Prosečnu neto platu (Republički zavod za statistiku),
- Broj zaposlenih na 1.000 stanovnika (Republički zavod za statistiku),
- Nivo kamate na depozite (Narodna banka Srbije),
- Kamata na stambene kredite (Narodna banka Srbije),
- Dugoročni depoziti nemonetarnog sektora kod banaka (Narodna banka Srbije),
- Lični transferi i doznake (Narodna banka Srbije),
- Stopa ekonomskog rasta (Republički zavod za statistiku),
- Rast mase stambenih kredita (Narodna banka Srbije),
- Poslovni rezultat privrede (Agencija za privredne registre).

Očekivani znak kod ovih varijabli jeste pozitivan (rast vrednosti varijable rezultira u rastu cena stanova), osim kod varijabli kamata na stambene kredite i kamata na depozite gde je očekivani znak negativan. Kako kamate na stambene kredite rastu tako stanovima raste cena jer se pojavljuje veći broj kreditnih kupaca usled niže cene kapitala. Takođe, kako se smanjuje nivo kamate na depozite tako oročena štednja u bankama (a i drugi načini pasivnog investiranja kapitala, kao što su investicioni fondovi) postaje manje privlačna za investitore.

Pored toga, dodali smo dve kontrolne varijable. Prva je udaljenost gradova od Beograda u kilometrima putnim pravcem (podaci preuzeti sa aplikacije *Google maps*). Pomoću ovih varijabli smo želeli da proverimo da li postoji efekat „beogradizacije", imajući u vidu da je najveći broj stambenih jedinica prometovan upravo u Beogradu, i da su cene stanova najviše upravo u ovom gradu, koji je središte ekonomskih, ali i društvenih kretanja u celoj zemlji (prema RZS, 40% nacionalnog BDP-a u 2021. kreirano je na teritoriji Beograda). Pretpostavka je da će cena stanova biti veća što su gradovi geografski bliži Beogradu. Druga varijabla je vremenska, i tiče se pojedinačnih godina, gde smo želeli da proverimo da li je kretanje cena nekretnina bilo povezano sa određenim vremenskim periodom.

Izazovi prikupljanja podataka i ublažavanja posledica

Problem na koji smo naišli jeste neažurnost i neusklađenost zvanične statistike. Naime, u periodu 2011–2018. godine podaci o cenama nekretnina sakupljani su po jednoj metodologiji, da bi od tada RZS podatke počeo administrativno da preuzima od Poreske uprave, što je dovelo do prekida u seriji podataka. Podaci nakon 2018. ne mogu se stoga porediti sa prethodnim godinama. Kada smo zvanično kontaktirali Poresku upravu sa željom da dobijemo podatke i za prethodne godine (pre 2018) kojima RZS ne raspolaže, dobili smo odgovor da Poreska uprava uopšte ne raspolaže takvim podacima, naročito ne po lokalnim samoupravama jer njih ni ne koriste u svom radu (određivanju poreza na prenos apsolutnih prava ili poreza na imovinu u slučaju lokalne poreske administracije). Podatke o prosečnim cenama nekretnina po opštinama poseduje i Republički geodetski zavod (RGZ), ali tek od 2017, što daje prekratku seriju podataka. Takođe, dok RZS daje podatke za Grad Beograd samo agregirano, a pojedinačno po gradskim opštinama samo za opštinu Lazarevac, RGZ daje podatke za 10 centralnih gradskih opština, međutim, u pitanju su katastarske opštine, čije teritorije se ne moraju preklapati sa teritorijom lokalnih samouprava, što bi učinilo korišćenje većine dela nezavisnih varijabli nemogućim jer su one procenjene samo za pojedinačne jedinice lokalne samouprave. Usled toga, odlučili smo se da za model koristimo podatke RZS jer je u pitanju duža vremenska serija i jer se podaci o cenama stanova po lokalnim samoupravama mogu ukrštati sa drugim ekonomskim i društvenim podacima, iako je negativna strana ovog pristupa to što ovi podaci prestaju upravo u trenutku kada dolazi do značajnijeg porasta cene nekretnina u Beogradu, ali i celoj zemlji (prema podacima kako RGZ tako i nove serije podataka samog RZS-a).

Rezultati modela determinanti cena stanova

Model je baziran na 20 jedinica – gradova (n=20), u periodu od 8 godina (T=8) u periodu 2011–2018, što daje ukupno 160 opservacija (n=160). Posmatrani gradovi su Sombor, Vršac, Pančevo, Novi Sad, Beograd, Subotica, Zrenjanin, Sremska Mitrovica, Valjevo, Šabac, Čačak, Jagodina, Kruševac, Kraljevo, Kragujevac, Požarevac, Leskovac, Pirot, Vranje i Niš. Za ocenjivanje modela korišćena je ekonometrijska tehnika najmanjih kvadrata (Ordinary Least Squares – OLS).

Tabela 2. Deskriptivna statistika

	Mean	St Dev	Min	Max
Prosečna neto plata	41,824.35	6,954.63	29,022.00	60,689.00
Broj zaposlenih na 1,000 stanovnika	266.87	51.30	166.00	410.00
Kamata na depozite	3.97	1.85	1.84	6.59
Kamata na stambene kredite	5.06	0.93	3.72	6.41
Dugoročni depoziti nemonetarnih sektora kod banaka (milijarde dinara)	1,794.33	311.36	1,370.70	2,376.80
Lični transferi i doznake (milioni evra)	2,681.00	266.42	2,442.00	3,326.00
Stopa ekonomskog rasta	1.79	1.89	-1.60	4.50
Rast mase stambenih kredita	105.23	3.95	98.90	112.20
Poslovni rezultat privrede (u milionima dinara)	427,007.88	95,900.85	296,502.00	583,569.00
Udaljenost	149.65	91.58	0.00	346.00

Model (Tabela 3) predviđa gotovo polovinu (49,6%) razlike u cenama stanova u novogradnji, i to sa visokim statističkim značajem. Međutim, kao statistički značajne varijable izdvajaju se samo prosečna neto plata (koeficijent 1,67), kao i broj zaposlenih na 1.000 stanovnika (koeficijent 232,8), koje opisuju opšta ekonomska kretanja u datom gradu, i to sa veoma visokim statističkim značajem (p vrednost ispod 0,01). Ostalih 7 varijabli imaju visoke p vrednosti i ocenjujemo da nisu statistički značajne u modelu. Od njih, 5 varijabli ima očekivane znakove, ali lični transferi i doznake, kao i visina kamata na depozite imaju neočekivani znak (negativan, i pozitivan, pojedinačno).

Što se tiče kontrolnih varijabli, udaljenost od Beograda ocenjujemo kao statistički značajnu (p vrednost manja od 0,01), dok se varijabla za godinu nalazi na granici značajnosti (vrednost p od 0,05). Imajući u vidu ograničenja modela vezano za broj opservacija i manjak pokrivenosti teritorije cele zemlje itd., smatramo da ovu varijablu ne bi trebalo tretirati kao značajnu.

Tabela 3. Rezultati modela

Regression Statistics				
Multiple R	0.709446225			
R Square	0.503313947			
Adjusted R Square	0.462997321			
Standard Error	20446.80009			
Observations	159			
	Coefficients	*Standard Error*	*t Stat*	*P-value*
Intercept	-7,010.2	86,437.7	-0.08	0.94
Prosečna neto plata	1.3	0.4	3.45	0.00
Broj zaposlenih na 1,000 stanovnika	227.5	43.1	5.28	0.00
Kamata na depozite	3,282.0	15,036.4	0.22	0.83
Kamata na stambene kredite	-2,548.2	15,070.2	-0.17	0.87
Dugoročni depoziti nemonetarnih sektora kod banaka (milijarde dinara)	59.8	149.2	0.40	0.69
Lični transferi i doznake (milioni evra)	-29.4	64.7	-0.45	0.65
Stopa ekonomskog rasta	214.3	2,084.5	0.10	0.92
Rast mase stambenih kredita	147.5	852.0	0.17	0.86
Poslovni rezultat privrede (u milionima dinara)	-0.1	0.2	-0.58	0.56
Godina	0.0	0.0	65535.00	0.05
Udaljenost od Beograda (u kilometrima)	-38.7	22.9	-1.69	0.00

Model pokazuje da na cene stanova u novogradnji po gradovima najveći uticaj imaju nivo prosečnih zarada, kao i udeo broja zaposlenih, kao indikatora opštih ekonomskih kretanja u lokalnoj privredi. Rast zaposlenosti i rast prosečnih zarada direktno dovodi do rasta cena stanova u novogradnji: rast prosečne mesečne neto zarade od 10,000 dinara dovešće do rasta prosečne cene kvadrata od 16,700 dinara, a svako procentualno povećanje udela zaposlenih na 1.000 stanovnika do rasta cena od oko 2.300 dinara.

Imajući u vidu da standardne ekonomske varijable, koje se u literature, koriste kao determinante kretanja cena nekretnina objašnjavaju tek polovinu razlika među gradovima u Srbiji, smatramo da je deo neobjašnjene razlike posledica investicione tražnje za nekretninama, koje se kupuju da bi generisale pasivni prihod.

Smisao koji nalazimo u ovim brojevima jeste da se u Srbiji, a posebno u Beogradu kao glavnom urbanističkom čvorištu, generiše poseban društveni sloj rentijera koja ima finansijskih mogućnost da sebi priušti kupovinu nekretnine (ili više nekretnina), kao i da postoji oštar kontrast sa onima koji hronično ne mogu da dođu do svoje prve nekretnine. Samim tim, stambeno pitanje je već *de facto* pitanje socijalne pravde u čije se uravnoteženje moraju uključiti svi relevantni političko administrativni akteri, od lokalnih zajednica, preko poreske uprave, nezavisnih agencija, do državnog aparata odlučivanja.

Istraživanje orijentacija aktera na tržištu nekretnina

Metodologija

Kvalitativni deo istraživanja ima za cilj da poveže vrednosne orijentacije kupaca stanova sa pojavom rentijerske kulture u urbanim sredinama Srbije, sa fokusom na Grad Beograd. Sprovedeno je tokom januara 2022. sa ukupno 10 ispitanika. Ispitanici su podeljeni u 3 različite grupe: prvu čine kupci prve nekretnine (4 ispitanika), drugu grupu kupci investicione nekretnine (4 ispitanika), a treću agenti za nekretnine (2 ispitanika). Ovakva struktura ispitanika odabrana je da bismo sakupili informacije o motivima i razlozima za kupovinu nekretnina kao mesta za život, ali i kao investiciju (kupci podeljeni u ove dve posebne kategorije), ali i da bi dobili pregled stanja na tržištu od strane profesionalaca koji se bave posredovanjem u kupoprodajama nekretnina (agenti za nekretnine). Korišćeni su strukturisani intervjui, posebni za svaku grupu ispitanika.

Svi intervjui su pseudonimizirani i sprovedeni putem telefona ili interneta (platfome Zoom). Cilj sprovođenja intervjua bio je da se saznaju motivacije ljudi koji kupuju nekretnine u Srbiji, bilo da je to nekretnina u kojoj nameravaju da žive, bilo da je to investicioni poslovni potez, kao

i da se dođe do informisanog pogleda na razvoj stanja na tržištu nekretnina od strane onih koji na njemu učestvuju kao posrednici u kupoprodajnim odnosima. Zarad pseudonimizacije odgovara, ispitanici su navedeni samo putem početnih slova imena, dok su agencije za nekretnine označene rednim brojevima.

Za svrhu ovog istraživanja kupci prve nekretnine definisani su kao lica koja su kupila ili su u procesu kupovine svoje prve nekretnine u kojoj planiraju da žive (sami ili sa partnerom / porodicom); kupci investicione nekretnine kao lica koja već poseduju neku nekretninu na svoje ime i kupuju dodatnu nekretninu sa namerom da plasiraju svoj kapital i da od nje ubiraju prihod; agenti za nekretnine su osobe koje su zaposlene na poslovima posredovanja kupoprodaje nepokretnosti u agencijama za nekretnine i poseduju adekvatnu licencu Ministarstva građevine za obavljanje date delatnosti.

Iako nisu svi ispitanici u trenutku intervjua živeli ili imali prebivalište u Beogradu, svi oni (njih 8) su kupili nekretninu upravo u Beogradu. Među kupcima nekretnina nalaze se kako oni koji su nekretninu kupili iz ušteđevine („za keš"), tako i kreditni kupci, uključujući i one koji su nekretninu kupili samostalno, ali i one koji su je kupili uz pomoć porodice ili porodičnog nasledstva.

Ispitanici **agenti za nekretnine** (ime, broj godina, ime agencije):

- N. (32), agencija 1
- Zo. (44), agencija 2

Ispitanici **kupci prve nekretnine** (ime, broj godina, zanimanje, lokacija gde je stan kupljen):

- Za. (33), projekt menadžer, Bulbuder
- Iv. (37), profesor, Banjica
- M. (33), ekonomista, Višnjička banja
- S. (30), digitalni marketing i PR, Višnjička banja

Ispitanici **kupci investicione nekretnine** (ime, broj godina, zanimanje, lokacija gde je kupljena poslednja investiciona nekretnina):

- Il. (40), međunarodni rad, Đeram
- B. (61), računovođa, Braće Jerković
- D. (35), ekonomista, Lekino brdo
- A. (37), ekonomista, Dorćol

Intervjui sa agentima za nekretnine

Ispitanici navode da je rast cena nekretnina posledica nesrazmere između ponude i tražnje za stambenim prostorom i očekuju ovakva kretanja i u budućnosti. Pored kupovine na kredit i niskih kamatnih stopa, navode da

na tražnju utiče kupovina od strane radnika u inostranstvu, ali i plasiranje štednje u nekretnine kao u sigurnu investiciju.

Odgovori ispitanika agenata za nekretnine se u najvećem delu pitanja preklapaju prilikom opisa stanja na tržištu nekretnina. Obojica ispitanika navode da već godinama postoji trend rasta cena nekretnina. Jedan ispitanik navodi da rast cene nekretnina ne potiče od „prosečnog stanovništva" jer su prosečne zarade u zemlji niske i ne omogućavaju laku kupovinu nekretnina po trenutnim cenama, ali da postoji nesrazmera između ponude i tražnje, jer je tražnja znatno veća: „gradi se stalno i dosta se gradi, ali i to što se gradi nije dovoljno da pokrije tražnju" (Zo).

Obojica ispitanika navode da kriza izazvana pandemijom virusa nije uticala na smanjenje cena, iako njeno izbijanje jeste imalo uticaja na tržište. „Kada je počelo vanredno stanje tržište nekretnina je praktično stalo" (Zo), ali se tržište brzo oporavilo i zabeležen je nastavak rasta cena nekretnina, koji i dalje traje. Prema rečima jednog agenta (N): „tokom pandemije smo sproveli istraživanje prema kome smo videli da ljudi investiraju u nekretnine prvenstveno kao investiciju zarad izdavanja jer su kamate na štednju zanemarljive u odnosu na inflaciju".

Kao najbrojnije kupce vide mlade ljude ili parove koji kupuju svoju prvu nekretninu, uglavnom na kredit, i to često uz pomoć porodice. Česte su „vezane kupovine" nekretnina: situacija u kojoj prodaja jedne nekretnine ide uvek uz kupovinu neke druge, i tu se često radi o podeli porodičnog nasledstva (po principu: proda se jedan veći stan da bi se kupila dva manja) ili razdvajanju porodice da mlađe generacije ne bi živele pod istim krovom sa starijima. Ove kupovine su često povezane i sa bankarskim kreditima, kao dodatak sredstvima da bi se kupila zadovoljavajuća nekretnina. Druga brojna skupina kupaca sastoji se od ljudi koji kupuju nekretnine da bi ih izdavali, bilo kroz dugoročan zakup bilo kroz „stan na dan" i preko specijalizovanih platformi kao što je Air B&B. Izbijanjem pandemije najveći broj ovakvih stanodavaca se brzo prebacio na dugoročan zakup, nekretnina.

Obojica ispitanika odbijaju navode iz medija ili pojedinih ekonomista da je rast cena nekretnina delimično uslovljen i pranjem para stečenih kriminalom kroz nekretnine. Postoje ograničenja u samim bankama i u platnom sistemu koji praktično onemogućuje ovakve stvari: „transakcije se obavljaju isključivo preko banke, davno su prošla vremena kada se to moglo obavljati kešom" (Zo) jer se i novac na računu mora pravdati nekakvim tragom, tj. poreklom novca, a i svaka transakcija u gotovini iznad vrednosti od 10,000 evra je zabranjena.

Visok procenat kupovine stanova „za keš" objašnjavaju više proceduralnim pitanjima i klasifikacijama novca: prvo, kupovina vikendica uglavnom ide u gotovini jer je njihova cena pristupačnija i jer banke za

njih retko ili uopšte ne daju stambene kredite, pa se kupuju iz štednje ili gotovinskog kredita koji nije povezan sa samom nekretninom pa se ne vidi njegov trag; drugo jeste postojanje vezanih kupovina. „Podela porodice, da se od jednog stana kupe dva... To je bio glavni razlog prodaje dugo vremena"; „Ima da se pokrene lanac 7–8 transakcija tako što ga pokrene jedan kupac, imam slučajeve gde su moji klijenti bili deo lanca od 7 ili 8 slučajeva transakcija" (Zoran). Međutim, samo se prva od ovih transakcija beleži kao kupovina na kredit, svi ostali kupci se posmatraju kao „kupci u kešu" iako je njihova kupovina omogućena upravo inicijalnim bankarskim kreditom.

Što se tiče investicionih nekretnina, jedan ispitanik (N) navodi da je standard da se njenim izdavanjem generiše prinos koji je dovoljan da se investicija isplati za 20 godina (što odgovara prinosu od oko 5% godišnje), ali da je u zadnjih par godina rast cena nekretnina bio viši od rasta visine zakupa, pa se otplata uloženih sredstava produžila na 22 ili 23 godine (prinos od 4,3%). On takođe navodi da je sve veći broj kupaca iz inostranstva, i da se posebno izdvajaju oni iz UAE i posebno Dubaija; ovde je izdvojio dve vrste investitora, prvu, koja tokom boravka u inostranstvu pomenutu nekretninu izdaje po principu „stan na dan", a u njoj boravi kada dođe u Srbiju tokom godine, i drugu, koji izdaju nekretninu na duže i planiraju da u njoj borave tek kada se budu vratili u zemlju sa rada u inostranstvu. Posebnu grupu čine kupci iz razvijenih zemalja Zapadne Evrope, SAD i Kanade – „to su uglavnom ljudi srednjih godina, gde već polako počinju da razmišljaju i o penziji" (N), što implicira da žele da u njima žive po penzionisanju i povratku u Srbiju.

Intervjui sa kupcima prve nekretnine

Ispitanici kao glavni razlog za kupovinu prve nekretnine navode želju za samostalnim životom u odnosu na roditelje, kao i da bi na taj način štedeli novac i došli do vredne imovine. Roditelji ispitanika takođe su živeli ili žive u nekretninama u svom vlasništvu. Stanovi su kupljeni isključivo na kredit, uz pomoć porodice i prijatelja koji pomažu prilikom sakupljanja novca za učešće, pokrivanje pratećih troškova i opremanje stana.

Kao glavni razlog za kupovinu prve nekretnine ispitanici navode želju da ne žive više sa svojom porodicom jer žele da se osamostale i da žive sami. Emocionalni razlozi takođe imaju uticaja na odluku da se kupi stan: „osećaš se vrednije, kao da si postigao nešto u životu", kao i problemi podstanarskog života ("jer ti nisi S, ti si podstanar... podstanari su nevidljiva bića"), kao i mogućnost preuređenja životnog prostora, te „da imaju nešto svoje" i da „to ne zavisi od nasledstva" i da ne moraju da brinu o selidbi usled unapred nenajavljenog raskida zakupa od strane zakupo-

davca (M). Globalna pandemija, usled koje je došlo do potrebe za radom od kuće, navela je Iv. da potraži veći stan i tom prilikom ojačalo ideju za kupovinom nekretnine.

Ali ni ekonomski razlozi nisu zanemareni: Za. navodi da je visina rate za kupovinu stana na kredit slična ceni kirije za zakup stana pa je onda kupovina prihvatljivija opcija, Iv. takođe da je rast kirija dovelo do toga da „deluje da je jeftinije da se kupi stan nego da se iznajmljuje", S. da je kupovina nekretnine i mogućnost da plasira svoju uštеđevinu „jer sa 13,000–14,000 evra uštеđevine ti kao sa tim novcem šta možeš da radiš? Ne možeš ništa krupno da time kupiš, to bi se samo sitno trošilo", a Iv. da time može da ulaže u svoju imovinu umesto da plaća kiriju „jer nemaš nikakvu dugoročnu korist od toga" jer nakon isplate kredita nekretnina ostaje u vlasništvu dok to nije slučaj sa zakupom. Jedan od razloga za kupovinu bile su i finansijske pogodnosti za povraćaj PDV-a i poreza na prenos apsolutnih prava jer su kupovinu učinile finansijski primamljivijom i zato jer posedovanje jednog manjeg stana može da bude budući ulog za kupovinu veće nekretnine ako se za tim bude ukazala potreba (Za).

Posedovanje nekretnine ispitanici nisu naveli kao nešto što bi imalo presudan, niti čak važan uticaj na stvaranje ili proširenje porodice. Jedan ispitanik (Iv) samo je naveo bi stvaranje porodice bilo povezano sa traženjem većeg životnog prostora da bi život bio komforniji, ali da to ne bi nužno iziskivalo kupovinu stana: „mislim da te stvari (kupovina stana i stvaranje porodice, primedba intervjuera) ne treba u životu stvari da čekaju jedna drugu".

Ispitanici su do svoje prve nekretnine došli isključivo kupovinom putem bankarskog kredita. Učešće za kredit dolazio je iz lične štednje ili uz pomoć porodice, najčešće roditelja, ali ponekada i bliže rodbine (tetka, sestra od tetke), dok su članovi porodice ili prijatelji često učestvovali i u opremanju stana i pokrivanju pratećih troškova, bilo kroz beskamatnu pozajmicu, kroz novčani ili drugi poklon.

Učenje po modelu od porodice može imati ulogu u želji za posedovanjem sopstvene nekretnine, svi ispitanici iz ove grupe navode da njihovi roditelji poseduju sopstvenu nekretninu u kojoj žive, a to je najčešće slučaj i sa njihovim bliskim rođacima ukoliko ih imaju (tetke, stričevi, ujaci i njihova deca). Preferencija za posedovanjem nekretnine može biti i deo kulturnog obrasca, kako navodi Za: „Koliko sam shvatila to (posedovanje nekretnine, primedba ispitivača) je kod nas više stvar mentaliteta nego što je stvarno praktično... moja baba smatra da je sramota da iznajmljuješ stan kada već imaš kuću" (misli se na roditeljsku kuću, primedba intervjuera).

Od argumenata koje su imali protiv kupovine stana tokom razmišljanja da li kupiti nekretninu ili ne izdvajaju se papirologija koja prati proces kupovine stana koja je dugotrajna i skupa (Za), ali i strah od toga da li

će se kredit moći otplaćivati u budućnosti usled gubitka posla ili rasta kamatnih stopa: „ako mi propadnu svi živi poslovi šta ću da radim?", navodi S. svoju dilemu. Drugi ispitanik (Iv) naveo je da je razmišljanje o emigraciji iz zemlje bio glavni argument protiv kupovine nekretnine u Srbiji, ali da je od iseljenja barem privremeno odustao usled teškoća traganja za novim poslom usled globalne pandemije, što je preteglo ka opciji kupovine stana.

Od razloga za kupovinu baš te nekretnine koju su kupili ispitanici navode nekoliko faktora, među kojima se izdvaja na prvom mestu cena date nekretnine, potom stanje u kojoj se nalazi nekretnina (da li je novogradnja) i prateće pogodnosti među kojima se izdvaja mogućnost kupovine garažnog mesta, ali i to da je lokacija geografski blizu mesta gde žive njihove porodice (M) ili da se brzo stiže do centra grada (S). Sigurnost u vidu proverenog investitora je takođe navođena kao jedan od faktora koji su uticali na odabir kupljene nekretnine (Za).

Intervjui sa kupcima investicione nekretnine

Ispitanici kupovinu stanova za rentiranje smatraju za investiranje bez rizika, dok rizik poslovanja u zemlji percipiraju kao veliki, a prihode od rentiranja kao stabilan pasivni izvor prihoda koji ne zahteva dodatno angažovanje. Stanovi služe i za očuvanje vrednosti uštеđevine ili nasledstva, ali i kao imovina koja će se jednog dana preneti naslednicima. Kupili su nekretnine često i pomoću bankarskih kredita, a izdaju ih dugoročno mlađim ljudima koji su počeli da žive samostalno ili studentima. Ispitanici često dolaze iz porodica čiji članovi poseduju stanove koje rentiraju.

Ulaganje u nekretnine percipira se kao sigurno ulaganje, ili kao „manje nebezbedno" od postojećih alternativa. „Imovina nekog prostora je jedino u nekoj ekstremnoj situaciji, neke velike nesreće, rata, nešto što može ozbiljno da bude ugroženo" (Il). „Hteli smo da uložimo u nekretnine kao najsigurniju investiciju koja ne može da propadne... Htela sam da investiram pare u nešto što je sigurno i što mogu sutra da ostavim svojoj deci" (D). Zarada od izdavanja jeste važan razlog za investiranje, ali ne mora biti ni jedini: očuvanje vrednosti nasledstva ili uštеđevine predstavlja takođe jedan od pomenutih razloga (D), kao i mogućnost ostavljanja imovine svojoj deci (D, B). „Mislim da neka ostavština koju sam imala od mojih roditelja ne treba da se razbacuje okolo, da danas sutra nešto treba i svojoj deci da ostavim" (B).

Nekretnine se posmatraju i kao likvidna investicija: ona se može prodati i taj novac investirati u nešto drugo kao što je, na primer, školovanje dece, a na nekretninama se zarađuje i prilikom njihove prodaje jer cene nekretnina značajno rastu (D). Pored toga, kupovina nekretnine koristi se i kao

deo strategije diverzifikacije imovine, što je potez čime se umanjuje rizik a povećava prinos (Il).

Za A., primaran cilj bio je generisanje prihoda od rente kao vrste pasivnog prihoda, koji se kasnije investira ponovo u nove nekretnine tako da stanovi sami sebe otplaćuju, a sa ciljem da se tako štedi za penziju i da nakon otplate bankarskih kredita pomoću kojih su stanovi kupljeni ovi prihodi zamene trenutnu platu.

Kupovina investicionih nekretnina finansira se iz različitih izvora, kao što su lična ili porodična štednja (Il), porodično nasledstvo (B) ili mešavinom lične štednje ili nasledstva i bankarskih kredita (A, D), gde se štednja koristi za učešće, dok se kredit kasnije isplaćuje od kirije pošto se pomenuta nekretnina iznajmi.

Ispitanici koji investiraju u nekretnine često imaju prilike da od bližih članova porodice ili rodbine vide investiranje u nekretnine koje se potom izdaju (majka Il. partnerke izdaje svoj stan u Beogradu, B. sestra i sestričina poseduju nekretnine koje se mogu izdavati ili su se izdavale), ili da su bliski članovi porodice povezani profesionalno na neki način sa tržištem nekretnina (A. otac imao je ranije svoju agenciju za promet nekretninama).

Rizik poslovanja u zemlji percipiran je kao veliki, što obeshrabruje ulaganja u pokretanje nekog sopstvenog posla: „jako je riskantno ulagati u bilo šta trenutno u Beogradu, barem za nas koja smo neka normalna srednja klasa" (D). Pasivni način investiranja kroz banke ili investicione fondove isto se percipira kao rizičan. Na nedostatak želja za pokretanjem posla ili nekim drugim aktivnim načinom investiranja kapitala umesto kupovine nekretnine utiču i lične osobine investitora: „Nisam o tome razmišljala, jer već imam 61 godinu" (B). Nepoverenje u zvanični bankarski sistem jeste jedan od navedenih razloga da se investira u nekretninu: „ja sam jedan od onih ljudi koji se ne oseća baš preterano spokojno sa puno novca u banci" (Il).

Drugi važan razlog za investiranje u nekretnine predstavlja i to što je u pitanju pasivan prihod, koji ne zahteva dodatni angažman vlasnika, niti nekog drugog plaćenog lica. Il. je naveo da je razmišljao o investiranju u poljoprivredno zemljište, ali da bi takav potez zahtevao dosta vremena i pažnje, gotovo angažman stalno zaposlene osobe i da je zbog toga odustao jer nema vremena da se time bavi, naročito jer trenutno živi i radi u inostranstvu. „Ovaj model (izdavanja stanova, primedba intervjuera) mi je odgovarao zato što ne zahteva dodatno vreme što neki dodatni posao zahteva, i ne nosi rizike što investiciono ulaganje zahteva"; „Ja sam malo kompulsivna osoba, gledao bih svaki dan šta se dešava (da je investirao u investicioni fond, primedba intervjuera) a ovako 5 godina nisam ušao u stan koji sam bio kupio" (A).

Nekretnine se izdaju i dugoročno, i kratkoročno, po principu „stan na dan". Međutim, izbijanjem pandemije korone virusa smanjio se broj turista, pa su nekretnine izdavane na dan počele da budu izdavane dugoročno, preko oglasa bez posrednika ili agencije. Zakupci su prvenstveno mladi ljudi koji su se odvojili od porodice i žive sami, kao i studenti koji su došli da studiraju u Beograd.

Zaključna razmatranja

Ukrštanjem podataka dobijenih iz kvantitativnog i kvalitativnog dela istraživanja dolazimo do najmanje tri zaključka. Prvo, pitanje stambenih politika u Srbiji, a posebno u Beogradu, postalo je važno pitanje socijalne pravde. Nedostatak jasno definisanih stambenih politika, koje bi usmerile investiciono ulaganje tako da kupovina stanova bude dostupna svima, rezultira stvaranjem nove društvene podele između onih koji mogu kupiti stan(ove) i onih koji to ne mogu.

Drugo, kvalitativni deo istraživanja, posebno intervjui sa kupcima prvog stana, i intervjui sa vlasnicima više nekretnina, dobro ilustruju stvaranje nove društvene podele. Obe vrste kupaca iskazale su potrebu za posedovanjem nekretnine kao *kulturnu preferenciju*, koja ima veze s osećajem materijalne, ali i finansijske sigurnosti, koja bi se mogla prenositi generacijski.

Konačno, kada uporedimo rezultate naših istraživanja sa postojećim institucionalnim okvirom i poreskom politikom u Srbiji i Beogradu, dolazimo do trećeg zaključka: stambeno pitanje je političko pitanje. Srpsko društvo se nalazi na poziciji u kojoj je potrebno aktivno uključivanje političkih aktera kako bi stambeno pitanje, i pitanje socijalnih podela, došlo u okvire dobro uređene socijalne pravde. Rezultati našeg istraživanja pokazuju da prednost treba dati javnim politikama koje usmeravaju ponašanje ka željenim ishodima. Stoga, reforma poreske politike, koja usled postojeće institucionalne konfiguracije podrazumeva koordinisanu reformu stambenih politika i na centralnom i na lokalnom nivou, trenutno je najbolje moguće rešenje kako bi se omogućilo pravedno kupovanje nekretnine u kojoj bi se zaista živelo. Uvođenje progresivnog poreza imalo bi za cilj otklanjanje neželjenog ponašanja (odnosno, gomilanje stanova radi profita), odnosno usmeravanje investicija ka izgradnji stanova koje građani i građanke zaista mogu da kupe. Naša institucionalna analiza pokazuje da je potrebno uvesti progresivni porez, kako na PDV, koji se plaća prilikom kupovine stanova, tako i na porez na imovinu koji se godišnje plaća na posedovanje stan(ov)a.

U praksi, to bi značilo da svako ko želi da kupi više od jednog stana, svaki put kada se odluči na taj potez, čeka ga sve veći PDV, tako da postane apsolutno neisplativo posedovati više nekretnina. S druge strane, oni koji

su u periodu tranzicije stekli više nekretnina, bilo kupovinom ili nasledstvom, potrebno je učiniti im održavanje takvih stanova skupim (kroz progresivni porez), čime bi se rešio problem „praznih stanova" i sprečilo ukorenjivanje rentijerske kulture. Kada vlasnik više stanova reši da proda „višak" postižu se najmanje dva efekta na tržištu: (1) usled veće ponude kvadrata pada njihova cena i (2) sami vlasnici dolaze do svežeg kapitala koji onda mogu da investiraju, čime se opšta privredna aktivnost društva podiže.

Međutim, imajući u vidu ograničenja u vezi sa podacima (nepostojanje podataka po beogradskim opštinama, već agregirani podaci za ceo region, kao i relativno kratku vremensku seriju koja se prekida baš kada dolazi do naglog rasta cena nekretnina u Beogradu), treba biti oprezan u davanju čvrstih zaključaka. Model nije uspeo da pronađe vezu između varijabli koje su povezane sa investicionim ulaganjem u nekretnine (kao što su visina kamatne stope na depozite ili stambene kredite, nivo doznaka i ličnih transfera iz inostranstva, poslovnih rezultata privrede itd.), ali to može biti samo posledica toga što za ove varijable nije moguće naći granularne već samo agregirane podatke za celu zemlju. Takođe, prediktivna moć modela ne objašnjava oko polovine kretanja cena stanova u novogradnji, upravo tu možemo tražiti uticaj investicione tražnje za nekretninama. Ovo ostavlja prostor za buduća istraživanja koja su neophodna da bi se osvetlili dati fenomeni.

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Summary

Housing is Political – Reforming tax policies of the residential real estate transactions in the City of Belgrade

The aim of the paper is to explore the possibilities to increase social and distributive justice in the Belgrade housing policy context. The research is conducted through the analysis of the effects that the existing housing tax policies and its relation to investments, purchase, owning and renting houses in the capital of Serbia. The research is threefold: firstly, the paper analyses the existing institutional framework for housing taxes; secondly, the authors conduct qualitative research by interviewing real estate agents and house buyers to determine their motives for purchasing their first or additional houses; thirdly, the paper provides a comprehensive model of housing prices determinants in the city of Belgrade. By cross comparing the research results, the paper aims at developing alternative models of taxation which would have significant impact on housing policies, linking them to social justice principles. The change of the tax policies should make houses affordable for those who are buying their first property and intending to live in them, and progressively expensive for those who buy houses for their businesses or as a form of investments or personal savings.

Keywords: housing policies, social justice, properties, taxes, Belgrade.

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Governing the Commons like a Pragmatist: The Case of John Dewey

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Abstract

As a result of the process of neoliberal policies, commons have been in a state of enclosure and exploitation. That kept the debate on governing the commons is very much alive. This paper examines what John Dewey can contribute to the debate through his method of inquiry. As part of his method, we will examine mechanisms such as public deliberation and democratic experimentalism. In addition, his contribution to the re-conceptualization of the commons will be discussed.

Keywords: commons, pragmatism, John Dewey, deliberative democracy, democratic experimentalism

"If we cannot organize ourselves so that we don't depend on capital and the state to stop us from being choked by our shit, how can we hope to bring about a revolutionary change in our life?"

Caffentzis, G. 2010. *The Future of 'The Commons': Neoliberalism's 'Plan B' or the Original Disaccumulation of Capital?* Lawrence and Wishart.

Introduction

This paper analyses of the contribution of John Dewey's philosophy of pragmatism to the concept of governing the commons. In the first section, main characteristics of the commons will be outlined. Then we will dive into the general characteristics of pragmatism. Thirdly, we will discuss the importance of public deliberation and experimentalism as outlined

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by John Dewey and his recommendations for shaping a governing mechanism which can be implemented to address the issue of governance[1] of the commons. Finally, we will discuss how Dewey could help in re-conceptualizing the commons. In this paper, the focus will not be on making a clear distinction between Dewey's original philosophy and Deweyan interpretations as the aim of this paper is to contribute to the adaptation of Deweyan thoughts for contemporary use, especially in governing the commons.

What are the commons?

As an operational definition of commons, I will use the one given by Charlotte Hess: "a commons is a resource shared by a group where the resource is vulnerable to enclosure, overuse and social dilemmas. Unlike a public good, it requires management and protection in order to sustain it.[2]" (2008, 37). I believe that this definition is useful because it links the issue of governance to the concept of the commons as its important and inseparable component. It is also important to highlight the fact that commons are owned by the community. However, the concept of the commons itself is not uniform and fixed. It is important that the definition be general because by commons we mean a wide variety of resources constantly changing.

Under traditional commons, we meant "resources seen as limited but essential for the survival of local communities" (Berge 2006, 65), which referred mainly to land or water resources among others. But with new commons, we see the emergence of a variety of forms of resources that need to be articulated.

This is precisely why Hess introduces the notion of new commons that visibly enrich the spectrum of what we consider under the term. New commons are created as a product of the development of several processes. First, the development of new technologies allows us to „capture" and recognize new forms of commons. Second, the appropriation and disappearance of resources through privatization and exploitation make us aware of the exploited resource. Finally, recognition of new commons in the legal system can be a good instrument for the articulation of the new commons (Hess 2008). As a result, new forms of commons are emerging, such as cultural, infrastructural, knowledge commons, health commons and global commons.

1 The term governance will be used for when discussing the governance of the commons and public governance. Later on, the term management will be used when talking about agile and lean management in private sector.

2 For some other definitions of the commons see: Vaccaro and Beltran 2019.

Cultural commons are a good example of conceptualization and recognition of endangered resources due to commodification and privatization. So some authors have written about the danger to indigenous cultures and communities that are threatened by the growing tourism industry (Caruthers 1998; Ifeka and Abua 2005).

Something that has been a topic for a long time, but has only recently been recognized as a new form of commons, are non-profit organizations, that is, the NGO sector (Lohmann 2001). For example, John Dewey sees various forms of associations of citizens as prime sources of socialization and as ways of articulating various interests[3] (Hildebrand 2008). The process of commodification and neoliberal policies lead to the destruction of certain cultural patterns of the community, reducing the level of solidarity and social capital. As we shall see later, these issues are of paramount importance in Dewey's conceptualization of experimental democracy and the democratic way of life. Related to cultural commons are neighborhood commons that concern public local policy issues such as housing practices, local civic associations or green spaces (Kleit 2004; Choe 1993; French and Hyatt 1997).

Infrastructural commons give us a good example of how new forms appear due to the development of technology that helps us detect them. By infrastructural commons, we mean transport commons such as roads, communication commons such as mobile telephony, administrative commons such as local communities, and public institutions and services that provide certain services such as the school or health system (Frischmann 2007). The Internet appears as an important communication and transport commons and is a perfect example of how new technologies create and help discover new commons. As part of the emergence of the Internet, knowledge commons are also appearing, which concern the facilitation and creation of knowledge and information that will be available to everyone (Brin 1995; Rainie and Kalsnes 2001).

The diversity of new and traditional forms of commons also requires diversity in the forms of governance, as well as governance innovations due to the specificities that different types of commons bring with them. What emerges as a question is whether there can and should be only one fixed governance mechanism that will be equally good and effective for every situation, especially in a state of constant changes and the emergence of new commons and threats. To answer this question, I will look at what Dewey has to offer us in governing the commons through the prism of adaptation and innovation of the governing mechanisms.

3 Dewey usually refers to such associations as communities or publics, where publics have a strong political connotation, which is not necessarily a case with communities (Hilderbrand 2008).

At the end of this section on conceptualizing commons, I will make a basic categorization of commons into first and second-order commons. When we talk about the commons of the first-order, we mean the common spaces and resources used and owned by the community (urban spaces, water resources, parks, etc.). When talking about the commons of the second-order, I mean those commons that enable efficient and fair governance of the commons of the first-order, that is, the effective functioning of democracy. Examples of such commons would be solidarity, the social capital of citizens, civil society organizations, democratic political culture, information and knowledge.

Need for the re-articulation of the commons

A wave of neoliberal economic policies was introduced in Britain and the USA from the 1970s and especially from the 1980s, spreading through the world. Even the former communist states were not bypassed by these policies, as a gradual process of neoliberal state-building took place[4] (Džuverović and Milošević 2020). This process was characterized by the universalism of liberal values, which required the state to introduce market mechanisms (if there weren't any) and deregulation (Richmond 2009). It was a top-down decision-making process where legitimacy was evaluated in relation to international organizations and standards, and not in relation to local support of citizens (Džuverović and Milošević 2020). The process of privatization of the resources that used to be considered common goods – the commons (such as health care, education, natural resources, etc.), hugely impacted their sustainability and availability. This was accompanied by the process of depoliticization in the sense that "asking questions about economic production within the framework of politics was considered taboo" (Szekely 2022, 28). Thus, commons were out of the mainstream political discourse and the target of privatization.

The privatization of common resources has been considered one of the remedies to the "tragedy of the commons" – the expected overuse of resources or goods that are shared among a group of people. The issue of governing the commons has been the focus of social and academic discussions ever since Garrett Hardin's famous article on the tragedy of the commons in which he presented the problem of governance as a prisoner's dilemma where each player tends to non-cooperate and maximize his utility, thus depleting the common good or resource (Hardin 1968). His main preoccupation is overpopulation. In the already famous metaphor of

4 Governing the commons during the communist era was also characterized by rigid and centralized form of governance of the bureaucracy. For more see: Mirovitskaya and Soroos 1995.

the open pasture, Hardin claims that individuals driven by personal interests will act in such a way as to seize the greatest possible benefit for themselves, by unlimited grazing of their herd on a common meadow, which will soon cease to exist. As a remedy for this phenomenon, Hardin prescribes a centralized administration[3], i.e. the state, as a player that will seriously raise the costs of non-cooperation and force individuals to create a sustainable use of resources through cooperation: "if we want to avoid destruction in this overpopulated world, we must be subject to some other coercion forces outside ourselves, Leviathan, to use Hobbes's vocabulary" (Hardin 1968, 314). Starting from similar assumptions, other authors advocated the privatization of the commons as the only effective solution (Demsetz 1967; Johnson 1972; Smith 1981). Interest in this topic is intensified by Elinor Ostrom's book on governing the commons, where she highlights the possibilities of the self-organization of communities and the setting of governance and monitoring rules which could ensure the sustainability of the common resource (Ostrom 1990). Ostrom emphasizes the importance of appreciating the possibility of communication among the users themselves, through which they can overcome the negative outcomes of the prisoner's dilemma, and create an effective surveillance system. She still remains in the Prisoner's Dilemma game, but she solves the issue of sanctioning and increasing costs to strategic players in a different way.

What does pragmatism bring us?

In this section, I will briefly refer to some main features of pragmatism that will emerge later when we consider in more detail the idea of democratic governance offered by Dewey. The main premise of the philosophy of pragmatism is anti-foundationalism, which represents the belief that no idea is universally perfect and set in stone (Barnes 2008). Pragmatists believe that no idea (ideology, religion, philosophical system) will lead us to some transcendental truth[5]. As Richard Rorty warns that "we have to give up on the idea that there are unconditional, transcultural obligations, obligations rooted in unchanging, ahistorical human nature" (1999, xxvii). We will see later, in John Dewey's theory, this concept will especially have an impact on the conceptualization of democracy through democratic experimentalism, where the molding of democracy as an instrument of governance into only one form will be criticized, but a combination of different demo-

5 In his philosophy, Dewey does not accept any arguments of inherent human nature or inevitable historic destiny. Even the ideals such as justice are determined by society, "once political philosophers remove ideals from their dynamic and human environment they become idols – inert to the analysis and improvement of pressing problems, they close inquiry rather than enlarge it" (Hildebrand 2008, 97).

cratic institutions that are in agreement with the newly created will be sought in accordance with the context and needs of the community. What Dewey points out as a big problem with institutions is that „we glorify the past, and legalize and idealize the status quo, instead of seriously asking how we are to employ the means at our disposal so as to form an equitable and stable society" (Dewey 1946, 159). Another important characteristic of pragmatism is that knowledge is a social phenomenon (Barnes 2008). This concept of knowledge builds on the understanding of knowledge as another form of commons that is very important for the development of the human and social capital of individuals, so it is important to ensure governance that will disseminate information and knowledge in the best way, especially the connection between knowledge and participatory forms democracy. John Dewey emphasized the importance of para-state institutions that spread knowledge and therefore can prevent the standardization of knowledge and ensure the pluralism that is necessary for the equality of the ability to participate politically (Emerson 2019). Dewey, like other pragmatists, emphasized the contingency that exists in the world and social processes which often radically change the social situation and therefore needs. That is why he emphasized the importance of developing reflective intelligence, i.e. the ability (but also the will) to adapt attitudes and beliefs to new situations and changes, especially when we talk about collective ideas and institutions, no matter how sacred they may be and long a part of the political culture of the community (Dewey 1922). As we saw in the previous section, constant changes create new commons, often through unintended consequences, which entails the need for institutions and governance mechanisms to adapt to it, especially by introducing innovative mechanisms. This was seen by Dewey himself, who advocated the form of democracy which in response to the great changes that are taking place in all spheres of society, enables citizens to participate in discussions within the community, to experiment in terms of shaping new institutions and forms of democracy (Dewey 1944). Thus, through trial and error, we eventually arrive at more optimal results in governing the commons. As a product of the already mentioned characteristics of the philosophy of pragmatism, pluralism appears, which insists on the confrontation of opposites and opponents, precisely because no idea or institution captures the entirety of social reality, something always manages to escape or be omitted (James 1977). For this reason, John Dewey's democratic experimentalism includes many features of agonistic democracy[6], although it surpasses it in its radicalism (Jackson, 2019).

6 Agonistic democracy acknowledges that there will always be conflicts due to opposed interests and focuses on contrasting conflicted sides by turning them from enemies into adversaries. For more see: Mouffe 2000.

John Dewey's Democracy

A. Public deliberation

Dewey believed that democracy is the best instrument for achieving the practical goals and interests of citizens, although he was highly critical of liberal representative democracy. Democracy is the correct system because it is the „embodiment of the moral ideal of a good which consists in the development of all the social capacities of every individual" (Dewey 1918). As we will see through the work, democracy is an instrument for governing first-order commons, but it is also a process where second-order commons are acquired, which citizens need for successful governance. For Dewey, real democracy is „a joint exercise of practical intelligence by citizens at large, in interaction with their representatives and other state officials. It is cooperative social experimentation" (Anderson 2006).

Criticizing the aristocracy present in representative democracy, embodied by the discourse on the supremacy of experts and the uninformed public (Lipmann 2010), Dewey argued in favor of participatory models of democracy that horizontalize decision-making power claiming that citizens have contextual and social intelligence that experts often lack, and which can be crucial in structuring community problems and formulating adequate policies (Shook 2013).

By this, Dewey certainly does not exclude experts and their knowledge from the decision-making process but emphasizes the importance of dispersing decision-making power to the citizens themselves because there is no strong enough justification to exclude or limit citizens in the process of policy formation. When he talks about the importance of including citizens' public discussion in the work of the bureaucracy, Dewey insists that "[n]o government by experts in which the masses do not have a chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in a way which forces the administrative specialist to take account of the needs." (Emerson 2019, 94; Dewey 2012, 208).

That is why Dewey introduces the notion of public deliberation as one of the models of citizen involvement in decision-making (Shook 2013). Dewey cites inquiry as the main mode of citizen participation, whose form has its roots in the experimental model of the natural sciences and consists of several steps: identifying the problem; formation of a hypothesis (proposal of some policy); discussion of the implications of the hypothesis; and testing the hypothesis itself, that is, the solution (Ralston 2010). This framework can be applied to the case of a certain endangered commons, for example, the construction of mini-hydroelectric power plants and endangering the mountain rivers and the living world in and

around them. Once the citizens become aware of the problem[7], they could form citizen assemblies or forums where certain solutions and the implications of those solutions are discussed, then as a result of the discussion a policy proposal is formulated that should make the endangered commons sustainable, and finally, it is further tested in reality The proposed solution is constantly subject to revision and at no point does it become permanent and irrefutable. These types of assemblies are irresistibly reminiscent of deliberative assemblies that are part of the practice of deliberative democracy, precisely for this reason many theorists considered Dewey a predecessor of this democracy current (Dryzek 2000; Habermas 1996). Dewey viewed such assemblies of citizens as partners of the bureaucracy, whose input should ensure the better formulation of policies that benefit those affected by it. Like some other American progressives of that time, such as Marry Follett, he believed that the state does not have exclusive legitimacy over the making and implementation of community political decisions, but also that such democratic forums of citizens can be a legitimate source of social action (Emerson 2019). For Dewey, such citizen forums represent an instrument through which decisions are reached that are not a mere sum of individual preferences, but the product of substantive communication among community members through appreciation of the life experiences and practices of participating individuals. Consensus is not the primary focus for Dewey, unlike for the theorists of deliberative democracy, but the quality of the discussion itself (Pappas 2012). Dewey puts ownership of deliberation to the citizens, that is, members of the community (Jackson 2019). In his theory, he uses communication instead of deliberation with the aim to highlight community ownership (communication=community).

It is interesting to notice that Deweyan pragmatists perceive deliberation and language as well as civil forums within the community, not only as social phenomena but also as important commons that citizens possess and can further develop. They represent good examples of *second-order commons*. That is why one of the most important criteria for evaluating a good decision and public policy is whether it strengthens future discussions and the functioning of such forums (Emerson, 2019).

However, it would be wrong to characterize John Dewey as a forefather of deliberative democracy as some authors say that his political theory is more radical and goes beyond the limitations of deliberative democracy (Jackson 2019). In fact, if we were to shape the way of governing the commons according to Dewey's principles, deliberative democracy would not be sufficient to remove all non-democratic decision-making elements.

7 It should be stressed that often it is very difficult for people to recognize that they have common problems, especially in the state of oppression. See: Boltanski 2011.

There are three points of criticism of deliberative democracy from the point of view of Dewey's philosophy of pragmatism:

1. Existence of some already determined goal or desired outcomes of deliberation.
2. Problematizing the insistence on the rationality of the arguments themselves within the discussion.
3. Ignoring the social context and injustice within which the deliberation takes place. (Pappas 2012).

Deliberative democracy sets before itself some desirable goals as outcomes of deliberation (Talisse 2005), which Dewey sees as pre-deliberative limitations of citizens within the discussion process. He emphasizes the quality of deliberation that is as burdenless as possible by pre-set normative restrictions and expectations. The assumption is that citizens in open communication will reach a solution that is in line with their daily practices and interests (which for Dewey are inextricably linked to the interests of the community), whatever that solution may be. This attitude of Dewey's is not so problematic when we consider the discussion or forum itself as a commons that we must nurture and improve, however, it becomes extremely problematic for us when we want to use deliberation as an instrument to achieve the best solution for the largest number of users of a certain commons, i.e. when we want to shape the sustainable governing mechanism of the community's commons through that process. Freeing the deliberative process of any normative expectations other than the inherent value of the deliberation itself will not necessarily lead to outcomes that lead to sustainable governance of the commons. Nevertheless, despite the low threshold of normative requirements, Dewey believed that there are illegitimate preferences and arguments that must be filtered during the discussion, such as those that call for the reduction of the rights of other individuals or groups, attitudes and arguments that exude racism and discrimination for example (Shook 2013).

Another criticism concerns the insistence of certain authors that deliberation itself is a process in which rational arguments are exchanged and where the strength of the argument is measured solely by how rationally justified the argument is (Benhabib 1996; Dryzek 2000). Emotions are left aside here, but so are many other elements of our experience such as telling stories and rhetorical performances. Here Dewey is following in the footsteps of some authors of post-structuralist feminism such as Iris Marion Young, who criticizes the exclusion and ignoring of everything that is not rationally argued (Young 1990; Pappas 2012). The inclusion of emotions, but also elements such as storytelling, which are an important part of the experience of both the community and individuals, is the only way to the authentic involvement of the community and citizens in the

decision-making process. If we take as an example a deliberative forum that discusses further governance of the city park (urban commons), arguments that come from emotional attachment and fond memories in favor of not disturbing the existing appearance of the park, must be equally taken into account as those arguments that speak in favor of the commercialization of certain objects within the park, which consist of statistical data about the income that such commercialization brings to the community. Deliberation in this sense would be authentic and would not close the door to the symbolic performances of citizens, but would follow the experience and way of communication of the community in which it takes place.

Finally, Dewey's third objection to the theory of deliberative democracy concerns the ignoring of the wider social context and the injustice that is present. Certain theorists of deliberative democracy believe that almost any asymmetry of power, but also disparities in human capital (education, self-confidence, debating skills) can be reduced within deliberative forums (Emerson 2019)[8]. However, Dewey, following in the footsteps of Hegel, insists on the importance of rights that empower[9], which start from the existence of social inequality and injustice, expand the circle of positive freedom and enable the individual to develop and improve his/her skills in order to participate in a more equal way in social and political life (Shook 2013). Economic inequality often goes hand in hand with other forms of domination such as political or class domination. That is why we have to introduce the notion of domination into the discussion which is "characterized by its capacity to restrict, in more or less significant proportions, the field of critique or (which in practice comes down to the same thing) deprive it of any purchase on reality" (Boltanski 2011, 117). For example, some post-communist countries experienced a mix of economic and political inequalities that prevented the citizens from articulating legitimate political interests. This was the case with competitive authoritarian regimes in which "formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy." (Levitsky and Way 2002, 52). Inequality, in fact, can be seen as a form of structural violence, where violence is perceived as any sort of limitation that could have been avoided. Such violence often is indirect,

8 Theorist of solidaristic grounded normative theory would support this notion, as they criticized theorists of deliberative democracy for neglecting and understating the importance of inequality and discrimination. For more see: Ackerly 2008; Forman 2018; Johnson 2022.

9 Dewey emphasized that political facts, such as human rights, are not outside of desire and judgement of the citizens (Dewey 1946). This means that right such as the ones of empowerment are highly dependent on social context, they are not abstract and unchangeable.

subtle and without a clear source (Galtung 1969). These various forms of inequality and domination need to be overcome so that equitable deliberation is made possible.

Social reforms aimed at reducing structural inequality are a process closely related to any type of citizen consultation and deliberation[10] because they have an impact on the ability of citizens to participate equally and represent their interests. As we will see in the next section, public deliberation is not the only governance mechanism employed, but also some other decision- making methods.

B. Democratic experimentalism

In "Public and its problems" Dewey argues that "industry and inventions in technology, for example, create means which alter the modes of associated behavior and which radically change the quantity, character and place of impact of their indirect consequences" (Dewey 1946, 31). We could argue that these changes create new forms of association, new commons and interest, which in order to articulate themselves need to "break existing political forms" (Dewey 1946, 31).

Considering the constant changes and different situations in which the community or commons find themselves, one governance system cannot be applicable and adequate forever and everywhere. That is why some authors state that Dewey's radical democracy far exceeds the notion of deliberative democracy, although deliberation still constitutes one of its most important aspects (Jackson 2014; Sabel 2012). For Dewey, democracy is „the personal way of life of individuals that signifies the constant possession and expression of attitudes, the formation of personal character, and the determination of desires and purposes in all areas of life" (Dewey 1993). Dewey approaches the concept of democracy holistically because true democracy is one that exists in all spheres of society, even in non-political institutions such as business organizations. On the one hand, practicing democracy in non-political spheres of life contributes to the building of social capital that is important for political participation, on the other, outcomes that arise in non-political spheres of life, such as in the workplace, also affect the political sphere (Jackson 2014). Citizens of a community will have a hard time developing the skills needed for participation and deliberation in the process of governing the commons if they do not have the opportunity to develop democratic skills and internalize democratic values in other spheres of life. As democracy is a social and relational phenomenon, it is very important to democratize all spheres of life, not

10 But also to any other governing mechanism, for example agile governance which will be introduced later on.

only economic and political but also those more personal spheres of life that can be fertile ground for the development of a reflective and participatory political culture, i.e. a democratic way of life, which is why he emphasizes the role of the family or the church in the formation of individuals (Emerson 2019). In this sense, democratic life itself, according to Dewey's understanding, is a form of the commons that is vital for both functional democracy (second-order) and just and effective governance of the first-order commons.

Although this perspective has certain logic from the point of view of Dewey's philosophy, it is also very problematic because often the reason for citizens' participation in the governing of the commons is that they make a certain commons accessible and sustainable, and not in order to exclusively develop their skills for democratic life. In reality, they are often secondary, although undoubtedly important.

The extent to which Dewey thought that non-political and political spheres are connected is shown by the fact that, within the concept of democratic experimentalism, he looked for a model of good governance in the production method of some industry sector organizations (Sabel 2012). He noticed that there could be some lessons learned from the production process and transferred into the governance. Namely, every problem or challenge in a production led to a deep examination of the root of the problem and quick adaptation to the new situation, therefore, as long as the hypothesis, or parts of the hypothesis, worked, it was applied. However, constant monitoring makes it possible to spot problems, and inquiry leads to changing problematic parts and adapting the process of production. Today, in management theory, such a system is the closest to what we call agile management, and in the political sphere agile governance. If we apply this mechanism to the governance of the commons, we arrive at a model that, in addition to being flexible and adaptable to circumstances, is not burdened or defined by any institution, value or pattern of behavior that proves inadequate during testing. Considering that we have a growing number of new forms of commons with different characteristics (some are exhaustible, while some spread with greater use, for example) it is natural to assume that in every situation one model will not be equally good and effective. That is why it is necessary to apply different democratic mechanisms in different situations. No mechanism, whether we are talking about participatory, deliberative or agonistic democracy, will not be used if the inquiry by citizens and the monitoring of the results show that they are inadequate. Constant changes require constant innovation of governance institutions (Sabel 2012). Thus, Dewey saw protest politics as a form of participatory democracy, when deliberation was not sufficient or possible, which he showed when he participated in marches for African-American and

women's rights (Shook 2013). Protest politics could serve as an extra-institutional democratic mechanism of governance by citizens when deliberative democracy is not feasible, or as a supplement to deliberative institutions. A deliberative governance mechanism will be adequate where citizens have time to decide through discussion on a sustainable solution for the use of the commons, but where the commons are threatened and facing rapid disappearance, protest politics will be a more useful and practical democratic mechanism[11]. Protest politics may pave the way for the establishment of a deliberative mechanism, but it itself represents an institution of participatory democracy available to affected citizens. The purpose is to constantly innovate political decision-making institutions and combine them according to the needs that the context requires. The process itself will not be linear and will have its ups and downs, but could eventually lead to a better-adjusted governing system than what could have been achieved with traditional policy-making.

In this section, I presented some of the models of democratic experimentalism offered by Dewey: industrial democracy representing employee participation, then agile management mechanism, and finally, protest politics as a form of citizen participation. However, in addition to these mechanisms, democratic experimentalism also includes various forms of civil disobedience, union and labor strikes, and any form of class struggle[12] (Festenstein 2019).

Is Agile governance compatible with Dewey?

Dewey's non-separating concept of governance in the political sphere from that in the economic or private one led some authors to look for the principles of governance in organizations that were non-political in nature. Thus relying on post-bureaucratic organizations that include the industrial sector concept of lean and agile management is introduced as a possible adapted solution for public governance (Sabel and Simon 2017). Sabel and Simon state the following as the main principles of adapted lean management:

1. *Rolling rule regime* where although there are main guidelines and rules, the agents[13] who implement the governance can deviate from them when such a deviation would lead to more optimal outcomes.

11 Some authors have argued that deliberative democracy can be mixed with other participative mechanisms, and that one does not necessarily exclude the other (Bohman 1996; della Porta 2013; Elstub 2018).

12 Participative workplace policies include spreading the ownership on workers and economic bicameralism. For more see: Landemore and Ferreras 2015.

13 Under agent we mean bureaucrats and citizens.

Of course, the control exists and a clear and justified explanation from the agents is needed as to why the rules were deviated from.

2. *Root-cause analysis* serves to clearly and accurately identify errors in governance and existing rules. This requires constant monitoring and deep analysis of the problem.
3. *Peer review*, also represents a type of monitoring where those who are on the frontline have a major role in examining formulated governance policies, unlike traditional bureaucracy where that role is performed by those who are higher in the hierarchy. Here we return to Dewey's insistence on the contextual knowledge held by those closest to the implementation of governance policies, as well as those affected by it.
4. Finally, there is *performance measurement*, which serves as an instrument for monitoring the effectiveness of governance policies and monitors not only the level of compliance with the rules of the regime, but also the level of achieved goals (Sabel and Simon 2017).

Following these rules leads to a governance regime that is much more ready for changes in the needs of citizens, as well as the level of resources or the state of the commons, compared to the traditional model of bureaucracy and governance.

Alongside with the use of some postulates of lean management, the focus is on agile governance as a mechanism that largely corresponds to John Dewey's philosophy. What this type of governance should bring is „the ability of human societies to sense, adapt and respond rapidly and sustainably to changes in its environment, by means of the coordinated combination of agile and lean capabilities with governance capabilities" (Luna et al 2016). Accordingly, agile governance is a model that is responsive to changes and easily adapts to them (Mergel, Ganapati and Whitford 2020). It is slowly finding wider use in administration, however, it is mainly applied in software project management. Opposite to it is the traditional governance model in the bureaucracy, the waterfall model (Whitford 2020), which is characterized by rigidity, hierarchy and routinized sequences in the application and formulation of public policy. Agile management, on the other hand, insists on adapting to the changes in the needs of end-users, which is why ethnographic methods are often employed in examining needs and obtaining information. However, if we introduce deliberation as one of the bases of information gathering, but also of governance, ethnographic methods become, if not superfluous, then definitely a secondary instrument of agile governance. Agile management has 12 of its main principles, which, although intended primarily for private sector organizations, still can find some application in public governance. I reformulated those 12 principles so that they fit the needs

of public governance, and narrowed them down a bit to 10, thus we came to the following principles:

1. Seek to fulfil the citizen's needs... Continuously improve service.
2. Respond to the demand for changes.
3. Shorten the timescale for the delivery... Deliver changes frequently.
4. Bureaucrats should work hand in hand with end users/citizens.
5. Emphasize face-to-face conversation between the policy design team and the broader public.
6. Sustainable development is the goal. All involved parties should be able to maintain a constant pace of engagement.
7. Continuously focus on technical quality and good design.
8. Emphasize simplicity.
9. Self-organization in teams improves design and production.
10. Regularly reflect on how to improve this process. (Beck et al. 2001).

In addition, agile governance insists not only on efficiency through rapid adaptation, but also on inclusiveness and equality of participation in the governance process (Mergel, Ganapati and Whitford 2020), thus responding to the two main elements of good governance according to Dewey, constant innovation and equality of participation.

Still, there is a need to deal more with the issues of equal participation and domination as we should not be uncritical of the concept of agile governance. Since it comes from the sphere of capitalist production, it is characterized by power inequality and the relation of "monetized servitude" (Vrousalis 2021, 46) stemming from profit orientation. In order to have a more just and equal governance model few elements need to be included. Firstly, there should always be a space for reflective moments by all involved and affected by the governance process of the commons (Boltanski 2011). That means that the community ownership of the commons applies to the governance model as well, in the sense, that they can rethink the way the commons will be governed on an equal basis. Relations of domination would have no place in the process of governance. Secondly, agile governance must be open to adjusting to the new political forms (associations and interests) due to the constant changes (Dewey 1946). Not giving a voice and a way for new political forms to participate in governing the commons represents domination and structural violence. This would not be compatible with the thought of John Dewey. Therefore, governing the commons must contribute to emancipation as the second-order commons.

Dewey's conceptualization of the commons

The rights of emancipation and development have a very important place in Dewey's theory. As we mentioned, the rights of emancipation represent the rights of positive freedom and they are social and inter-relational in the sense that the community should be obliged to enable its members to exercise those rights in order to develop themselves, which, in turn, must not threaten the development of other individuals (Shook 2013). By exercising these rights citizens become more competent and can give better input to the political system and governance in general. The development of the individual represents a commons of the second order with an inherent value, while the rights of emancipation here have an instrumental value, they do not have an immutable form and are not abstract and universal. Dewey himself views them as concepts immersed in a wider social context and created by society itself (Shook 2013). Since human and citizen rights depend on a wider social context, this means that rights as such can be adjusted to the needs and practices of citizens and their communities[14] (Hildebrand 2008). To give an example, this could mean that marginalized communities could have a bigger share of the commons or could be allowed to exploit the commons if they are directly dependent on the given common resource.[15]

Cultivating habits for participating in collective decision-making, that is, habits for democratic life is also an important habit of the second-order commons for Dewey (Ralston 2012). The development of such habits and attitudes that favor the participatory model of democracy is achieved through education, the dissemination of pieces of information necessary for decision-making, and finally, through participation itself. Therefore, the enumerated ways of acquiring habits themselves become commons of the second order, which shows the interdependence of different forms of commons and how the deterioration of one can cause danger to other commons. In addition, Dewey believes that "the human ability to formulate and share meanings, is a social affair" (Hildebrand 2008). Ideally, the public should harness cooperative communication and exchange of knowledge through solidarity and participation. In such public citizens are empowered to acquire the necessary knowledge about the issue they

14 Keeping in mind that rights need to empower and emancipate and not be used as a tool for domination.

15 Not giving them preferential access to the common resource could mean their further degradation and even threat to their existence. Of course, there should be a balance between such affirmative actions and sustainability of the commons.

are interested in[16]. A great example of what this means in practice gives us David Hildebrand when talking about the trade-off between wanting safe drinking water and lower taxes. By participating in an adequate public, citizens with these preferences will learn of the trade-off between clean water and lower taxes, as in order to get drinking water, taxes for corporations would need to get higher (Hildebrand 2008).

When I considered new forms of commons in order to show the constant development and their emergence, I mentioned Lohmann's inclusion of the NGO sector as one of the forms of commons. Dewey would fully agree with such inclusion because he himself saw the contribution that civil organizations can have to the democratization of society (Festenstein 2019). By participating in the work of such organizations (trade unions, church organizations, civic initiatives, etc.), citizens create democratic habits necessary for more successful participation. Then, Dewey includes a corporate[17] moment in the public discussion where relevant organizations from the civil sector can give their input and contribute to the growth of the quality of deliberation, while in the case of other models of participatory democracy they can contribute to successful social mobilization (in the case of protests or various forms of civil disobedience). According to Dewey, one of the core features of any community is *shared action* (Hildebrand 2008). For a community to exist, it needs to emerge through shared action, meaning that governing the commons as shared action empowers communities (second-order commons)[18].

So far, we have seen how communication, or language, is an important element of Dewey's theory of democracy, and he most often uses the term communication instead of deliberation to emphasize the connection that language has with the community in which it is used (communication – community) (Jackson 2019). As a common language and public discourse are subject to influence and appropriation by the more powerful classes and are inevitably embedded in the relations of power and hierarchy that exist in society (Abend 2008), it is, therefore, important to make the discourse inclusive and democratic. It could be done through an open debate among citizens on the meanings of political terms, the question of political correctness and legitimate political options, because the meaning of important terms and the boundaries of what is allowed and what is not allowed in the discourse must not be determined exclusively by

16 Adequate public serves here as a second-order commons for the dissemination of knowledge (form of new commons).

17 Corporate in terms of including not just individuals, but also various associations of individuals in deliberative process.

18 Besides shared action, key features of a community are shared values and associative nature (Hildebrand 2008).

a small elite. If that is the case, we find structural inequality and violence embodied in the very discourse that is dominant in society, and then also in deliberative forums.

Things are not all fine and dandy

Dewey's philosophy and Deweyan's political thought were not without their problems and criticisms. Some authors like C.A. Bowers criticized Dewey and his philosophy for staying silent on the rising environmental problems, presenting Western ethnocentrism as universalism, and having discriminatory remarks towards the indigenous people[19](Bowers 2006). These are indeed troubling remarks that should not be sidelined, however, filtering long-gone authors through today's ethical standards and norms can sometimes be a bit of a slippery slope, mainly because authors, much like other people are products of their time. For example, when it comes to environmental issues, only since the 1960s did they come into the mainstream of political agenda, which is why we could not entirely blame Dewey for not addressing them properly. Still, nothing is stopping us from filtering out problematic elements of his original thought, mainly through Deweyan political thought provided by the likes of the authors cited and mentioned in this paper, for instance[20].

In addition, Michael A. Wilkinson claims that Dewey tries to oust the element of *political* from the concept of governance when he introduces the scientific method, thus overlooking the importance of political dominance and inequality (2012). In his words, Dewey relies too much on the liberal notion of the free market of ideas and rejects the notion of revolution, thus further ignoring the power imbalance, political inequality and obstacles towards the new ideas (2012). To some extent, I agree with Wilkinson, but from what was previously written in this paper we can see that the element of *political* has its place in Dewey's theory[21], on the other hand, it is true that Dewey does not talk in length on how these new mechanisms can come to be, especially if opposed by the positions of power. This needs to be elaborated more in future debates and research.

Finally, I have to point out the possible fallacies of the participatory mechanism mentioned in this paper, as they are not the perfect tools for governing. For instance, Davis A. Super claims that the participatory

19 Bowers here refers to Dewey's characterization of the "savages" as governed by habits instead by intelligence.

20 Many authors when referencing Dewey's work do not do so as part of the historical studies, but more as an interplay in conceptualizing ideas for contemporary use.

21 Let us recall that one of the ways for governance is through participatory mechanisms that include social mobilization such as protests and marches.

approach to antipoverty programs in the US had worse results than the centralized one (2008). This does not mean that centralized mechanisms are better and more efficient than participatory and decentralized ones, but only that sometimes participatory mechanisms can fail, which is something that Dewey was certainly aware of, as we mentioned earlier in the paper. Moreover, even if working properly, there is another problem of eventual participatory saturation by the citizens as we cannot expect them to endure regular and long deliberative and participatory processes (Smith and Setala 2018).

All in all, Deweyan political philosophy offers us a great starting point in researching citizen-led governance mechanisms and their potential. This means that we need to look for ways to adapt and draw positive lessons from John Dewey in order to apply them to solve the problems of our time.

Conclusion: What have we learned?

Throughout this paper, we considered two types of contributions of John Dewey's philosophy of pragmatism to the problem of sustainable and just governance of the commons. The first type of contribution is reflected in the way the commons are governed. As we saw in the chapter dealing with the definition of new commons, constant changes create new forms of commons, the pragmatist position is that the speed of these changes and unexpected outcomes and consequences create the need for innovations in governance methods and mechanisms. Pragmatist anti-foundationalism criticizes the sacredness of political institutions, governance institutions are especially important for us and emphasizes the need for constant innovation and adaptation not only to changes but also to everyday practices and needs of citizens and the community. Deliberation, i.e. civil assemblies and forums, appears as one mechanism of innovative governance of the commons. In them, citizens can directly participate in the creation of governance plans and public policies concerning the sustainability of the commons through collective discussion. Such discussion includes not only the exchange and collision of rational arguments, but also the exchange and understanding of the experience of others, emotions, but also performance acts such as rhetoric, the idea being that the deliberation itself, as well as the outcome of the deliberation, should be in accordance with the practices[22] of the participating citizens. Dewey focuses exclusively on the quality of deliberation and the complete exclusion of desirable outcomes in the deliberative process is problematic because the purpose of any govern-

22 Individual and community practices.

ance mechanism, at least when we talk about the commons, is to lead to sustainability and fair outcomes, the quality of deliberation is there extremely important, but not primary. From the point of view of pragmatism, it would be wrong to highlight deliberation as the only and everywhere applicable governance mechanism, deliberation is just one of the innovative options that correct the negative consequences of ossified representative democracy and economic outcomes on the market. Experimentation is, according to pragmatists, one of the main methods of governance by which we arrive at better-adapted and more adequate institutions, and thus better outcomes. Insisting only on the instruments of deliberative democracy would contradict the pragmatist philosophy because it would shut down the process of examining institutions and constant innovation. Therefore, the instruments of participatory democracy, which are often combined with deliberative democracy, appear as suitable instruments.

Dewey's contribution to the concept of the commons is not only related to the governance of the commons, but also to a further conceptualization of the term. Throughout the paper, the importance of re-conceptualizing the commons through community ownership that escapes the clutches of the market and the state was of utmost importance. This becomes the first and the most important step that gives legitimacy to reclaiming the political aspect of governing the commons within the community.

Throughout his entire political theory, the concept of democratic life, which represents a form of second-order commons associated with the cultivation of civic virtues, habits and attitudes that favor political participation, is carried through. This form of the commons is firmly connected with other forms, such as solidarity and the NGO sector, which are fertile ground for the expansion of the very concept of democratic life in Dewey's sense, which further leads to better governance of the commons. We will easily notice that this also applies to some other commons. For example, if we were to talk about health as a form of the commons, then we could see a connection between health and the preservation of green commons within the city, such as parks that serve for recreation, but also preserve the mental health of users.

As two main contributions of John Dewey's pragmatist philosophy, we highlight the agile governance of commons embodied in public deliberations and democratic experimentalism, i.e. the need for innovations in governance to follow constant changes and the emergence of new commons, as well as for the adaptation of governance mechanisms to the characteristics of specific commons through constant monitoring. Another contribution is highlighting the interconnectedness of different forms of commons.

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Political sociology meets public policy: exploring policy formulation as a locus for assessing power of policy actors[1]

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Abstract

The uplift of a governance paradigm opened the door for different non-formal actors to join the policy-making process. This proliferation of actors posed some new questions about the relationship between them. One of the aspects of this relationship is the power of actors. The paper seeks to contribute to public policy literature in a way to explore if a policy formulation stage of a decision-making process can be used as an arena for assessing the power of the aforementioned actors. The argument this paper suggests is that policy formulation as a stage where the confrontation of actors is most visible and prominent is in fact an appropriate place for studying actors' dynamics and should be taken into consideration when discussing the power of policy actors.

Keywords: governance, policy formulation, policy actors, power

Introduction

For centuries, government, the embodiment of the state, had a pivotal and fundamental role in the process of making decisions. Political theorists have praised the role of government in assuring stability and security of the social system, while other actors often held a relatively marginal role. However, this paradigm completely changed in the late 20th century.

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The principle of horizontality had taken a more prominent role and had started to become a desirable objective in public policy and public administration sectors. A number of various actors that obtained the opportunity to actively participate in the process of policy-making has culminated in the production of new structural patterns that resulted in novel institutions with unique approaches, relationships and stakeholders. The role and function of these new institutions were now to be studied, analyzed and explained by the policy scientist.

Governance is a term simultaneously used by and for different organizations. It is one of those omnipresent concepts that has acquired its popularity both in the academic sphere as well as in the "real life" policy practice. Even though there is no unanimous agreement, it is safe to say that the core of the governance conceptualization is the change in behavior of the actors. Governance holds the idea of enabling diverse actors to participate in the processes in which they have interest. Hence, it is, from my point of view, the quintessence of a democratic political ideal.

In the following paper the goal is to explore structural elements of policy formulation stage of the policy cycle model in the context of uplift of a governance paradigm and discover if it can be used for assessing power of policy actors. It is justified to be curious to know how we can conceptualize the relationship between two types of players- state actors and non-state actors – and how we could further highlight the importance of this relationship as an essential intersection in public policy. Despite the fact that academic literature in this field tackles certain actors' strategies in policy-making (Beyers 2008) and uses power as a variable (Shore and Wright 2003), what it does not examine is the nature of power play in policymaking when it comes to governance. Often, these studies on power did not follow changes that had occurred in the public policy discipline (a tendency towards more horizontal policy-making, interpretivism, and pluralism of actors). In order to contribute to public policy literature, this paper seeks to densely describe changes that have happened in the last half of century in regard to policy-making process and offer a new point of view on policy formulation stage. This objective is relevant because only after the systemic literature review one can propose a sound argument hence this paper aims to offer exactly that – a literature review as a foundation for further exploration of policy formulation and power interaction. This objective is not only puzzling for public policy but it also contributes to political sociology literature as it showcases the relationship between notions relevant for both of the mentioned subdisciplines of political science. Hence, I argue that policy formulation in the collaborative governance setting is the most suitable stage of the policy cycle to evaluate actors' interests and how they influence policy outcomes.

The paper consists of two building blocks – *what* and *where*. As the goal of the paper is to explore the potential of policy formulation as an arena for assessing the power of actors, firstly we need to see how the policy-making process is happening in the new context. This is the mission of the *What* pillar. The *Where* part focuses on policy formulation as a location for assessing power. Here not only structural conceptualization is offered but also an argument of why this is a viable strategy.

The uplift of governance

Every now and then, a new "buzzword" appears in academic circles. Most of the time, these words are attached to some societal issues that are prevalent at the time, such as recession, political capital, information society, capacity building or stakeholders. In the last twenty to twenty-five years, governance has gained enormous popularity as a dominant buzzword thrown around enthusiastically to validate ideas and hypotheses on the workings and interconnectedness of systems that explain the changing state of world affairs. This vague, omnipresent term has been a part of mandatory vocabulary in published papers of political science and public policy academia since the early 1990s and still pervades as a quite fashionable concept (Hewitt Alcantara 1998; Peters 2001; Treib, Bähr and Falkner 2005). Additionally, Rhodes (2000) claims that governance is now everywhere and appears to mean anything and everything.

Governance, or the nexus of "regimes, laws, rules, judicial decisions, and administrative practices that constrain, prescribe, and enable the provision of publicly supported goals and services" (Lynn, Heinrich and Hill 2001, 7), has started to capture the interest of policy and political scientists during the second half of the 20th century. Frederickson (2004) claims that one can be grateful to Harlan Cleveland for the first usage of the word 'governance' in 1970, alluding that Mr. Cleveland said that what people want is less government and more governance. With this exclamation, Cleveland ignited the focus shift of policy and political science scholars from the process of transforming vertical, state-centric system of public administration into a more horizontal, inclusive and open horizontal decision-making scheme. Based on the relevant literature (Peters and Pierre 1998; Pierre and Peters 2005), it can be argued that there are two pillars of the same argument that elucidate the emergence of governance as a practice in the public sector. The first one is the domestic and relates to citizens' demands, while the second places the focus on the private sector and relates to issues in the international context. Stephan P. Osborne (2010) divided literature on governance into five different areas, (1) socio-political governance; (2) public policy governance; (3) administrative governance; (4) contract governance and (5) network governance.

As stated earlier, governance is a concept widely used by government officials, civil society practitioners and political scientists and is most generally defined as the "development of governing styles in which boundaries between and within public [voluntary] and private sector become blurred" (Stoker 1998, 1). The pivotal value of democracy is equality; analogue governance rests on equally involved actors in a political process.

Public demands require making partnerships in service provision between public administration and other non-state actors. Governance thus assumes government is just one of the actors that is important for effective and efficient output of production. Kooiman (1993) writes that there is no single actor who has the knowledge resource capacity to tackle problems unilaterally, while Peters and Pierre similarly conclude that the state actually loses the capacity for direct control and replaces that faculty with a capacity to influence (2005, 226). Governments ultimately realize that due to demands made upon them which they cannot meet, they require reliable partners in order to maintain (or regain) their efficiency in results delivery. This argumentation is in line with the central argument of the proponents of mostly neoliberal ideology, which proposes that governance is a necessary shift from the bureaucratic state to the hollow state (Salamon 2002, Rhodes 1997; Milward and Proran 2000). Quoting Rhodes (1997), "governance is mutual resource dependency". Governments understand that due to all the demands made upon them which they cannot meet, they require reliable partners in order to maintain (or regain) their efficiency in service delivery. Furthermore, the concept of governance implies that there is greater number of actors involved in the process of policymaking. While Jessop (2004) views the policy arena as an "unstructured complexity", Kenneth (2008) warns that the policy arena has become visibly more crowded (4). This change does not only consider the question of the number of actors involved, but also their specialization. In this complex take on policy-making, public and private stakeholders work together in collective forums with public agencies and engage in consensus-oriented decision-making. In policy science, this is known under the name collaborative governance (Ansell and Gash 2007).

The emergence of governance concept had tremendous impact on the development of political science thus Peters (2008) claims the early understanding of governance is closely related to functionalist approach. Peters furthermore argues that with the development of governance the focus of political scientists, and particularly policy scholars focused on functional need to understand steering within the democratic decision-making process. This notion evolved into one of the most important distinctions relevant for political science – difference between government and governance (Rhodes 1997). The question of differentiation between these

concepts stayed a central analytic question for scholars concerned with governance (Peters 2008, 4).

Keeping this in mind, within the last 25 years, several schools of thought were developed, whose mission was to, contribute to the better understanding of societal reality by expanding the mainstream methodological and conceptual focus. Thus, within policy literature, a plethora of terms such as interpretative policy analysis, deliberative policy analysis, participatory policy analysis, discursive policy analysis and argumentative policy analysis had found their place. Although these concepts are far from being interchangeable, one can place them under the same umbrella, since actors play a central role in all. Whereas in the classical policy analysis the principle idea was to explain and analyze the process of decision-making, the nature of outputs and evaluation of policies, the current approaches, such as participatory policy making o deliberative policy making, acknowledge non-state actors as relevant stakeholders and focus on structural characteristics of their behaviour, interaction and influence on the policy-making process.

This rather big shift from the classical rationalistic understanding of policy analysis pushed through two very important aspect relevant for the societal and political sphere in a contemporary life. Firstly, proponents of interpretative policy analysis introduced the idea policy-making should be embedded in diversity of its publics. Such stronger orientation on link between policy-making and diverse social groups that got the legitimacy to participate in policy-making is, argue, one of defining principles of contemporary democratic regimes. Therefore, this legitimizes interpretative policy analysis to be relevant and useful approach in modern public policy analysis. Secondly, interpretative policy analysis focuses on so-called collective entities (Petković 2008). Collective entities such as traditions, narrations, discourses and worlds of lives are essential segments of interpretive policy analysis. On the one hand they depend on a certain social setting, they are constructed based on actors' perception and intersubjectivity, however they exist independently from the individual in their raw conjures. From my point of view, this finding is particularly important because it reminds researchers to be sensitive for difference, but also to comprehend those certain human universalities. The relevance of this duality lays in the political sphere of contemporary life where sovereignty and call for national particularities is important and present in the public sphere, while at the same time there is an imperative of unity and cooperation. In such a delicate time, interpretative analysis which compromises between these two ontological stances might be useful in offering acceptable policy solutions.

Even though new approaches in policy analysis focus on power, they still remain limited in the interpretation of its perpetuation within the governance structure. In other words, prominent policy scientists engaged in the new wave of policy analysis such as Fischer, Hajer, Wagenaar or Yanow, or even Foucault and Dryzek, brilliantly explain the structure of policy analysis, the societal context and the methodology of the processes, but do not offer a plausible conceptualization of the distribution of power within the new paradigm of policy-making. Hence, what lacks is the actual explanation of concrete, implemented policymaking, particularly as it relates to the theory of how actors behave in such unpredictable circumstances.

Policy actors and their power

With the proliferation of the governance paradigm, various actors interested in the policy process or its outcomes started to be greatly drawn to being a part of this process. This had, as seen in the previous section, resulted in fostering the creation of new rules within the policy. The role, position, function, task and possibilities of all actors had changed accordingly and policy actors have started to be studied in the context of cooperation, negotiation, deliberation, debate, argumentation, and coordination. However, all those approaches that relay only on horizontality and consensus have turned out to be inefficient.

Definitions of policy actors generally do not differ much in encompassing the essence of this phenomenon. Enserink et al. (2010) in their book on policy-making in multi-actors environment describe an actor as "a social entity, a person or an organization, able to act on or exert influence on a decision." (79) Hence, they add that their assumption is that no individual single actor is able to act solely and unilaterally in imposing their interest to others but that cooperation is needed in order to solve a policy problem. M. Cahn begins his relatively basic analysis of policy actors in the US context (1995, 199) by stating, "policy actors are those individuals and groups, both formal and informal, which seek to influence the creation and implementation of these public solutions". This rather straightforward definition of policy actors, despite the complexity of this area within policy science, manages to pinpoint the quintessence of their role and intentions. Kustec Lipicer (2006, 29) argues that policy actors or policy players are a crucial part of policy analysis and, delving deeper than Cahn, claims that different actors participate in different policy stages.

One of the most important characteristics of policy actors is their attachment to the state (Petek 2012, 92; Kustec-Lipicer 2006. 28–29). Within policy science, there is a clear distinction between state actors (also known as formal) and non-state actors (in literature, terms non-state and

non-formal are used interchangeably). While the formal actors' jurisdiction is territorially limited, their behaviour is based on the notion of sovereignty, in that they possess autonomy in their actions and have the power of cohesion/repression. On the other hand, the non-formal actors emerge from the private sphere, with no territorial or state jurisdiction, and are predominately active as civil society, non-profit organizations and think-tanks). Both of those actors share the common principle of interest as a criterion for participation in policy development. They use their resources (for more on resources and actors' power, please see the next chapter) to drive and deliver policy outcomes. However, due to vastly different functionalities and methods of participation (as well as the goals they are pursuing), both actors have distinct roles to play depending on the stage of the policy process. Ana Petek (2012), in her dissertation, summarized Birkland and Howlett and Ramesh's categories of actors in order to demonstrate the loci of three categories of actors – society, between society and state and state (table 1). As the chart below illustrates, most of the policy players reviewed were allocated in either formal or non-formal categories, which confirms their relevance in the public policy discourse. Even though here we find both categories s consisting of three sub-categories ("in", "outside", and "between" state and society) to show the complexity of policy stakeholders, many other policy texts offer only two categories – state and non-state actors – due to issues of pragmatism and quality analysis (Grdesic 1995).

Table 1. Comparison of categories of actors

<table>
<tr><th colspan="2">Birkland</th><th colspan="2">Howlett and Ramesh</th></tr>
<tr><td rowspan="3">Formal actors</td><td>Legislative</td><td rowspan="2">Elected officials

Legislative
Executive</td><td rowspan="2">Actors located in the state</td></tr>
<tr><td>Executive
President/ government
Public administration
Agencies</td></tr>
<tr><td>Courts</td><td>-------</td><td></td></tr>
<tr><td rowspan="5">Non-formal actors</td><td>Individuals</td><td>Voters</td><td rowspan="2">Actors between the state and society</td></tr>
<tr><td>Political parties</td><td>Political parties</td></tr>
<tr><td>Interest groups</td><td>Interest groups</td><td rowspan="3">Actors located in society</td></tr>
<tr><td>Research organizations</td><td>Research organizations</td></tr>
<tr><td>Media</td><td>Mass media</td></tr>
</table>

Source: Petek (2012, 125)

It is often claimed that state (or formal) actors have exclusive right to formal decisions (Hill 2010; Sabatier 1999; Kustec-Lipicer 2006; Petak 2008). Even though this argument is in its essence correct, it is relatively reductionist from the point of view of contemporary governance understanding of the decision-making process. As seen from the previous chapter, even though the state (actors) have the mandate to make decisions, they cannot do that solely on their own, due to limited resources they possess. Within the governance framework, state actors are bound to cooperate with non-state actors in order to produce policies beneficial for the whole society, which by *de facto,* limits their decision-making monopoly. Nevertheless, Kustec-Lipicer (ibid) is right when she argues that state actors' decisions have effects on the whole population of a certain country and due to that, their behaviour has to be guided by specific procedures of transparency and predictability. The main goal of state actors, as the argument goes, is to assure welfare of its constituents; however, the downside of the state apparatus is bureaucracy and its perpetuation of rigidity, inefficiency and sluggishness. Another feature of formal or state actors is their duty, or legal obligation, to create public policies, which, according to both Birkland (2001) and Howlett and Ramesh (2005) influence the activity of the legislative, the executive and the judiciary branches. Over time, the role of the state in the process of making decisions has been changing. As described in earlier, with the emergence of governance and realization that some societal and/or political problems are rather too complex, the state had to focus on the collaborative modi. Different actors got the access to the policy/making due to their particular characteristics which are needed in a specific case. Colebatch (1991) understands policy as a nexus which consists out of three pillars – authority, order and expertise. Authority means the right to produce legitimate policy outputs, order refers to institutions that are devoted to an issue policy wants to tackle and expertise is a knowledge on a specific issue. In other words, Colebatch the conception of powerful government as the only important actor and introduces other stakeholders as relevant in the decision-making process. As a result, the state and non-state actors create collaborative relationships where the former can achieve specific policy goals with assistance from the latter, even while pursuing their own interests (Rhodes 1988).

Non-formal (or non-institutional/ non-state) actors are the second category of relevant players within the policy process. Even though they do not have legal duty to participate in the decision-making process, they have every right to do so, according to some concepts, such as collaborative governance. As shown, in order to have more sustainable, effective,

and just policies, non-state actors are vital in the policy process engagement. Good governance requires a plethora of actors participating in the process in order to construct better policies. Petek (2002, 127–128) analyses four reasons why non-formal actors participate in decision-making process, which were originally postulated by Donahue and Zeckhauser (2006). He argues that sparse governmental resources, limited productivity of state actors, issues with information acquisition for formal actors and legitimacy in terms of need for support of non-state actors are the essential reasons why a government would open a policy arena for a wider circle of stakeholders. In addition to those reasons, Hill (2005) points out that non-state actors (he calls them non-system actors) are particularly influential and necessary when policy discourse becomes complex. By demonstrating this assertion with the example of education policy, Hill argues that non-system actors help in acquiring changes to outdated policy practice and translating sometimes abstract policy to an implementable adaptation. As seen in Table 1, there are various kinds of non-formal actors.

With the emergence of good governance and the policy network approach, civil society has gained more attention as a policy actor to an extent that some authors such as Matthew Cahn claim that policy is "a result of institutional processes influenced by non-institutional actors" (Cahn 2012: 203). In democratic societies, civil society organizations, together with experts, unions and political parties should be involved in the decision-making process through consultation and expert advice, and this is exactly the key to the governance and the policy network approach. However, with the transformation of the decision-making process, the *modi operandi* of the civil society organization (at least declaratory) has changed. Sørensen (2002) argues that new actors that got the opportunity to participate in policy-making were forced to leave their particular interests outside the polity and, at least nominally, started to claim to advocate for the public good. Thus, it can be concluded that both the government and civil actors needed to adapt to a new reality.

Civil society organizations, as explained by Kochler-Koch (2010) are not involve in the process of policy-making as representatives, but their potential is more their active participation. M. Novak (2017) in their text on civil society organization's accountability elaborate Kaldor's differentiation on accountability by claiming there are two types of accountability when it comes to CSOs – "Procedural accountability (internal, functional or management accountability), which refers to the responsibility for resources, and moral accountability (external, strategic, political accountability), which refers to the receivers and beneficiaries of services provided by CSOs" (Novak 2017, 131). According to this author, civil society organizations, in order to increase the trust in civil society, should be taken

accountable because they do not solely represent "their members but also beneficiaries, funders, supporters and donors" (ibid: 141). Different actors imply different and often competing interests thus in order to understand the relationship among actors and the sole dynamic of a policy-making process power as a variable should not be ignored.

Arts and Tatenhove (2004) claim "in general, political power has to be regarded, on the one hand, as the ability of actors to mobilize resources in order to achieve certain outcomes in social relations, and, on the other, as a dispositional and a structural phenomenon of social and political systems." Therefore, they offer their definition of power as "the organizational and discursive capacity of agencies, either in competition with one another or jointly, to achieve outcomes in social practices, a capacity which is however co-determined by the structural power of those social institutions in which these agencies are embedded." (2004, 347)

In the light of all this, Brugha and Varvasovszky (2000, 240) claim it can be said that political scientists have viewed decision-making process as determined by how power is structured based on:

- *Elitism* (power is concentrated in the hands of influential few; Lasswell, Bachrach and Baratz)
- *Pluralism* (power is distributed among various groups; Lindblom, Dahl)
- *Marxism* (power is distributed among classes and the state is the instrument of class power; Marx, Lukes, Gramsci)
- *Corporatism* (state has the power to overcome the conflict between labour and capitalism; Schmitter, Siaroff, Lipjard)
- *Professionalism* (power is concentrated in the hands of professional elites who may give preference to their own interests over those of the public they serve; Chambers; Lauder, Light, Marshall)
- *Technocracy* (governing using principles of scientific rationalism; Lowi, Olson, Lindbloom, Radaelli)

In the governance related understanding of polity, where there are lots of actors who pursuit various interests, power as a variable should not be ignored. The topic of power in policy studies is often associated with one specific approach of studying policy-making – stakeholder analysis. Stakeholder analysis is focused on questions about the position, interest influence, interrelations, networks and other characteristics of stakeholders, with reference to their past, present positions and future potentials explain Brugha and Varvasovszky (2000, 239). Even though this method has been used mostly to support project management within the corporate sector, its implications have proven to be rather important for contemporary understanding of a policy-making process. As previously pointed out, looking

only at policy networks in the study of policy actors has a limited potential to explain policy changes if it is not complemented by an analysis at the lower level in terms of actor properties (Rhodes and Marsh 1992, 196). Stakeholder analysis brings into the study of policy process perceptions, values and resources as vital components of contemporary policy-making process. Together with the network level, aforementioned components allow one to understand and analyze decision-making process in details. Stakeholder analysis thus helps us understand how interests of stakeholders are being channelled into objectives. Dahl (1957; 2003) in his attempt to operationalize power argues that power is relationship which includes base, means, amount and scope. He claims that the base of an actor's power consists of all resources – opportunities, acts, objects that one can exploit in order to affect the behaviour of another. Means are defined as instruments which allow behaviour of others to be altered. It is more active category than base and includes treats and treats as *modi operandi*. If power is seen as relationship between A and B, the Scope consists of B's response, while the Amount can be represented by a probability statement (the chances are 9/10 that if the A promises something to the B, the B will comply). Purdy (2012, 410) elaborates certain Dahl's points and among other aspects, argues that resources are important in operationalization of power. She claims resources include tangibles such as financial resources, people, technology, and supplies and intangibles such as knowledge, culture and capabilities. Purdy believes that in collaborative processes organizations and individuals use resources to influence other participants by rewarding them for support or compliance or by punishing them for dissension or noncompliance (2012, 411). As we have seen power and authority are closely linked, thus Purdy (2012) claims that the determination of who may participate in a certain stages of policy process can be considered power as well.

Probably the most influential theorist of power in the late 20th century is *Michel Foucault*. His understandings of power can be found in his two pieces *Discipline and Punish* (1977) and *The History of Sexuality* (1980). Sadan in her analysis of M. Foucault, Sadan (2004) claims, "Foucault was influenced by Weber and Marx, but unlike them did not feel committed to a comprehensive analysis of organizations or of economic aspects, he chose each time to analyze a different social institution." For the star it should be noted that Foucault thought that there is no need to develop a theory of power. He believed there is no objectivity of the researcher and need for standing outside the social order.

Foucault believes power is inseparable from interaction. However, he sees power as "not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes

to a complex strategical situation in a particular society." Foucault (1980, 93). For him, power is not wielded by individuals nor classes nor institution, it is dispersed, subject-less as "elements of broad strategies but without individual authors. Further on, power is present in every moment of social relations, it is not necessarily repressive, negative, but also positive. Power, in Foucault's view is inseparable from knowledge, hence his term power/knowledge is taken from Nietzsche's ideas about the connection between knowledge and power. Foucault writes on discourse as well and argues it is a channel through which knowledge and subjects are constituted, hence "power relations are dependent on culture, place and time, and hence Foucault deals with power discourse in contemporary Western society" (Sadan 2004, 57). Power, for Foucault, is not intentional, meaning individuals' intentions have little bearing on this conceptualization of power. Gaventa (2003) argues: "in this interpretation of power, the diffuse nature of power effectively transcends the bi- polar power/powerlessness division." Foucault claims that the split between structure and agency is effaced, in other words, both structures and agents are constituted by and through power.

Keeping this in mind, the motivation for this paper is to explore the suitability of a policy formulation as a stage of a policy-making process for assessing power. To be more precise, a research question I am curious to answer is – *can we use policy formulation as a stage in a policy-making process to assess power of different stakeholders*? In order to build a solid argumentation line, in the next section I contextualize policy formulation within the policy cycle model and then conceptualize policy formulation as a justifiable arena for assessing the power of actors.

Policy cycle model

There are very few models and approaches that have had such a great impact on the development of a discipline as had the policy cycle or policy stage model. This simplified version of a real-life scenario public policy process that was initially proposed by H. Lasswell, has had several upgrades and variants over time in order to boost its validity and proximity. The versions developed by Brewer and deLeon (1983), May and Wildavsky (1978), and Jenkins (1978) are among the most widely adopted ones. Today, the concrete differentiation between agenda setting, policy formulation, decision-making, implementation, and evaluation (eventually leading to termination) has become a conventional way to describe the chronology of a policy process (Werner and Wegrich 2007: 43). Nevertheless, in almost all of those stages of the policy model, three main phases can be detected, namely, pre-decision, implementation and evaluation of a policy. The policy stage model, no matter how many levels it has and no matter how

it was understood over time within the policy process, it was and still is, the focal point in almost every policy analysis. As Werner and Wegrich explain, "according to such a rational model, any decision-making should be based on a comprehensive analysis of problems and goals, followed by an inclusive collection and analysis of information and a search for the best alternative to achieve these goals" (44).

However, the critics have been vocal and have directed some severe critiques to the policy stage model. P. Sabatier and H. Jankins-Smith argue that it is not a causal model at all, and it does not allow setting hypotheses that can be empirically checkable; likewise, it is imprecise and is based on implicit, top-down perspective rather than a bottom-up approach and is determined largely by legal perspective, without taking societal context into consideration (deLeon 1998). Additionally, "Everett (2003) argues that the model represents a revision to the classic rational paradigm of policy making, which emphasizes formal procedures and ignores the complex, value-laden nature of the policy process, as well as the primary role of political power in determining the direction of public policy. Because of this, the policy cycle model is allegedly impractical and inappropriate for most cases of decision making" (Howard 2005, 3). Additionally, the policy cycle framework, according to Werner and Wegrich (2007, 56), ignores the role of knowledge, ideas and learning in the policy process as influential and independent variables affecting all stages of the policy process.

Nevertheless, authors agree that the policy cycle framework still has a lot to offer. Bridgeman and Davis (2003, 98), for example, agree with this argument and claim that its biggest value in the realm of policy and public administration studies is that it helps public servants make sense of the policy task. In their publication on the policy cycle model, Werner and Wegrich (2007) summarize its role in contemporary policy science by arguing the following, "the policy cycle perspective will continue to provide an important conceptual framework in policy research, as long as the heuristic purpose of the framework is considered and the departure from the hierarchical top-down perspective and the receptivity for other and new approaches in the wider political science literature is taken into account" (Werner and Wegrich 2007, 57). Werner and Wegrich definitely have insight into the relation between the policy cycle model and governance, "the whole debate on (new forms of) governance and the development from government to governance builds on results of and debates within policy research [...]. Research on implementation has prepared the ground for the governance debate by detecting non-hierarchical modes of governance and patterns of co-governance between state and social actors, and through the recognition of the crucial role of civil society (organizations) for policy delivery. [Hence,] in terms of democratic governance

and from the perspective of public administration research, it remains of central relevance in which stage which actors are dominant and which are not" (57–58).

In the following paper, I agree with Schlanger (1999), who highlights the openness of the cycle perspective for different theoretical and empirical interests in the field of policy studies. Therefore, the policy stage model will be used as a proxy for the assessment of the role and power of actors in the policy process. As I will argue in the next sections the policy stage model, if complemented by the contemporary insights on the structure and dynamics of the public policy process, can keep its heuristic value. It can help illuminate various aspects of the policymaking process that are still inadequately analyzed and described, and in that capacity, be assistance to both policy practitioners as well as to policy scientists.

Policy formulation as a power arena

If a policy cycle model is to be used, one suggests that the policy process can roughly be divided into three meta-phases: pre-decision, implementation and post-decision. In the pre-decision phase, the main activity is to identify problems and arrange a suitable platform for the implementation and decision-making activities to come. Hence, different stages have their particular characteristics relevant for understanding a decision-making process in whole. Yet, according to literature (e.g. Turnpenny, Jordan, Benson and Rayer 2015; Howlett, Perl and Ramesh 2009), there is discrepancy in amount of literature covering different stages, at the same time emphasizing that a policy formulation stage is "arguably one of the most poorly understood of all the policy process stages". (Turnpenny, Jordan, Benson and Rayer 2015, 5). Building on that, Wu et al (2010, 47) recognize that policy formulation "is critically important but relatively inscrutable stage of the policy process". Furthermore, Petak and Petek (2009, 59) claim that since "that phase includes the estimation of alternative options in the implementation of policy, therefore [it] is regarded as vital in the making of the policy itself".

The policy formulation stage of the public policy cycle is a stage, defined by Sidney (2007, 79), which "involves identifying and/or crafting a set of policy alternatives to address a problem, and narrowing that set of solutions in preparation for the final policy decision." Since government already selects actors based on procedures stipulated by governance principles and depending on policy types, it is to be expected that within policy formulation, consensus and agreement will be the main impetus for formulating policy. Perhaps Hai Do's (2013) summary of the idea of policy formulation is the most thorough. He reminds us that the focus of policy formulation is embedded in the work on the subsystem, advocacy coali-

tion, networks, and policy communities (Weible and Sabatier). The policy formulation process was taken up in the agenda- setting works by select researchers from 1995 to 1998 (Kingdon and Birkland); however, the policy formulation process is exclusively executed in the policy communities and policy networks (Howlett and Ramesh, 2002, 3).

One of prevalent trends in the discussions on policy formulation is policy design. The genesis of this concept dates back to the mid-20th century, the era of rationality when potential causes of failure in implementation were explained in terms of failures in formulating effective policies. Howlett (2014, 191) claims that the sole focus on the economic considerations of the implementation tools led to separation of formulation from implementation, which ignited "the origin of modern design studies". Paralleling the causal approach, in which implementation outcomes are seen as a direct consequence of formulating policies, policy design approach tries to perfect the policy-making process and influence decision-making overall. Even though the design approach did take into consideration the pre-decision stage of the policy process, it mainly prioritized implementation as a focal point, and embraced reductionism, disregarding external influences on the policy-making process and the role of policy actors. Nevertheless, researchers in the arena of policy design have embraced new insights of deliberation, political environment and policy tools and have continued to "hope to improve the process of designing policy alternatives. They propose that improving the search for, and generation of, policy alternatives will lead to more effective and successful policies" (Sidney 2007, 80).

Today, work on policy design "aims to identify aspects of policy making contexts that shape policy design" (ibid). Papers on policy design usually rely on "institutional theories that suggest laws, constitutions, and the organization of the political process channel political behavior and choices. That is, institutions shape actors' preferences and strategies by recognizing the legitimacy of certain claims over others, and by offering particular sorts of opportunities for voicing complaints[...]" (Sideny 2007, 81). Other work focuses on discourse and dominant ideas. Capano and Lipi (2005) argue that the current debate on policy design "includes the policy mixes by which policy makers perceive and decide which instruments have to be selected. In the recent literature, the instruments seem to be addressed by an ongoing scientific propensity to examine the presumed emergence of 'new' tools in governing beside to the 'old' ones already embodied in former classifications" (4). However, policy design can be thought of as an ideal-type, as M. Howlett argues (2014, 193), and before we address this issue and offer a potential solution, it is necessary to take a closer look at the mere nature of policy formulation. This further investigation of policy

formulation uncovers features inherent to this specific stage, namely policy tools or options, participants, and their models of influence. A new policy design school of thought takes into consideration governance shift in policy-making; however, it lacks "methodological sophistication and conceptual clarity" (Howlett 2014, 1999). Additionally, the context in which policy tools are being used should be better explained, particularly in regards to influence and/or power in order to grasp complexity of contemporary policy-making.

Policy tools options

In their explanation of policy formulation, Corchan and Malone (1999) claim that this stage can be summarized with a simple question- "what is the plan?" (46). In order to achieve the best possible solution for a policy problem, we need to assess and evaluate different options for solving this problem. Various actors involved in this stage, based on their interest and specializations, might have different ideas of the best ways to achieving policy objectives. Thus, policy formulation is a "critical phase", claimed by Sidney (2007). Here, pathways and the destiny of the whole policy process are being determined, which has wide implications not only on the policy process, but on the part of society to which this public policy is directed. Wildawsky, a key public policy investigator, argues that policy formulation is about the understanding of the relationship between "manipulable means and obtainable objectives", which is inevitably "the very essence of public policy analysis." (Wildawsky 1987, 15)

The policy formulation stage of the policy process is, in fact, a decision-making arena where various options on how to solve a concrete problem are presented, assessed and contextualized. In their description of the policy design, Kraft and Furlong (2007, 98) argue that there are five successive steps in their description of the policy design: (1) the definition and analysis of the problem; (2) the generation of alternatives related to a policy problem; (3) the development of the criteria for future policy evaluation; (4) the estimation of alternative solutions; and (5) a decision about what policy option is the most effective solution to the problem the political community faces. This ideal type of a categorization might serve as a viable starting point, but it disregards several points which are central to this paper. Foremost, the fifth step of Kraft and Furlong's description is impaired by reductionism, which is, as the argument goes, inherent to most authors who write on policy formulation, given that it disregards the characteristics of agency. In other words, in order to understand what is actually happening in policy formulation, it is necessary to take into account the interests and tendencies of actors engaged in the process. Even though those interests are oftentimes complementary to the needs

of the political community, they can also the interests can be jeopardized by different restrictions, particularities or short-sightedness of involved parties. It is therefore reductionist to observe policy formulation exclusively as an arena for solving community needs and problems. That being the case, it is necessary to examine the distinct participants within the policy formulation stage, their role in the contemporary policy-making process and how these attributes lead to behavioural outcomes.

Participants, models of influence and formulation tools

In the prevailing literature on policy formulation, it is not rare to refer to the concept of 'policy advisory system' (Banfield 1980; Craft and Howlett 2012). Policy advisory system literature focuses on the "nature and kind of advice provided by decision-makers and see them as originating from a system of interacting elements" (Craft and Howlett 2009, 79). Within this scope of subject-matter, little is known about the non-institutional actors of policy advisory systems (Hird 2005), since most scholars focus on the knowledge utilization in government (Dunn 2004; Hoppe and Jeliazkova 2006). However, as Craft and Howlett write, "it is [still] not clear in any given situation which actors are likely to exercise more influence and prevail over others in a formulation process" (2012: 81). They continue that the "understanding of the structure and functioning of policy advice systems" as well as "detailed specification of the nature of their interactions in terms of amount of influence" is required (ibid). In my perspective, in addition to the requirements expressed by Craft and Howlett, it is important to first define that influence, then to distinguish power from the influence and finally to increase the number of empirical findings in various policy fields that would shed more light on the position and constellation of policy actors in the policy formulation process. One of the main questions in the context of policy formulation is, "who are the policy formulators?" Sidney (Sidney 2007, 79) compares agenda-setting and policy formulation and argues that "we expect fewer participants to be involved in policy formulation than were involved in the agenda-setting process, and we expect more of the work to take place out of the public eye." Given the assertion that there are fewer actors in policy formulation and the process is more private, it highlights the importance of actors in this stage and begs the question of how this opportunistic context motivates actors' agenda, and in turn, policy formulation outcomes.

The points often overlooked in the analyses of policy formulation are mechanisms or techniques policy actors use in their attempts to achieve policy goals. Policy tools and instruments exist in all stages of the policy process; however, the most visible are instruments for implementation such as regulations, subsidies, taxes or voluntary agreements (Hood, 1983). Howlett (2000) argues that a second category of implementation instru-

ments has recently been identified, and he calls them procedural tools. These include education, training, provision of information and public hearings. The common denominator of these instruments is that they seek to affect outcomes indirectly throughout the policy process. Together with these two categories of policy tools, there is a third kind that. Radin (2013) and Turnpenny Jordan, Benson and Rayer (2015, 3) conceptualize as so-called analytical tools, or tools which have largely remained outside of the mainstream policy research. These analytical tools became known under the name 'policy formulation tools', since their task is "the collection of as much information and data as were available to help decision-makers address the substantive aspects of the problem at hand" (Radin 2013, 23).

In 2015, Turnpenny, Jordan, Benson and Rayer analyzed various approaches to utilizing policy formulation tools and explaind the most common ones. They argue that in contemporary policy-making, policy tools have become more important due to complexity of governance perspectives. In the preface, they list the most important policy tools and state the following Turnpenny, Jordan, Benson and Rayer (2015: xiv):

This book includes tools for forecasting and exploring the future (for example, scenarios), tools for identifying and recommending policy options (for example, cost–benefit, cost-effectiveness and multi-criteria analysis) and tools for exploring different problem conceptions and frames (for example, participatory brainstorming). These tools have typically been developed to perform a different set of tasks, namely collecting, condensing and interpreting different kinds of policy relevant knowledge.

In the last two decades, one major concept emerged within the policy discourse which explains the behaviour of policy actors. Precisely, it is the concept of *policy appraisal* that builds on the three relevant aspects of contemporary public policy-making, namely *governance*, *administrative capacity* and *effectiveness*. It also contributes to understanding the concepts of *theoretical presumptions* and *legitimacy standards*, apparently neutral elements embedded in public policy (Lascoumes and Le Gales 2007). Focusing further on policy appraisal, we can get better insight on the shifts taking place in governance, and gain more understanding of the capacities present within public administration for effective policy implementation. Policy appraisal can likewise place g emphasis on legitimacy, accountability and justification of public action (Turnpenny, Radaelli, Jordan and Jacob 2009, 641). However, what is policy appraisal really? According to Organisation for Economic Cooperation and Development (OECD), "policy appraisal is a systematic way of bringing evidence to bear on alternative policy options, weighing up costs, benefits, their distribution between different parties and over time, uncertainties and risks, as a way of assisting the development of policy" (2008, 3). The idea behind

policy appraisal is to make the most effective use of the evidence that is available, assessing areas of ignorance and uncertainty and devising strategies for handling these uncertainties (ibid).

Contemporary policy science, at least the part that deals with policy formulation, should expand its interest and focus and go beyond sole description of actors' relationships and dynamics. Not only is it that policy had changed in its structure and function over time, but that actors had started using tools and techniques deriving from power and influence in a different manner, resulting in new outcomes to be studied by policy scientists. As Sidney (2007, 80) points out, when writing on changes occurring within policy science, "research considers particular policy tools and trends in their use, as well as their underlying assumptions about problems and groups. As scholars answer such questions, they consider the array of interests involved and the balance of power held by participants, the dominant ideas and values of these participants, the institutional structure of the alternative-setting process, more broadly the historical, political, social, and economic context." In other words, it should be taken into account that "during the formulation stage, policy analysts will typically have to confront trade-offs between legitimate public demands for action, and the political, technical and financial capabilities to address them" (Turnpenny, Jordan, Benson and Rayer 2015, 6). In policy literature, texts on policy formulation focus on factors that influence how actors craft alternatives; however, very little has been written on the operational mechanisms that actors exercise in an attempt to achieve their goals. This assertion is further supported by the following claim by Turnpenny, Jordan, Benson and Rayer (2015, 20): "the tools literature has often lacked a sense of human agency and, as noted above, the policy formulation literature tended to ignore the tools being used." All of these findings lead us to the conclusion that policy formulation is about power (Schattschneider 1960), its manifestation and its ability to influence others. As Schattschneider reminds us: "... the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power" (1960, 68).

Conclusion

The presented literature review on policy formulation suggests that it is a platform where various stakeholders gather to decide on the most appropriate solution for a concrete societal or political problem. Hence, policy formulation is the important stage of the policy-making process where institutional and non-institutional actors meet. In policy formulation, these actors are gathered to create a specific public policy, contributing their respective experience, insight on a certain problem, knowledge and capacity to design a public policy initiative. Whether it's within the govern-

ment or the state, an actor who has the authority to invite other actors and to build a policy arena always desires to collaborate with the most competent and useful actors in order to collectively produce an effective public policy, which would adequately tackle an existing problem in society.

Policy formulation as such is designed to make an inventory of potential policy solutions and to evaluate on the appropriateness of each. In other words, policy actors in the policy formulation stage propose solutions and jointly assess the positive and negative aspects of each in order to propel the most promising into consequent policy stages. However, what interests us mostly is how they do it. I argue that policy actors often have different views on certain policy areas, and therefore, different objectives in regards to a policy problem. This would mean that policy actors employ different means and techniques (as presented in the previous section) to persuade other actors why their idea is sounder. Most recent research (Turnpenny, Jordan, Benson and Rayer 2015) shows that policy formulation is a crucial stage in the policy process. This is precisely where the most relevant decisions are made that will later influence how concrete policy problems are solved. If policy formulations are set up in a way to respect the principles of inclusiveness, expertise and participation, it generates collaborative governance at its finest. As abovementioned, collaborative governance is, in fact, imagined as a part of mutual cooperation of actors whose aim is to achieve consensus. However, the matter of particular objectives and interests always arises, and actors do not want to miss out on a chance to influence the decision-making process. In the later stages of the policy process (monitoring and evaluation), actors may play a role, but the rules of the game are more complex. Policy has already been designed specifically so that actors could implement or evaluate it. I argue that policy formulation is indeed the most suitable stage of the policy cycle to evaluate actors' interests and how they influence policy outcomes. Therefore, taking into consideration all that has been said about collaborative governance, I believe that policy formulation is the best locus for assessing power of actors.

As Vangen and Huxhan warn, there is no coherent body of literature on power in collaborative settings" (2005, 174) thus this paper helped to connecting several policy concepts relevant for better understanding of contemporary policy-making by offering a systematic review. Even though this paper is no by any mean a complete literature review on policy formulation, collaborative governance and power, it most certainly is a contribution to a body of literature and should serve as an impetus for empirical confirmation of the aforementioned problem.

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European court of human rights caselaw on the right of the same-sex couples to marry. A view from a social justice perspective[1]

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Abstract

ECtHR has established case law by which national authorities are obliged to legally recognize and regulate same-sex partnerships. However, they are not obliged to give the right to marry to same-sex partners taking into account dominant moral beliefs in society. This paper aims to test such an approach from the perspective of four theories of justice. The aim is to see if the consistent application of precepts and principles of these theories of justice to this case law makes such an approach of the ECtHR just from the viewpoint of any of these theories of justice. This way what may seem as intuitively just or unjust is tested against concrete and particular standards of justice.

Keywords: same-sex marriage, ECtHR, social justice, right to marry, LGBT+

Introduction

According to the case law of the European Court of Human Rights (ECtHR/ the Court), as will be shown in the second part of this paper, the member

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1 This paper is the result of the research I have done to prepare my presentation at the conference Marriage, Extramarital Union, Same-sex Union; Perspectives of Equality in the Context of Diversity (Brak, vanbračna zajednica, istopolna zajednica: Perspektive jednakosti u kontekstu različitosti) held on 26 November 2021 at the Union University Law School, Belgrade.

states of the Council of Europe (CoE) have to legally recognize and provide for the legal framework for same-sex partnerships. They are to regulate the mutual rights and obligations of the partners in same-sex unions to provide them with similar mutual rights and duties to those of married persons such as mutual assistance, inheritance rights etc. However, the ECtHR does not oblige the states to provide access to marriage to same-sex partners, taking the moral standards of a given society as a valid reason not to extend the right to marry to gay and lesbian couples.

Such an approach could be seen as pragmatic given that it solves most of the practical problems of same-sex couples such as the right to intestate inheritance, the right to a partner's pension, the right to visit a partner in a hospital, or not to testify against one's partner, etc. while in the same time it takes into the account conservative views about marriage. This paper aims to examine whether such a pragmatic approach is just. Therefore, in the third part of this article, a political analysis[2] of this established case law will be conducted by examining it through the lens of four social justice theories. The purpose of that analysis is to establish if such case law is consistent with any of these theories of justice. The conclusions will be summarised in the fourth part. I should make two clarifications before I move on. First, for the purposes of this analysis, marriage as a special form of a relationship between two consenting adults and their rights and obligations towards each other arising from that relationship are taken into the consideration, therefore leaving the matter of adoption of children by same-sex couples out of the scope of this paper. Second, the political analysis of the ECtHR case law that I am conducting in this paper is blind to the position of the ECtHR as a supra-national court and is blind to the constraints this Court has when deciding the cases before it, which may cause some of my statements to sound unfair toward the ECtHR. I will dwell more on this feature of my approach in the conclusion of this paper.

Relevant caselaw of the ecthr

2 The term political analysis is borrowed from Constitutional Aspects of European Private Law. Freedoms, Rights and Social Justice in the Draft Common Frame of Reference written by Martijn W. Hesselink, Chantal Mak, and Jacobien W. Rutgers accessible at Constitutional Aspects of European Private Law: Freedoms, Rights and Social Justice in the Draft Common Frame of Reference by Martijn W. Hesselink, Chantal Mak, Jacobien W. Rutgers:: SSRN [last accessed 14 June 2022]. As Hesselink notes on page 12 the authors "discuss some issues... where different social justice theories lead to different solutions and, reversely, where different solutions are more or less compatible with certain well-known notions of social justice." The latter is what I did in this paper. I examined whether ECtHR's case law on same-sex marriage is compatible with four well-known social justice theories.

In 2004 in the case of *Schalk and Kopf,* Application no. 30141/04, judgment ECtHR, 24 June 2010, the same-sex couple filed an application to the Court against Austria claiming that their right to marry, enshrined in Article 12 of the Convention was violated because Austria did not grant them the right to marry (*Schalk and Kopf v. Austria*, ECtHR judgment, para 39). Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CoE ECHR, 1950) reads that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." The applicants claimed that the wording of Article 12 did not necessarily have to be read as men and women had to marry a person of the opposite sex (*Schalk and Kopf v. Austria*, ECtHR judgment, para 44). Indeed, it could be interpreted as if the words men and women were used to denote that every person has a right to marry, and not in the sense that only persons of the opposite sex can marry each other. However, in 2010 the Court found that Article 12 of the European Convention on Human Rights (ECHR/the Convention) safeguarding the right to marry is based on the traditional understanding of marriage (*Schalk and Kopf v. Austria*, ECtHR judgment, para 55). The Court based its conclusion on the fact that elsewhere in the Convention the substantive rights are given without a specification of sex, and that therefore, the use of words "man" and "woman" in Article 12 was intentional, especially taking into the account that at the time this rule was drafted the marriage was understood as a heterosexual union (*Schalk and Kopf v. Austria*, ECtHR judgment, para 55). Therefore, the Court concluded that the contracting States are not obligated to provide marriage access to same-sex couples (*Schalk and Kopf v. Austria*, ECtHR judgment, para 63). The Court noted that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another", and that national authorities are in the best position to assess if they should allow same-sex couples to marry (*Schalk and Kopf v. Austria*, ECtHR judgment, paras 61–62). So, the national governments are not prevented from providing same-sex couples with a right to marry, but they do not have an obligation to do that. This reading of article 12 of the Convention could be changed with the help of the living instrument principle, however, the Court held that there was no existing consensus regarding same-sex marriage in Europe (*Schalk and Kopf v. Austria*, ECtHR judgment, paras 47 and 58).

The applicants from *Schalk and Kopf* alternatively claimed that restricting marriage to heterosexual couples only was a violation of the prohibition of discrimination in connection to their right to private and family life. Therefore, they relied on article 14 of the Convention in conjunction with article 8 of the Convention claiming that the right of same-sex couples to marry is included in these provisions (*Schalk and Kopf*

v. Austria, ECtHR judgment, para 101). However, the Court dismissed such a claim because the Convention has to be read as a whole without internal contradiction, so if article 12 of the Convention which regulates the right to marry does not impose an obligation on the national authorities to grant the right to marry to same-sex couples, neither can the more general rule such as the article 14 taken together with the article 8 (*Schalk and Kopf v. Austria*, ECtHR judgment, para 101).

On the other hand, the Court's case law gradually developed to impose an obligation upon the states to legally recognize and regulate same-sex partnerships in a form other than marriage. In *Schalk and Kopf* the Court found that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships" and are thus in a relevantly similar position to different-sex couples regarding the need for legal recognition and regulation of their relationships (*Schalk and Kopf v. Austria*, ECtHR judgment, para 99). However, at that time there was no clear consensus about the legal recognition of same-sex unions in any form in CoE countries thus the Court could not establish the positive obligation for national authorities to recognize and regulate these (*Schalk and Kopf v. Austria*, ECtHR judgment, para 105). Therefore, the margin of appreciation of national authorities to decide whether to recognize and protect same-sex partnerships was still wide. In *Valiantos and others v. Greece*, Applications nos. 29381/09 and 32684/09, judgment ECtHR, 7 November 2013, the Court noted that

> "extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognized by the State" (Valiantos and others v. Greece , judgment ECtHR, para 81).

This is important because, without this recognition, and regulation persons in same-sex partnerships would often have to go to court to realize their rights in situations in which married persons would not have to refer to court. As was stated in *Oliari and others v Italy,* Application nos 18766/11 and 36030/11, judgment ECtHR, 21 July 2015, this presents a significant hindrance for same-sex couples to obtain respect for their private and family life (*Oliari and others v Italy*, judgment ECtHR, para 171). To illustrate this a reference to Serbian law is made given that that is the system I am most familiar with. According to the Law on inheritance (Zakon o nasleđivanju, 1995, 2003 i 2015) in conjunction with the Family Code (Porodični zakon, 2005, 2011 i 2015), a same-sex partner does not

have a status of an heir at law.[3] This means that when a person dies intestate their same-sex partner does not inherit them. Therefore, the surviving partner would have to go to court to try to prove that they have a share in the deceased's estate. Another example is when the spouses buy an apartment, but only one of them gets registered as an owner, the Family Act prescribes that the other spouse will be deemed registered (Porodični zakon, 2005, 2011 i 2015, čl. 176, st. 2.). This is not the case when it comes to same-sex partners. They do not enjoy such protection. Now, imagine that same-sex partners buy an apartment, but only one of them gets registered as an owner, and then the registered one dies intestate. Chances are that the other partner would have to go through long litigation, uncertain of the outcome to protect their property. One could say that this can be prevented by getting registered in the first place, or by making deeds or contracts, but the point is that married couples do not have to do that when they are in the same situation. Although in *Valiantos* the Court did not establish the positive obligation of the state to legally recognize same-sex unions, it did find that among states who recognize forms of civil union alternative to marriage, the vast majority opens these alternative forms for same-sex couples which makes really hard to defend the stance that these alternative forms should be restricted to heterosexual couples only (*Valiantos and others v. Greece , judgment ECtHR, paras 91 and 92).* In *Oliari* the Court finally established that there is a thin, but still, a majority of CoE states recognizing same-sex unions and providing for protection (*Oliari and others v Italy*, judgment ECtHR, para 178), which led the Court to establish that there is a positive obligation of the state to provide for legal recognition of same-sex partnerships, and for the regulation of their relations (*Oliari and others v Italy,* judgment ECtHR, para 185). This stance was reaffirmed in the *Fedotova and others v Russia* where the Court stated that the states have a positive obligation "to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship" (*Fedotova and others v Russia*, Applications nos. 40792/10, 30538/14 and 43439/14, judgment ECtHR Grand Chamber, 17 January 2023, para 178). This legal framework should regulate their mutual moral and material rights and obligations such as mutual assistance, or issues regarding taxation, maintenance, inheritance etc. (*Fedotova and others v Russia*, judgment Grand Chamber ECtHR, para 190).

Finally, the Court underlined that the recognition of same-sex partnerships has an intrinsic value to the persons involved irrespective of

3 The Law on Inheritance in Article 8 enumerates the heirs at law one of them being the spouse of the deceased. Furthermore, the Law on Family in article 3(1) defines marriage as a union between a man and a woman, excluding the deceased's same-sex partner from the circle of heirs by law.

particular legal effects connected to that recognition (*Valiantos and others v. Greece*, judgment ECtHR, para 81), and that "the recognition would bring a sense of legitimacy to same-sex couples" (*Oliari and others v Italy*, judgment ECtHR, para 174). While this is true, it is also an inconsistency in the Court's reasoning. The marriage may also have an intrinsic value for those couples who wish their relationships to be recognized in such a form. How come this intrinsic value is relevant when it comes to affording forms other than marriage, but not giving the right to marry? Furthermore, doesn't it seem that the recognition of same-sex partnerships in a special form, and reserving marriage for heterosexual couples only is another way to strike the difference between homosexual and heterosexual couples? It is as if it is said you are recognized, but you are still not worthy enough.

If I would have to sum up the Court's approach to the issue at hand in just a few words I would call it a pragmatic approach. By imposing an obligation upon the national authorities to recognize and regulate same-sex partnerships the Court provides a solution to several practical problems. However, when it comes to the right to marry the Court gives way essentially to the feelings of a portion of society about two persons getting married. One may cloak this under notions such as social connotation, cultural connotation, etc. but what it comes down to is how other members of a particular society feel about same-sex couples getting married. The question is: is that a reason good enough to prevent grown-up persons from getting married should they wish so? Intuitively, an affirmative answer to this question seems like an injustice. To make a more elaborate assessment I need to move from intuition to a particular standard of justice. More on that in the next section.

The political analysis

Given that there is more than only one concept of justice I considered three different theories of justice which seemed to me to be the most dominant in political philosophy. These are utilitarianism, liberal-egalitarianism, and libertarianism. As representatives of these theories, I took Bentham and Mill, Rawls, and Nozick respectively. Each of these theories came about as a reaction: utilitarianism to natural law philosophy (Shapiro 2003, 19); Rawls developed his theory as an elaborate response to utilitarianism (Kymlicka 2003, 53), and Nozick tried to offer a third way. I also took into the account theory of justice of John Finnis as a proponent of the contemporary version of natural law philosophy who is also an opponent of same-sex marriage making this analysis even more interesting. What I want to do in this section is to see whether this pragmatic approach of the Court fits into any of these theories. Starting from the principles of justice of each of these theories I wish to see if there could be a coherent

line of reasoning to justify the restriction of access to marriage to different-sex couples on account of how other members of society would feel about granting same-sex couples right to merry, which is tolerated by the ECtHR. I do not intend to contest the principles upon which these theories rest, but to see if the consistent application of the proclaimed principles leads to the support for the pragmatic approach of ECtHR or not.

According to Bentham, every person is guided by the aversion of pain and inclination toward pleasure (Bentham 1823, 1). Therefore, the action of an individual and the government alike is moral if it tends to augment the pleasure or happiness of the subject whose interests the action may influence or to prevent the pain, unhappiness, or mischief from happening to the party whose interest is at stake (Bentham 1823, 2). This is how Bentham sees the principle of utility, as a cornerstone of utilitarianism. The action of a government is then in accordance with this principle if it is sought to augment the happiness, or pleasure of the community or to prevent from happening the pain, or unhappiness of the community, where the community is seen as the sum of all individuals who are members of that community (Bentham 1823, 3). Mill says in the same vein that the ultimate goals of any action are pleasure and avoidance of pain (Mill 1863, 10). How to choose the right action? Bentham offers several criteria: the intensity of the pleasure/pain that the action may cause; the duration of the pleasure/pain caused; the certainty or uncertainty of the realization of the pleasure/pain; whether the pleasure/pain is a remote or instantaneous consequence of the action; the probability that the pleasure or pain caused will be followed by the pleasure or pain or in other words the ability of the action to cause further pleasure or pain (Bentham 1823, 29–30). Finally, from the perspective of the government, it has to be taken into account how many individuals will be affected by the act, and in what way (Bentham 1823, 30). Ideally, the government should weigh whether the act causes more pleasure than pain for every individual affected by the act, and then calculate how many individuals are positively and how many are adversely affected by the act (Bentham 1823, 31). If there are more individuals positively affected by the act then the act is following the greatest happiness principle (Bentham 1823, 31).

Having this in mind it may seem that not allowing same-sex couples to marry is justifiable in utilitarian terms if the majority of individuals in a society would feel offended by same-sex couples getting married. After all, Mill did say that the institutions of society should harmonize the interest of an individual with the interest of the society and that individuals should be raised to equate their happiness with the common good (Mill 1863, 19). However, Mill also said the following:

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences." (Mill 1869, 135)

Applied to the topic at hand this means that the dissatisfaction of members of society with same-sex couples getting married is not a part of a utilitarian equation. It is not relevant, because marriage is a personal matter between persons getting married, and it does not limit anyone's freedom or rights. A same-sex couple getting married is conduct that affects essentially the interest of persons getting married and not the interests of other members of society. Allowing same-sex couples to marry increases the total amount of freedom in society. Therefore, from the utilitarian standpoint feelings of other members of society about same-sex couples getting married are not a relevant argument for preventing them from getting married.

What about Rawls' theory of justice? Rawls assumes that every person has a rational plan of a good life they wish to lead, and he is impartial towards particular plans (Rawls 1999, 79). To be able to follow their plan whatever it may be individuals need primary social goods such as rights, liberties, income, wealth, and opportunities (Rawls 1999, 79). The distribution of these primary social goods depends on the architecture of the basic social structure consisting of fundamental institutions one of which is a monogamous family (Rawls 1999, 6). Rawls provided for two principles of justice (Rawls 1999, 266). The first governs the distribution of fundamental rights and liberties (Rawls 1999, 266). The second governs the distribution of social and economic goods (Rawls 1999, 266). Given that the right to marry is considered a human right even by those who give quite a restrictive view of what human rights are[4] it is fair to say that access to the right to marry is under the jurisdiction of the first principle of Rawls' theory of justice.

4 Paul Tiedemann claims that human rights protect aspects of personhood which leads him to the conclusion that rights like the right to peaceful enjoyment of property or the right to a fair trial are fake human rights. The first one is fake because it is possible to preserve personhood without private property, and the second one is fake because it is merely a procedural right. While a right to marry is an expression of the freedom of will and thus of personhood. For more on this see Tiedeman, P., 2020, *Philosophical Foundation of Human Rights*, Cham: Springer, pp. 142, 321, 315, 207–209.

The first principle of Rawls' theory of justice reads "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (Rawls 1999, 266). The first principle has priority over the second one meaning that liberty may be restricted only for the sake of preserving this equal system of liberties for all (Rawls 1999, 220). The liberties of an individual may not be sacrificed for some economic or social goal (Rawls 1999, 182), only for the sake of equality in liberties. This means that the restriction may limit the extent of liberty but equally for everyone and that the reason for such a limitation is the prevention of "an even greater loss of liberties" (Rawls 1999, 217, 188). The best example is the restrictions on the freedom of speech where it is not allowed to spread hate or to call for the extinction of a class of humans. This is the limitation of the content, thus a true limitation of freedom of speech, but it applies to anyone and it is for the benefit of the total system of freedom of every person.

Now, if the right to marry is a human right, and marriage is a form of monogamous family, and if there are same-sex couples who, as part of their conception of the good life, wish to get married and live in such a form of monogamous family, then the restriction of their freedom to do so seems unjust from the perspective of Rawls' theory of justice. This is because their freedom is restricted, but the restriction is not equally applicable to everyone and is not for the benefit of the total system of freedom because recognizing the right to marry to same-sex couples does not endanger any other freedom of any other person, thus making the restriction uncalled for. The freedom of same-sex couples to marry is restricted because of the moral standards of other members of society, which is, according to Rawls unacceptable because the public authorities have to be impartial towards any religious or moral beliefs (Rawls 1999, 186).

However, Rawls does say that if the restriction of freedom is some kind of progress compared to the state of the art before that particular restriction was instituted, and if there are guarantees that the system is moving toward the full equality of freedom for everyone, then this inequality in liberties is acceptable from the perspective of his theory of justice. To illustrate this, he uses quite a radical example and says that slavery could be acceptable if it relieves 'even worse injustices' for example if enslaving prisoners of war come instead of killing them all, and if there is a perspective of abandoning slavery altogether (Rawls 1999, 218). Applying this way of thinking to the topic at hand would mean that the pragmatic approach of the ECtHR where the Court imposes an obligation upon the States to legally recognize and regulate same-sex partnerships, but not necessarily to grant the same-sex partners the right to marry is acceptable from the perspective of Rawls' theory of justice, but only as a stage towards the full

equality regarding the right to marry. The evolution of the Court's case law shown in the previous section showed the gradual move from welcoming the legal recognition and protection of same-sex unions but leaving it to the national authorities to asses if they should do so, to establishment of the positive obligation of the CoE states to legally recognize and protect these unions, reducing the margin of appreciation of the states to the matters of the form and content of the protection where margin remains wider regarding the content when dealing with still controversial issues (*Fedotova and others v Russia*, judgment Grand Chamber ECtHR, para 183). It is, therefore, safe to say that the living instrument principle allows for a gradual move toward full equality in freedoms which is in line Rawlsian concept of social justice.

Nozick's Entitlement Theory refers to the justice of the acquisition and of the transfer of material goods, or in his words: "holdings" (Nozick 1974, 150–153). His theory is a theory of the just distribution of material resources in a society. At a first glance, it is not relevant to the topic at hand. But let us take a look at the foundations of his theory of justice.

His theory of justice is grounded in the understanding that all individuals are goals in themselves, and not an instrument for the attainment of certain ends no matter how desirable they may be (Nozick 1974, ix, 32). No one, not even the state can sacrifice an individual for the benefit of society because there is no society as an entity having its own good, only individuals and their well-being (Nozick 1974, 32–33). Interfering with the well-being of one individual for the benefit of society means sacrificing an individual's well-being for the benefit of other individuals (Nozick 1974, 32–33). This is unacceptable because every person has equal moral weight (Nozick 1974, 33). Each person has their own life to lead (Nozick 1974, 34). Nozick suggests that the government forcing a person to do something they do not wish to do, or forbidding them to do something they wish to do is an act of joint aggression by other individuals through the instrument of government against that one person (Nozick 1974, 34).

Applied consistently to the issue at hand these precepts lead to the conclusion that not allowing same-sex couples to marry because of social connotations or moral standards of community etc. amounts to sacrificing the good of married life of certain individuals (when they perceive such life as something good) for the benefit of the distaste of other individuals for same-sex couples to be married. Such a result is unacceptable for a Nozickian having in mind the aforementioned precepts. Therefore, making the pragmatic approach of the ECtHR incompatible with the libertarian notion of justice.

Finnis's theory of justice rests on the understanding that life, play, knowledge, aesthetic experience, friendship, religion, and practical reason-

ableness are seven self-evident forms of the good (Finnis 2011, 85–90). These values are ultimate and self-evident because they are not derived from any higher value or values, but they are the points to which everyone strives and which are the essential motives of our actions which he demonstrates by elaborating on the good of knowledge (Finnis 2011, 59–75). Now, a person may strive or participate in these ultimate forms of the good more or less successfully either by following their urges or by pursuing the attainment of these ultimate goals intelligently (Finnis 2011, 84).

To pursue these goods intelligently one needs to follow the principles of practical reasonableness (Finnis 2011, 100–103). There are nine of these principles and they are: having a coherent plan of life; no arbitrary preference amongst values meaning that whichever of the seven values we choose to pursue we must not deny the rest of them the status of being the ultimate ones; no arbitrary preference amongst persons not excluding rational self-preference; detachment and commitment are two complementary principles securing the persistence in our pursuit for the good but being able to accept the failure and adapt the pursuit accordingly; efficiency within reason meaning limiting the application of maximizing principles such as the greatest utility principle to values that are comparable, and excluding the application of such principles when it comes to equally worthy and incomparable values; respect for every basic value – whichever basic value we choose to attain we must not attain it in a way which would mean hurting any other basic values; favouring the good of one's communities; following one's conscience (Finnis 2011, 100–126).

The question of what is social justice comes to light when individuals form political communities such as states whose purpose is the facilitation of personal self-realization of every individual (Finnis 2011, 147–148). So, the collaboration in the provision of conditions for the rational participation of every individual in ultimate values is the common good in a political community such as the state (Finnis 2011, 155). The matter of just allocation of material resources, opportunities, offices, etc. necessary for the realization of the common good is an object of distributive justice (Finnis 2011, 166). Resources, offices, opportunities, etc. can be put into the common good's service only when allocated to individuals (Finnis 2011, 167). For this allocation to be just Finnis suggests several principles of distributive justice (Finnis 2011, 173–176). These principles essentially come down to this: the allocation of material resources should not allow the accumulation of wealth in the hands of a few, and opportunities and offices should be open to those with adequate faculties who in turn should use their opportunities and offices not only for the self-realization but in the interest of the common good as well. The latter is closely connected to the second kind of justice called commutative justice pertaining to the

proper behavior between individuals and their groups (Finnis 2011, 179). One aspect of it indicates that when an individual holds a public office, they must act in the interest of the common good meaning they have a duty of commutative justice to those under the authority of the office which that individual holds (Finnis 2011, 184).

Now, given that the good of friendship is one of the basic goods, and that Finnis defines it as a state of affairs where each person involved takes the other's well-being as an integral part of their own well-being it is safe to say that such a definition covers friendships in their usual sense, but also relationships among parents and their children, among siblings, or among romantically involved persons (Finnis 2011, 141–144). Simply put it defines any type of love between individuals. It further means that marriage as one of the forms of participation in the good of friendship should be available to all persons equally under the same conditions (a distributive aspect of social justice) and that those holding public offices such as members of a parliament should make laws facilitating the access to marriage to heterosexual and homosexual couples just the same.

Well, Finnis would not agree with me on this. He argues that an inclination, as he calls it, to have sexual intercourse with persons of the same sex is not intelligent participation in the basic good of friendship or marriage as an aspect of it (Finnis 2011, 449). He claims that marriage has two elements: the friendship of a man and a woman and procreation (Finnis 1994, 1066). It does not matter if the couple is not able to have children due to medical reasons for instance, as long as the intercourse is such that it would normally lead to the conception of a child (Finnis 1994, 1068). If husband and wife have protected sex, or pleasure each other in a way not suitable to lead to procreation then they too do not participate in the good of marriage (Finnis 1994, 1068). The same goes then for same-sex couples. He goes as far as equating sexual intercourse between same-sex partners with that between two strangers or between a prostitute and a client (Finnis 1994, 1067).

These assertions are greatly inconsistent with his view that the understanding that one of the seven forms of the good is ultimate value becomes apparent to those who experienced the urge to reach these goods for the sake of reaching them. He demonstrates this by discussing the good of knowledge when he said:

the value of truth becomes obvious only to one who has experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who likewise could enjoy the advantage of attaining correct answers (Finnis 2011, 65).

If this is so, then his claims about the nature of same-sex relationships may not be true because he may lack the relevant experience. If he is not gay then he could not have reached his conclusions by analyzing his own experience (Radonjić 2018, 105). It seems that he also failed to account for the experience of the actual same-sex couples, and even if he did, he did not explain why their experience might have been irrelevant (Radonjić 2018, 105). On the other hand, ECtHR did admit that same-sex couples are just as capable of having lasting and committed relationships. Which is based on common knowledge.

Furthermore, even if we take for granted that the wish to have joint posterity is an essential part of the good of marriage, and if we note the fact that there are both homosexual and heterosexual couples wanting to have children then it is not clear why one objective obstacle to have children (medical reasons) is valued differently than the other objective obstacle (biological reasons) if the desire is what counts. There simply is not any rational or logical support for Finnis's conclusions. His statements are value judgments, represented as statements of fact.

Knowing this, and consistently applying the principles of justice and the values that are at the basis of the Finnis' conception of justice to the pragmatic approach of the ECtHR to the issue at hand it is fair to conclude that ECtHR goes against the Finnis' notion of justice as long as the Council of Europe may be viewed as one of the types of community in which individuals realize the common good.

Conclusion

The goal of this paper was to question the case law of the ECtHR regarding the obligation of member states of the Council of Europe to recognize the right of same-sex couples to marry from the perspective of social justice. As was shown the ECtHR holds that national authorities must recognize same-sex partnerships and regulate the rights and duties of the partners, but they do not have the obligation to grant them access to a particular form of partnership we know as marriage. In this way, many practical problems same-sex partners face, are being solved, while at the same time the feelings of conservative parts of societies about the institution of marriage are indulged. The question posed here was if this pragmatic approach is acceptable from the standpoint of four different theories of justice. The answer from the utilitarian, libertarian, and natural law points of view is no, and yes for a limited amount of time from a Rawlsian standpoint given that the Courts' evolutive interpretation of the Convention gives reason to believe that full equality will be reached in time.

Finally, one should ask themselves if it is fair to put a case law of a supranational court to such scrutiny. Is it really up to the ECtHR to impose

such moral standards that could be seen as controversial by a great number of citizens of the member states of the Council of Europe? The answer is no. The ECtHR cannot take the place of a supra-national legislator. However, these are purely legal dogmatic arguments, and the analysis conducted in this paper is not of such sort. It is a political analysis. The purpose of the analysis was not to criticize the Court and to argue for a change in the Court's methodology. The case law of the ECtHR was just the most convenient and accessible object to conduct this political analysis. The point of this was to offer a different viewpoint when discussing whether to allow same-sex couples to marry. The hope is that the fact that four different value systems; four different conceptions of social justice, endorse access to marriage to heterosexual and same-sex couples just the same might serve as a valid argument in the national debates. It offers a line of reasoning that it is just that everyone has the right to marry regardless of their sexual orientation independently of the case law of the Court, or of the public opinion. The case law of the court, as was said, just served as a playground for this political-philosophical exercise.

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Territorial Disputes in the Post--Yugoslav Space: Nation-Building between Identity Politics and International Law

Thomas Bickl

Summary

This analysis of a sample of territorial or border disputes 30 years after the beginning of Yugoslavia's disintegration is informed by a pluri-angle analytical framework. With territorial disputes, a single reading of the phenomenon by international law with its established principles and standards of peaceful dispute settlement can be insufficient. More often than not, territorial disputes not only relate to territorial sovereignty *per se*, but also to issues of nation-building and statehood, identity narratives, ontological security, and (perceived) legitimacy as to whether a border is 'just'. In the context of EU enlargement, the level of power (a)symmetry between actors also plays a role. Looking at the case studies (i) Croatia v. Slovenia, (ii) Serbia v. Croatia, and (iii) Serbia v. Kosovo, this paper demonstrates why States sometimes do not comply with EU conditionality and that the behaviour of State actors is by no means irrational, but can well sustain a dispute and/or pose a threat to dispute settlement by international law.

Keywords: Borders, Dispute Settlement, Identity, International Law, Yugoslavia

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I. Introduction

When acceding to the EU, candidate countries face a great number of criteria they need to fulfil or comply with. Sometimes, however, they do not comply, e.g. in the process of solving their bilateral border disputes, even if the solution of that dispute would seem to be in their interest. This paper[1] will want to shed light on why States behave the way they do and what impact this has on the effectiveness of the international law dispute settlement system.[2]

Territorial disputes are as old as the contemporary international system of territory-bound sovereign States. Russia's recent war of aggression against the Ukraine is a painful reminder of the fact that (armed or non-violent) territorial conflict is amongst the most serious issues over which governments or States can be at odds with (see e.g. Gibler 2012, 9; Huth and Allee 2002, 32). This paper is first going to take a brief look at the functional and identity aspects of borders further down in this introductory part. Section II introduces an analytical framework composed of (i) the pertinent provisions of international law based on the relevant jurisprudence of international courts and tribunals in respect of State succession and borders, and of the peaceful modes of dispute settlement, (ii) national identity and legitimacy filter models based on a combination of both rationalist and constructivist considerations, and (iii) the concept of ontological security reflecting the need of human beings and State actors to preserve constancy in their social and material environment. This framework is subsequently applied to the country case studies in section III, namely the border disputes between (i) Croatia and Slovenia over the maritime and land border, (ii) Croatia and Serbia over the Danube border, and (iii) Serbia and Kosovo over statehood as such. Section IV will pinpoint the conclusions that can be drawn from the country cases in respect of State actors' behaviour and how identity politics in the context of nation-building[3] can affect dispute settlement based on international law.

If we look at border and territorial disputes, it would seem to make sense to briefly draw on the variety of forms that borders take for States, citizens, and human beings as a whole. Firstly, borders serve as the territorial limits of jurisdiction, in other words: the geographical application

1 This study is a fully revised and updated version of a presentation given at the Serbian Political Studies Association Annual Conference at the Faculty of Political Science at the University of Belgrade on 25 September 2022.

2 I am very grateful to Filip Ejdus, Dejan Jović, Susanne Pickel, and the anonymous reviewers for their valuable expertise and suggestions.

3 Nation-building, for the purposes of this study, shall be understood as the creation by State actors of a broad consensus over the country's national symbols, borders, interpretation of the way to independence and of the break with the Yugoslav past (see Pavlaković 2015, 8).

of all forms of governance and the enforcement of laws. This geographical delimitation does not only apply between sovereign States but also internally in a given entity where there are regional sub-entities or administrative units. Generally, it may be said that borders are an indispensable prerequisite for public administration (for an early but very comprehensive account of modern public administration see Wilson 1887).

Borders, however, also have an important identity function as they can be imaginary in one's own mind structuring our psychological and social life (Kullasepp and Marsico 2021, v). Further to the identity aspect, physical borders can create or amplify (dis-)continuity processes, e.g. when the self is subject to migration. Also, notions of self vs. other play a considerable role. Those can be institutionally provided, and a given national or other collective identity may, in that context, be seen also as a social border (Kullasepp and Marsico 2021, 1–5). In a nutshell,

> "borders [and territory] are not just abstractions, they are concreate realities where lives unfold and where a sophisticated psychological and cultural process of meaning, making, and identity definition takes place". (Kullasepp and Marsico 2021, vii)

II. Territorial disputes analytical framework

With every piece of territorial conflict between sovereign States, it is useful to start out by looking at the universal principles and norms of international law.

International Law

Historically, in the context of entities obtaining independence, we can observe the processes of decolonisation in Latin America in the 19th, and in Africa and Asia in the 20th century. In the early 1990s, we witness several examples of State dissolutions, namely of the Soviet Union (USSR), the Czech-Slovak Federation (ČFSR, previously ČSSR), and – of particular relevance to this study – the Socialist Federal Republic of Yugoslavia (SFRY). There is settled jurisprudence by international courts and tribunals relating to de-colonisation and State dissolution in this regard.

It is a universally recognised principle of international law that the former internal boundaries of a territorial entity become international borders protected by international law after obtaining independence. This principle is known as *uti possidetis juris*, and has been firmly established by the International Court of Justice (ICJ) in e.g. *Burkina Faso/Republic of Mali* (ICJ 1986, paras 20; 23) and *El Salvador/Honduras* (ICJ 1992, para 44). Originally applied in the context of decolonisation, *uti possidetis* was also

used following the dissolution of Yugoslavia, as established in Opinion No. 3 of the Badinter Commission created by the then European Community (Conference of Yugoslavia Arbitration Commission 1992, 1491–1493)[4], and later referred to by the Arbitral Tribunal in *Croatia/Slovenia* (Permanent Court of Arbitration 2017, para 336). It must be noted in this context, that *uti possidetis juris* is "essentially a retroactive principle, investing as international boundaries administrative limits intended originally for quite other purposes" (ICJ 1992, para 44).[5] It is also important to note generally that no legal act has ever been adopted by any federal post-World-War-II body which would establish and define the administrative boundaries between the Yugoslav federal units (Permanent Court of Arbitration 2017, para 316; see also e.g. Radan 2000, 7; Simentić Popović and Sandić 2020, 44; Bickl 2021a, 2).

For delimitation purposes, i.e. the definition of borders, we can draw on settled jurisprudence distinguishing between (i) legal title to territory (the afore-mentioned principle of *uti possidetis juris*), and (ii) the effective control of an area (*uti possidetis effectivités*). It is important to note that legal title carries more weight than *effectivités*, as the ICJ noted in *Nicaragua/Colombia* (ICJ 2012, para 66) and *Benin/Niger* (ICJ 2005, paras 75–76), and as also observed by the Tribunal in *Croatia/Slovenia* (Permanent Court of Arbitration 2017, para 340).

Fig. 1. Overview dispute resolution modes (*Source*: author)

	Bilateral	**Third party**
Negotiations	*Agreement (Treaty, Protocol, MoU*)*[6]	*Mediation (for bilateral agreement)*
Judicial settlement	*Special Agreement (ICJ**, ITLOS***) or Arbitration Agreement for submission to →*	*Mediation (for bilateral submission agreement)* Court/Tribunal****

* Memorandum of Understanding; ** International Court of Justice;
*** International Tribunal for the Law of the Sea; **** Arbitration

4 Weller (2022) posits that what applies to the dissolution of federal-type States such as the SFRY is "constitutional self-determination".

5 Milovan Đilas (Chair of the post-World-War-II intra-Yugoslav Croatia-Serbia/Vojvodina Boundary Commission) is reported as saying that the inter-Republican boundaries "were never intended to be international boundaries" (Owen 1995, 34–5).

6 Treaties are usually ratified by the respective national parliaments, Protocols and MoUs are not. Treaties and Protocols are legally binding, whilst a MoU is considered a declaration of intent.

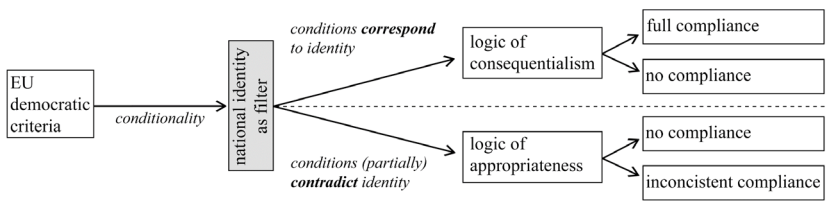
With regard to the actual settlement of disputes, there are essentially two major modes of conflict resolution: (i) bilateral, and (ii) third-party. Whilst in the bilateral mode the parties are in direct contact and negotiations, the third-party role can mean both a facilitating or mediating role still confined to the bilateral mode, or a full third-party mode where the treatment of the dispute is delegated to judicial resolution, usually the ICJ or arbitration (see e.g. Tanaka 2018, and fig. 1).

Identity and legitimacy filter-models

The basic concept here is that, when a government is confronted with an external conditionality item (for EU accession, for example), national identity works as a *filter* distinguishing between whether a government follows a cost-benefit calculation (consequentialism) or acts in line with socially constructed norms and identities (appropriateness). Referring solely to rationalist considerations when looking at the compliance record of EU membership criteria may be insufficient. This is why it appears that there is a need for also employing a constructivist concept of national identity as a decisive factor to determine whether an issue is subsequently put to pure cost-benefit calculations (Freyburg and Richter 2010, 264).

The reasoning behind this bridge-building approach is that rationalist and constructivist explanatory factors are not contradictory. Rather, they ought to be seen as complementary to help explain the effectiveness of EU conditionality. National identity is regarded as a cognitive model defining the way in which actors see their interests and to what degree they are legitimate and appropriate to fit a given national identity. If an external conditionality requirement proves partly or fully at odds with the national identity, compliance will follow the appropriateness reasoning. In turn, if a requirement is filtered as non-problematic, its further consideration can go down the consequentialist cost-benefit path. It is vital to note that either way can lead to non-compliance. It is the *reasoning* that is different (Freyburg and Richter 2010, 265–6; see fig. 2).

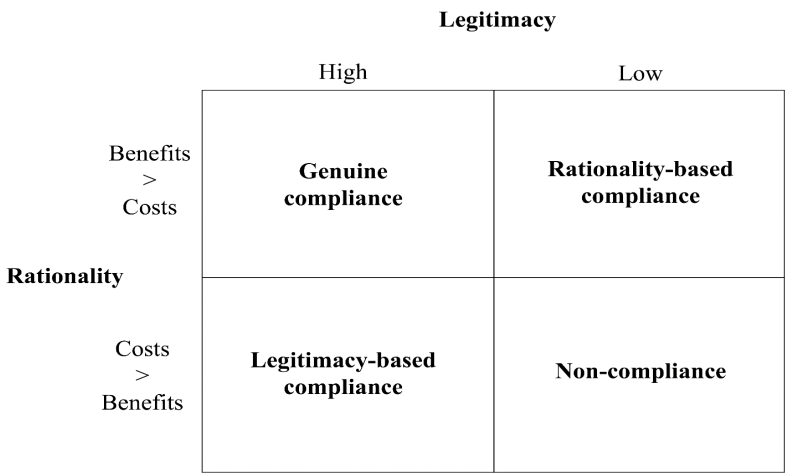
Fig. 2. Filter model for conditionality compliance
(*Source*: author; modelled after Freyburg and Richter 2010, 266)



An example of national-identity appropriateness considerations is the fulfilment of an EU conditionality item to pave the way for the opening of EU accession negotiations. Croatia, for instance, had to extradite army general Ante Gotovina in 2005 (Freyburg and Richter 2010, 274–5), and Serbia had to conclude an agreement with Kosovo on collaboration as regards the majority Serb Communities in Kosovo in 2013, the so-called Brussels Agreement (Ejdus 2020, 139). In both cases, securing progression on the EU path appeared to outweigh the considerable political costs related to seemingly 'giving in' on a national identity issue.

A complementary conceptual model looks at the *compliance* patterns of EU Candidate Countries with equal consideration of rationalist and constructivist approaches. When rationality and legitimacy contradict one another, the difference is obvious. If an actor complies in a case against their interests, i.e. costs exceeding benefits, but the perceived level of legitimacy is high, then legitimacy can be regarded as having triggered compliance. Here, as a result, the level of *legitimacy-based* compliance can be seen as substantial. In the same vein, if actors see their interests in line with the EU demands for reform, e.g. benefits exceeding costs, but are not convinced by the persuasive nature of the argument, the response can be seen as *rationality-based* compliance. The problem with this type of compliance is that once the material benefits have arrived, the (only selectively implemented) changes may be reversed at some point. Further, such cases may increase the heterogeneity of EU membership and hence of the organisation as such altogether.

Fig. 3. Compliance behaviour of EU candidate countries (*Source*: author; modelled after Noutcheva 2012, 29)



Lastly, when the benefits exceed the costs and the conditionality item is perceived as appropriate, and highly legitimate, there is *genuine compliance*. Political actors will carry out reforms quickly and in a sustainable way. A high level of trust in the appropriateness of measures is likely to boost norm-binding State behaviour. Conversely, when the rational cost-benefit ratio for compliance is very high whilst at the same time the level of legitimacy is very low, we are going to see *non-compliance*, which is a distinct possibility in cases of popular issues of national identity (Noutcheva 2012, 28–34; see fig. 3).

Ontological security

Also closely related to the issue of identity is the analytical concept of ontological security. Its core assumption is that there is a need for human beings to have constancy of their social and material environment, and that States are to be considered ontological security seekers striving for biographical continuity (Ejdus 2020, 18; Ejdus 2017; Steele 2008). In other words, ontological security in world politics is the

> "possession [...] of answers to four fundamental questions that all polities in some way need to address. These questions are related to *existence*, *finitude*, *relations*, and *auto-biography*" (Ejdus 2020, 16).

Of particular relevance are critical situations which can create ontological *in*security. They are "unpredictable events that affect a large number of individuals", catch State actors on the spot, and "disrupt their self-identities" (Ejdus 2020, 15). As a consequence, "collective actors experience anxiety, exhibit regressive behaviour and attempt to restore the calm through rigid attachment to routines" (Ejdus 2020, 30). In the face of disruptions and fragmentations, States need an additional source for national identity narratives. This can be done by creating ontic spaces linked to the collective-identity narratives. As Ejdus explains (2020, 30),

> "by mooring their identity to material environments, States secure their sense of biographical continuity and fend off anxieties stemming from the prospect of a divided and fractured self [...] To assume this role of an 'ontological seabed', material environments need to be discursively linked to projects of the self, which can be accomplished either through introjection or projection [...] State representatives [tend to] operate [...] within pre-established and often sedimented identity discourses".

As a result, the interplay between landscape or buildings and collective-identity narratives or master narratives can lead to the creation of "*ontic spaces*" (Ejdus 2020, 167; see fig. 4).

A further important element is the anxiety-controlling mechanism of *avoidance* stemming from ontological dissonance. Such ontological dissonance can emerge when a collective identity is under threat, or when different (collective) identities of the self are in contradiction to one another. If all the identities in question are fundamental and identity transformation is impossible, the easiest way out of the ontological dissonance is to take measures of avoidance. In practice, avoidance more often than not materialises in simply avoiding making a choice and/or in postponing it. Notably, this can happen even when the action is against the State actor's wider interest. Prominent examples of dissonance caused by conflicting identities (and thus conflicting policy goals) are Israel and its policy towards Palestine vs. the pursuit of peace and stability in the region, or Serbia and its policy goals vis-à-vis Kosovo as opposed to proceeding on the path to EU membership (see country cases in III.).

Fig. 4. Ontological insecurity and related actor strategies (*Source*: author)

Critical situation	*Rupture in constancy of social or material environment*	*Dissonance of collective identities or policy goals*
Strategy	*Master narratives* *Ontic spaces*	*(Identity transformation or)* *Avoidance*

III. Country cases

This section will apply the analytical framework to three cases of bilateral territorial disputes in the post-Yugoslav region. To be sure, there are far more bilateral disputes in the neighbourhood. Notably, the aim here is to identify cases amongst the successor States of Yugoslavia where there has *not* been any kind of bilateral settlement yet after 1992.[7]

7 Croatia and Bosnia and Herzegovina concluded a Border Treaty in 1999. Although it has not been ratified by either parliament to date, it has been applied in good faith despite minor disagreements predominantly over two tiny sections of the border along the Una River (Bickl 2019, 54). Croatia and Montenegro have a Protocol in place from 2002 (between Croatia and the Federal Republic of Yugoslavia at the time). Although the Protocol envisages a prospective final treaty settlement, it has preliminarily settled the land border around Prevlaka and put a sophisticated maritime delimitation regime in place in the entrance area to Herceg Novi and Kotor Bay. However, the (preliminary) territorial sea border has subsequently given rise to

The cases selected below represent a genuine type of territorial conflict each. Although the first two are border disputes technically speaking, they are not the same. Croatia vs. Slovenia is legally solved (and has a history of bilateral negotiations, too), but has not yet been implemented. It is a so-called mixed dispute concerning the maritime and land border that had been subject to third-party judicial resolution by means of an arbitration procedure and to preceding third-party facilitation to help conclude the arbitration agreement in the first place. Croatia vs. Serbia over the land border along the Danube is a dormant conflict with no real solution dynamics. It constitutes a dispute involving a navigable river, an issue that has thus far been treated bilaterally, albeit at a very low level of intensity. Lastly, Serbia vs. Kosovo is about the latter's status (i.e. statehood, and hence indirectly also about borders) and thus particularly challenging, also but not only in terms of nation- and identity-building. It is not a dispute in the technical delimitation sense. Rather, it is about the very statehood or international legal personality of Kosovo.

What all three disputes have in common, however, is that they include an EU dimension: bilateral disputes between Candidate Countries and Member States or amongst Candidate Countries themselves need to be solved ahead of EU accession as a precondition (European Commission Enlargement Strategy 2018, 7). On the other hand, there is a varying degree of active EU involvement with regard to mediation or facilitation regarding the three disputes under consideration.

Slovenia vs. Croatia

The mixed territorial dispute between Croatia and Slovenia has concerned the land and sea border after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). As no legal act on the definition of the administrative boundaries of the SFRY Republics has existed (see section *International Law* in II.), the land boundary was de facto governed by the limits of the cadastral units of the municipalities in the border areas of the constituent Republics. This type of cadastral delimitation became the international border between the two countries after their independence in 1991. At various spots, however, the cadastral records overlap. As for the sea boundary, the territorial SFRY waters were fully integrated, meaning there was no internal allocation of territorial waters by Republics. As a result, the question of maritime delimitation between Slovenia and Croatia at the time of independence was fully open (Permanent Court of Arbitration 2017, 10–11, paras 37–42; see also footnote 9).

considerable controversy between Croatia and Montenegro related to off-shore exploration licencing (see Caligiuri 2015, 2).

During the EU accession negotiations of Croatia in 2009, Slovenia, by using the national veto of an EU Member State, created additional EU conditionality. Ljubljana requested the resolution of the unresolved dispute over the course of the common State border with Zagreb by means of an arbitration procedure. Previous bilateral attempts since the mid-1990s had failed.[8]

In assessing this (new) EU conditionality item, Croatia can be said to have been in rationality-based compliance mode. The anticipation of a (perceived) loss of territory impacted strongly with regard to the appropriateness of the conditionality item. However, the overall aim of securing EU accession apparently outweighed the black-mailing of Slovenia over the border dispute, so in the end Croatia accepted the arbitration procedure.

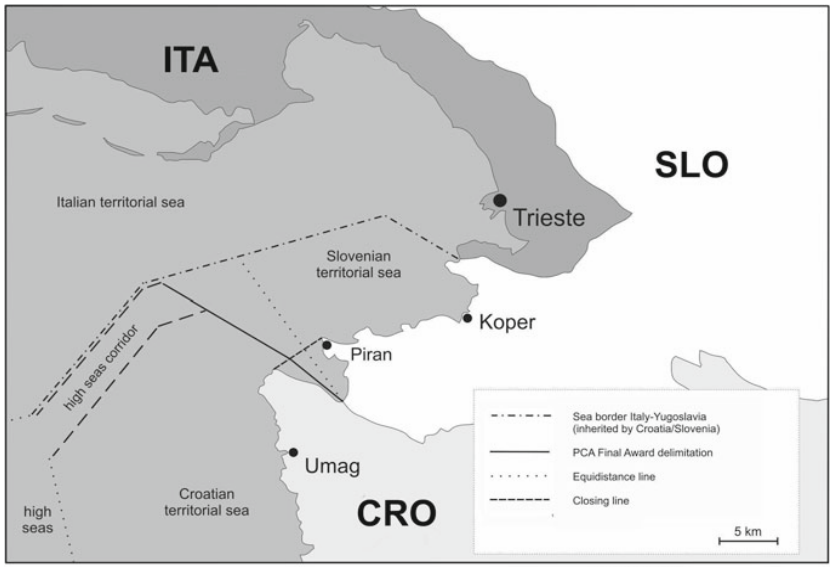
In terms of dispute settlement, the European Commission successfully took on the role as active third-party mediator producing two drafts of the later arbitration agreement by which the resolution of the dispute was submitted to third-party judicial settlement (Cataldi 2013; Bickl 2021a, 160–180).

With regard to ontological security, it is fair to say that Piran Bay is an ontic space for Slovenia. Up until 1991, Slovenia as a constituent Republic of the Socialist Federal Republic of Yugoslavia (SFRY) largely controlled the Bay and enjoyed access to the high seas in the Adriatic via the Yugoslav territorial sea including the full freedom of navigation for all naval vessels and fishing rights for any Slovenian vessel in the integrated Yugoslav waters.[9] The notion of Slovenia as a sea-faring nation featured prominently during the hearing of the arbitral proceedings and can be said to be a master narrative of Slovenia in the border dispute with Croatia (see Permanent Court of Arbitration 2014, 3–4). With regard to Croatia, it may be said that the entire State territory can be regarded as Croatia's ontic space. This is due to the painful experience in the Homeland War in 1991–1995 where around 20,000 people lost their lives (Jović 2011, 37).

8 A fully negotiated settlement from 2001, also referred to as the Drnovšek-Račan agreement (referencing the then prime ministers) stalled during the ratification process in Croatia which led to a freeze of the situation. A subsequent effort in 2007 to refer the dispute to the ICJ proved unsuccessful (Sancin 2010, 96–98).

9 It is useful to note that the SFRY waters (and previous Yugoslav waters after 1918) were integrated, so there was no sovereignty over or sovereign rights in maritime spaces divided up by Republics. This gave rise to maritime delimitation issues in the context of the dissolution of Yugoslavia, notably between Croatia and Slovenia, Croatia and Bosnia and Herzegovina, and Croatia and Montenegro.

Fig. 5. Delimitation in Piran Bay, territorial sea border, and junction area according to 2017 Final Award (*Source*: Bickl 2021a, 218)



That war has subsequently become a vital part of the Croatian 'self' as a sovereign and independent State, if not the "founding narrative"[10] of Croatia after 1991. The related master narrative around the border dispute with Slovenia used by Croatian State actors was that it is impossible to give away territory that has been defended elsewhere in an atrocious war that cost many thousand lives' (Bickl 2021a, 81) which led, *inter alia*, to the official principled position of Croatia that the delimitation in Piran Bay should follow the equidistance line (see fig. 5) effectively dividing the waters in the Bay between the two riparian States by half (see also Arnaut 2002).

The fact that territorial issues were of utmost sensitivity in Croatia had already become evident in 2001 when a fully negotiated bilateral border agreement with Slovenia stalled in the ratification process in Croatia and had to be abandoned (Bickl 2021a, 139–144). With a view to the dispute resolution mode under international law, it is worth noting that the 2001 initialled agreement was reached in a full bilateral mode without third-party mediation.

10 Dejan Jović in a private conversation with the author. For the role of the Homeland War (*domovinski rat*) in the nation-building process and the construction of the collective identity of Croatia see Jović 2017.

Legitimacy considerations seemed to play a decisive role again when the arbitration procedure stalled in the summer of 2015 due to illegal communication between the representative of the Slovenian government and the arbitrator nominated by Slovenia. Croatia considered this action unlawful (and illegitimate) entitling itself to terminating the prior arbitration agreement from 2009 and leave the arbitration proceedings without delay irrespective of the jurisdiction of the arbitral tribunal to take a decision on whether the proceedings need to be terminated or can continue – which they did. The Tribunal subsequently reconstituted thus procedurally remedying Slovenia's violation of the Arbitration Agreement. As a consequence of its 2015 withdrawal (subject to an unanimous vote in the Croatian parliament), Croatia does not recognise the 2017 Final Award of the arbitration tribunal. It is important to note, however, that the Final Award constitutes a binding settlement of the dispute under international law (see e.g. Court of Justice of the EU 2020, para 10) notwithstanding the fact that the EU Court of Justice later determined that it cannot be enforced through EU law (on the latter see CJEU 2020, paras 102; 106).[11]

In essence, Croatian State actors can be said to have applied the national identity filter coming to the conclusion that compliance must depend on an appropriateness reasoning. They then found that it was illegitimate to continue an arbitration procedure after the other party had broken the rules, regardless of whether Croatia was legally entitled to terminate the arbitral proceedings, which it was not. It is a universally established principle of international law that arbitral tribunals have inherent jurisdiction (*compétence de la compétence*)[12] to decide on the termination of proceedings and that thus parties simply cannot withdraw unilaterally[13], so the decision of the Croatian government to do so must be seen as a deliberate political decision fully aware of its non-legality in substance and thus an open defiance of international law. In ontological security terms, the strategy of the subsequent Croatian governments since

11 Slovenia filed infringement proceedings against Croatia with the Court of Justice of the European Union (CJEU) in July 2018 seeking to enforce the Arbitration Award indirectly through EU law. The Court did acknowledge that both parties had an obligation to implement the Arbitration Award under international law. With regard to EU law, the Court found that there was a political link between provisions in the Croatian EU Accession Treaty and the Arbitration Agreement. However, that link was not strong enough in legal terms to provide for the jurisdiction of the Court to entertain the Case. For a critical view on the CJEU's rather formalistic approach see McGarry 2021 and Bickl 2021b.

12 See e.g. International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadić* Case IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, para 18.

13 The tribunal's jurisdiction on all procedural matters, although inherent anyway, is expressly mentioned in Art. 6(4) of the pertinent Arbitration Agreement between Croatia and Slovenia (See also CJEU 2020, para 9).

2015 can be seen as *avoidance* refusing or at least postponing the implementation of a judicial settlement that would lead to a (perceived) loss of territory.[14]

The current status of the Croatia-Slovenia border dispute is one of a frozen conflict. At the time of writing, there were no prospects of a bilateral implementation of the contents of the arbitration award any time soon, despite the fact that it is a binding settlement under international law. On the contrary, now that Croatia joined the Schengen Area of free movement inside the EU at the beginning of 2023 (with the express support of Slovenia stating that Croatian accession to Schengen was also in the Slovenian interest; Croatian Ministry for Foreign and European Affairs press release 06 July 2022)[15], Slovenia will no longer have any political leverage vis-à-vis Croatia. Therefore, it will be up to the two parties bilaterally to agree on a voluntary basis whenever both sides consider it feasible.

Croatia vs. Serbia

Croatia and Serbia have an unresolved dispute over the boundary line along the joint section of the Danube. The dispute is, as are the ones between Croatia and Slovenia above and the Serbia-Kosovo one below, a side-effect of the dissolution of Yugoslavia (see section *International Law* in II.).

The main reason for the Danube-border dispute lies in the fact that the river has changed its course since the 19th century (see fig. 6), mainly through natural meandering and regulation works – the cutting of channels to shorten the waterway and improve navigation – which resulted in the creation of 'pockets' between the Danube's main navigable channel and the original cadastral records (which had been left unchanged) claimed by Croatia (Dimitrijević 2012, 13; Vukosav and Matijević 2020, 194–195; Bickl 2022, 119).

Croatia bases its territorial claim on the principle of *uti possidetis juris* (see *International Law* in II.) and thus the cadastral limits of the country's districts and municipalities. The data of these territorial units relate

14 It is worth noting that the delimitation of a maritime border between successor States following the dissolution of the preceding State cannot amount to a 'loss' of territory *per se* when the maritime spaces under national sovereignty were not divided up by republics, but integrated waters under the sovereignty of the federal State in the first place, as was the case with the SFR Yugoslavia. With regard to the delimitation of the land border, the Arbitral Tribunal in Croatia vs. Slovenia did not 'apportion' territory *de novo*, but decide on the relatively tiny sections of the course of the border where the cadastral records of both parties concerning the administrative border between the republics up until 1991 overlapped or the legal title to territory was unclear.

15 On 2 December 2022, the Slovenian parliamentary committees for EU Affairs, Foreign Affairs, and Home Affairs subsequently voted in favour (RTVSLO 2022).

to the so-called first stable cadastre following a geodetic survey under the Austro-Hungarian Empire 1877–1891, i.e. from *before* the regulation works on the Danube. These cadastral limits were carried over to the Socialist Yugoslav Republic of Croatia after 1945 and feature in municipal cadastral maps of the SR Croatia (Bickl 2022, 120; author's field notes State Archive Zagreb 21 September 2021).

Serbia bases its claim on the presumption that there has never been any document succeeding the report of the Đilas Commission from 1945 (adopted by the CPY[16] Politburo) fixing the Danube as the *provisional* boundary line between the Yugoslav Republics of Croatia and Serbia in a general way. Therefore, it was the exact course of the river boundary which was now to be determined. International State practice in the context of customary international law and settled jurisprudence of international courts and tribunals clearly suggested that the centre-line of the Danube's navigable channel (Thalweg) was the appropriate means of delimitation for a navigable river. Further, Serbia could not accept the cadastral claims of Croatia as (i) land cadastres were supposed to be used for technical, taxation, and statistical purposes, and (ii) SFRY cadastres were generally considered "unsatisfactory and unreliable" at the time lacking regular updates and overall accuracy (Bickl 2022, 123).[17]

With a view to conditionality, there is no EU-related momentum for the time being as EU accession of Serbia cannot be expected any time soon. Nevertheless, there is a clear obligation to solve any bilateral dispute between an EU Member State and a Candidate Country ahead of EU accession (see e.g. Petrović and Tzifakis 2021) and the Danube border issue between Serbia and Croatia is mentioned in the 2022 Serbia report (European Commission Serbia Report 2022, 87). Thus, it can be said that the settlement of the Danube border dispute is a core conditionality item for Serbia's EU accession negotiations, apart from the normalisation of relations between Belgrade and Pristina (see below). Nonetheless, there seems to be no urgency on both sides. The two parties entered into bilateral talks in the framework of an Inter-State Commission on the Danube border founded in 2002 holding meetings rather infrequently, however, with no real progress over the last 20 years. There were no meetings between 2011 and 2018, for example, and the last meeting of the Inter-State Commission to date took place in 2019 (Bickl 2022, 124–125), so the current timeline is largely *sine diem*.

16 Communist Party of Yugoslavia.

17 The above summary of the claims is based on unpublished documents from the bilateral Inter-State Commission on the Danube border provided to the author by both parties to the conflict.

Fig. 6. Cadastral (Croatia) vs. Danube navigation channel (Serbia) claim. (*Source*: Vukosav and Matijević 2020, 194)

As regards ontological security, the Danube has not been an ontic space on either side. This may be due not least to the pragmatic collaboration on practical issues of the joint river maintenance. The Danube is a major component of the international waterway linking the Black Sea and the North Sea, the Trans-European (Rhine-Danube) Corridor VII from Rotterdam to Sulina. In fact, Croatia and Serbia signed a bilateral agreement on navigation and technical maintenance of international waterways in 2009, and both countries take part in the joint management of the river in the context of the responsibilities and obligations of all riparian States (Danube Fairway 2019).

In respect of the current status of the dispute, it may be considered dormant and at the same time protracted given the principled positions of both parties. Given the current situation where EU accession of Serbia is not imminent, there may be a window of opportunity, however, to resolve the dispute bilaterally and by secret diplomacy within the realm of the existing Inter-State Commission. Alternatively, both parties may wish to

submit the dispute to the International Court of Justice (ICJ). Regardless of the fact that Croatia as an EU Member State has some leverage vis-à-vis Serbia as a Candidate Country, this power asymmetry very much fades away when there is a political will on both sides.

With regard to potential third-party dispute resolution, the European Commission or other actors[18] may want to actively engage in facilitating a bilateral settlement or the terms of submission to the ICJ, provided the parties to the dispute so wish.[19]

Serbia vs. Kosovo

If one looks at the dissolution of Yugoslavia as a process, Kosovo's declaration of independence in 2008 is the most recent step. The prior independence of Montenegro in 2006 marked the end of Serbia as a part of Yugoslavia[20] and the return to independent statehood after 88 years. It is useful to recall that the difference between the territorial disputes between Croatia and Slovenia and between Croatia and Serbia on the one hand, and between Serbia and Kosovo on the other hand, is that whilst the former disputes relate to the course of the border in a more locational-technical sense, the dispute between Belgrade and Pristina is one about statehood as such. In other words, the latter is more fundamental politically as Serbia does not recognise Kosovo as an independent State under international law. In this regard, it is useful to note that Kosovo as a constituent part of Serbia is enshrined e.g. in Art. 182 of the Constitution of the Republic of Serbia.[21] Kosovo adopted a declaration of independence on 17 February 2008. The International Court of Justice in its Advisory Opinion from 2010 stated that the adoption of the declaration of independence was in accordance with international law.[22]

18 The US, for instance, have facilitated the ground-breaking agreement from 11 October 2022 on the maritime border between Israel and Lebanon. Notably, the two countries have no diplomatic relations with one another, so technically the agreement consists of two separate agreements with Washington. For an analysis see Yiallourides *et al* 2022. One must also mention the strong role of US facilitation in the historic Prespa Agreement concluded between Greece and North Macedonia on 17 June 2018, or the EU-US dialogue with entities' and State representatives in Bosnia and Herzegovina on State and electoral reform in the spring of 2022.

19 For a legal analysis on the prospects of a settlement of the dispute by the International Court of Justice see Bickl 2021b.

20 Between 2003 and 2006, the State's official name was Serbia and Montenegro.

21 The Constitution was adopted by referendum on 28/29 October 2006 following the departure of Montenegro from the State Union of Serbia and Montenegro in May of that year.

22 The United Nations General Assembly submitted the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law" (as drafted by Serbia) to the Court on 8 October 2008. The ICJ delivered its Opinion on 22 July 2010 (see ICJ 2010).

Fig. 7. Serbia and Kosovo including majority ethnic Serb areas (*Source*: bbc.com 12 August 2022)

With regard to conditionality in the EU accession process for Serbia and for Kosovo[23], the so-called normalisation of relations between the two parties is a core conditionality item and enshrined in Chapter 35 of the accession negotiations for Serbia and in the relevant documents for Kosovo (see European Commission Serbia Report 2022, 88–89; European Commission Kosovo Report 2022, 79–80) in the good-neighbourly-relations domain together with the alignment with the EU's Foreign and Security Policy (most recently with a focus on the alignment with the EU sanctions regime in respect of Russia[24]). The Belgrade-Pristina dialogue was launched in March 2011.[25] Although meetings in Brussels have been convened at regular intervals and there have been a few technical coopera-

23 Kosovo applied for EU membership on 15 December 2022.

24 The EU foreign-policy alignment conditionality item is beyond the scope of this paper. For a current account see European Commission Serbia Report 2022, 134–137.

25 For the Belgrade-Pristina dialogue under the auspices of the EU High Representative for the Foreign and Security Policy and the Special Representative see https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue_en.

tion agreements in the dialogue's early phase (see Bieber 2015), there were, for a long time, no signs of any kind of comprehensive bilateral agreement apart from rather limited results in crisis management by the EU and the US, such as on the license plate issue in northern Kosovo.[26]

However, in the second half of 2022, signs of a fully-fledged major diplomatic offensive on the part of the EU – with solid silent-diplomacy backing from the US – materialised in the form of a comprehensive draft bilateral agreement that was going to be put before the parties without much prior debate.[27]

At a high-level meeting in Brussels on 27 February 2023, the Presidents of Serbia and Kosovo accepted the "Agreement on the path to normalisation of relations between Kosovo and Serbia" (European Union External Action Service 2023, February 27). It contains a Preamble (mentioning "the different view of the Parties on fundamental questions, including on status questions") and eleven Articles e.g. on the development of good-neighbourly relations and a mutual recognition of "their respective documents and national symbols, including passports, diplomas, licence plates, and customs stamps" (Art. 1), on the acceptance of "the aims and principles of the United Nations Charter, especially those of the sovereign equality of all States, respect for their independence, autonomy and territorial integrity [...]" (Art. 2), the peaceful settlement of disputes in line with the UN Charter (Art. 3), the "assumption that neither of the two can represent the other in the international sphere or act on its behalf", and that "Serbia will not object to Kosovo's membership in any international organisation" (Art. 4). With regard to the path to EU membership, Art. 5 stipulates that "[n]either Party will block, nor encourage others to block, the other Party's progress in their respective EU path based on their merits". Art. 7 provides for the "self-management for the Serbian community in Kosovo" and the "establish[ing of] specific arrangements and guarantees, in accordance with relevant Council of Europe instruments [...]". Art. 8 obliges the Parties to "exchange Permanent Missions [to be] established at the respective Government's seat".[28] Art. 10 establishes a "Joint Committee, chaired by

26 For the events e.g. in the second half of 2022 see BBC News 2022 and Balkan Insight 2022.

27 Despite the fact that silent diplomacy does hardly allow for any detailed ex-post tracing, the proposal was widely considered an ultimatum to both parties. President Vučić of Serbia publicly so confirmed after a meeting with envoys from the EU and the US at the beginning of February 2023 (see Popović 2023). For earlier reactions to the then so-called Franco-German proposal (the later 2023 Agreement) which started circulating in the second half of 2022 see Euractiv 2022.

28 This provision on Missions rather than Embassies is the most obvious parallel to the Basic Treaty between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) signed in 1972 and applied until re-unification in 1990. For a comparison

the EU, for monitoring the implementation of this Agreement", and Art. 11 refers to the "Implementation Roadmap" annexed to the Agreement.

The related Implementation Annex was agreed on at a separate meeting in Ohrid, North Macedonia, on 18 March 2023. Major provisions include bullet point three stipulating that the "Agreement and the Implementation Annex will become integral parts of the respective EU processes of Kosovo and Serbia" in amending the existing so-called benchmarks for Chapter 35 for Serbia to reflect the new obligations from the Agreement and the Annex, and in doing the same as regards the Kosovo's Special Group on Normalisation agenda[29], bullet point five launching the "negotiations within the EU-facilitated Dialogue" to establish "the self-management for the Serbian community in Kosovo [...]", bullet point 6 foreseeing the establishing of the "Joint Monitoring Committee [...] within 30 days", and bullet point 8 providing for the implementation of all Agreement Articles "independently from each other", and the recognition of both Parties that "any failure to honour their obligations" will have consequences in terms of their "EU accession processes and the financial aid they receive from the EU" (bullet point 12; European Union External Action Service 2023, March 18).

It is useful to note, that neither the Agreement nor the Annex has been signed by the Parties. This may largely be due to the fact that President Vučić had publicly committed himself not to sign anything bilateral with Kosovo (see Taylor 2023) to avoid formal recognition of Kosovo. Still, both the Agreement and the Annex must be considered binding, not bilaterally in the form of an international treaty (see Milanović 2023), but nevertheless in view of the fact that the Parties' new obligations will become an integral part of their EU accession documents. Further, the Agreement and the Annex can be considered to have been adopted by the express statement of EU High Representative Borrell published after the Ohrid meeting (European External Action Service 2023, March 19), and it would seem they are indeed enforceable with regard to political and financial issues of the EU accession process.

On the issue of recognition, it appears that the Agreement cannot amount to formal recognition of Kosovo by Serbia. This is manifest not least by the Preamble (referencing the exclusion of status questions) and

of the Basic Treaty and the Agreement on Normalisation (which is beyond the scope of this paper) see Milanović 2023. For the relations between the FRG and the GDR 1972–1990 see e.g. Vanderwood 1993 and Simma 1985.

29 The beginning of EU accession negotiations with Kosovo (which submitted its application for EU membership on 15 December 2022) is subject to a prior positive recommendation of the EU Commission and a subsequent unanimous approval by the EU Member States.

the fact that it was not signed as a bilateral treaty (with Art. 6 observing that such treaty is still going to have to come into existence). However, one may argue that recognition is implicit by accepting that the two Parties are separate subjects of international law (Istrefi 2023), or that the Agreement is a "step towards the consolidation of Kosovo's statehood" (Milanović 2023). It appears undisputed more generally that Kosovo can undertake and has undertaken obligations under international law (Radović 2023). The question of its status under international law currently arises in relation to Pristina's application for membership of the Council of Europe (CoE). If and when Kosovo becomes party to the European Convention of Human Rights, it will be part of its inter-State adjudication system: the European Court of Human Rights (ECHR). It seems difficult to imagine, however, that, given a potential future inter-State case between Serbia and Kosovo, different views of recognisers and non-recognisers of Kosovo on its international legal personality could be sustained for Kosovo's CoE application generally see Forde 2022.

With regard to the accession of Kosovo to international organisations, the most prestigious being the UN, Art. 4 of the Agreement appears to offer some guidance *prima facie* in that it rules out Serbia opposing Kosovo's membership. It remains unclear, however, whether this would include Serbia trying to convince other UN members not to vote in favour of Kosovo's accession to the United Nations, i.e. could be understood as a ban on Serbia's policy of de-recognition (see also footnote 32 and below). In view of Art. 5 (on EU membership) expressly ruling out encouraging other parties to block membership, the absence of such wording in Art. 4 on international organisations generally appears to suggest that an interpretation in the sense of ruling out de-recognition efforts does not hold water.

In terms of compliance and legitimacy considerations for the phase 2011–2023, it will not be difficult to assess that both parties have complied with the Belgrade-Pristina dialogue conditionality procedurally by attending the meetings. It can be assumed that the Serbian State actors did not want to walk away from the EU accession process which is one of several (sometimes competing) foreign policy goals (comprising also fruitful relations with Russia, China, the US, and the non-aligned countries[30]) and that the Kosovo State actors sought to ensure a favourable processing of their bid for membership. Up until the Agreement and the Annex in February and March 2023 (see above), however, there was a clear lack of commitment from the Serbian side to come anywhere near a comprehensive bilateral settlement that would include a de facto acceptance of the statehood of Kosovo. Conversely, Kosovo never seri-

30 For a recent account of the foreign policy challenges of Serbia see Guzina 2022.

ously undertook the implementation of self-management of the majority-Serb communities in Kosovo. As a result, one can posit inconsistent or non-compliance with regard to the national-identity filter model as the conditions partly or largely contradict the national interest, or, at best, some minimum amount of rationality-based compliance perceiving the conditionality item as (very) low in legitimacy. At the time of writing, after the 2023 Normalisation Agreement, we are probably witnessing an upgrade of the level of legitimacy on both sides, but it remains to be seen whether this proposition will stand the test of implementation of the Agreement.

To generally understand the behaviour of Serbian State actors (and of EU actors), we need to turn to ontological security. For the Serbian national identity, Kosovo plays a central role. It can be said with some accuracy that it is a truly ontic space irrevocably linked to the Serbian statehood as heartland territory and not only strongly valued by State actors, but also by major societal stakeholders such as the very influential Serbian Orthodox Church. It is important to note that Kosovo as the ontic space of Serbia has a fairly long history going back to 1389.[31]

Further in ontological security terms, the condition of having to de facto accept Kosovo as an independent entity causes a major disruption of Serbia's biographical continuity and thus a high level of anxiety. As States are ontological security seekers, they will want to control this anxiety caused by ontological dissonance. One way of doing this is to use measures of avoidance meaning difficult decisions are postponed or ignored altogether in order to successfully manage conflicting identities (in the case of Serbia its European identity and its traditional identity; Ejdus 2020, 135). A useful measure in this regard is to employ a master narrative. In the case of Serbia, that master narrative is about never recognising Kosovo no matter what the political costs are. It is important to note that this narrative has been used by all Serbian governments since the fall of the Milošević regime in October 2000 (Ejdus 2020, 97–150). This master narrative has been accompanied by a fully-fledged policy of de-recognition of Kosovo as from 2011 where Serbia has thus far been investing considerable effort in silent diplomacy on the international stage.[32]

The (implicit) master narrative of Kosovo can be regarded to be the very declaration of independence by the representatives of the citizens of Kosovo on 17 February 2008, and thus the legal right and the legitimacy

31 For the construction of Kosovo as Serbia's ontic space see Ejdus 2020, 39–63.

32 Serbia's main policy goal has been to keep ensuring there is no majority in the United Nations General Assembly (UNGA) in favour of Kosovo. A former Serbian diplomat claims that Kosovo can currently count on a maximum of 83 votes out of 193 UN members and that there has been an upward trend as for de-recognitions of Kosovo (b92.net 2022). For a comprehensive account on Serbia's de-recognition policy on Kosovo see Papić 2020.

of the claim to statehood. The declaration constituted the centrepiece of Kosovo's written and oral pleadings before the ICJ during the proceedings relating to the Advisory Opinion on Kosovo's declaration of independence (see footnote 22 and the minutes of the oral pleading before the Court on 01 December 2009[33]). Kosovo's explicit narrative in the context of the Dialogue sponsored by the EU has been that it would have to lead to a legally binding agreement including mutual recognition (ANSA 2022), something that presently seems to be being achieved in fact rather than law following the adoption of the 2023 Agreement and Annex (see above).

Whilst Serbia, in view of the conflicting policy goals of joining the EU (which also the present government has adhered to internationally; Spasojević 2023, 269–270) and not accepting Kosovo as an independent State, seems to have been avoiding to take a clear decision about the future of its EU accession path for a long time, the same may be said about the EU itself which has long seemed to avoid a decisive move on the Belgrad-Pristina Dialogue (which no longer has that label after the 2023 Agreement and Annex). Talking of which, it appears that Russia's war of aggression in the Ukraine and geopolitical aspects about the Western Balkans as a whole in terms of stability and the influence of other global actors in the EU's immediate vicinity must have created some new momentum.

In respect of the status of the Serbia-Kosovo dispute, it is one of an open conflict that was protracted in the first decade after the start of the EU-sponsored Dialogue. There seems to be a fully-fledged path to a resolution now, however, after the Agreement and Annex from early 2023. To be sure, the underlying challenges remain. Identity transformation is perhaps more of a theoretical choice as it cannot be brought about overnight. However, there are pragmatic ways of a bilateral settlement which does not include formal recognition – and the 2023 Agreement and Annex indeed follow that direction.

IV. Conclusion

As has been demonstrated with the country cases above, there is strong evidence that identity issues play a decisive role when it comes to the assessment of external conditionality. In other words, when assessing a policy demand, State actors will attach great importance to the legitimacy of a given demand and thus determine whether a purely rationalist cost-benefit consideration is possible at all. This effect is aggravated, it seems, when there is a strong link between territorial issues and the

33 For the pertinent argumentation of Kosovo see pages 35–44 of the translation of the 1 December 2009 afternoon session at https://www.icj-cij.org/public/files/case-related/141/141-20091201-ORA-02-01-BI.pdf.

national identity. In addition, this becomes even more salient when the process of nation-building takes or has taken place during the dissolution of a State involving armed conflict. That was the case with several entities during the break-up of Yugoslavia. Hostilities and bloodshed directly affected Croatia during the Homeland War 1991–95, and the same is true for the war over Kosovo in 1998/99 with regard to Serbia and Kosovo.

With regard to the normalisation of relations between Serbia and Kosovo and the EU accession process, the EU itself bears great responsibility for fairness and credibility. The incorporation of the Agreement and the Implementation Annex via benchmarks (Member States must decide by unanimity on their fulfilment[34]) into Chapter 35 for Serbia and the Kosovo Group's documents respectively must not lead to new opportunities for blockades and delays. First, the five Member States that do not recognise Kosovo (Spain, Slovakia, Greece, Cyprus, and Romania) for fear of secessionist dynamics domestically must refrain from blocking Kosovo. Also, enlargement scepticism for internal convenience by other Member States (Bulgaria, France and The Netherlands have set particularly negative examples in the case of North Macedonia and Albania more recently) can easily frustrate a fair assessment of Serbia's and Kosovo's efforts.

Overall, the Agreement is undoubtedly a unique opportunity. However, dispute settlement does not stop here. On the contrary, the implementation now requires some skilful steering and a roadmap on the part of the EU (together with the US) due to several challenges arising from the Agreement. As there are no deadlines (save for the implementation of the Joint Committee) and most of the implementation issues still need to be negotiated in detail, it will be crucial that the most important provisions are implemented in parallel, such as Kosovo's UN membership (which is largely outside the control of the EU)[35] and the self-management for the Serbian community in Kosovo[36] to permanently sustain the momentum of implementation.

Having said that, when there are powerful narratives related to identity formation, preservation, or reinforcement in the process of nation-building, there is (very) little room for manoeuvre in bilateral dispute settlement. This is simply because when issues under dispute are closely

34 Usually there are opening, intermediate, and closing benchmarks. Member States have the leverage of unanimity with both the definition and the assessment of attaining each of the benchmarks.

35 Admission to the UN requires a two-thirds majority of the votes cast in the General Assembly (Art. 4 UN Charter) after prior recommendation by the Security Council (with at least 9 out of 15 votes without a vote against by any of the permanent SC members; Art. 18(2)), i.e. China and Russia may want to prevent Kosovo's accession.

36 It would seem crucial that Kosovo takes take full ownership of designing the self-management structures whilst at the same time Serbia must be involved also.

related to the collective identity of a nation, it becomes virtually impossible to move from a perception of threat or victimisation to one of exploring mutual gains or a spirit of compromise or reconciliation in the wider context of the benefits of peace and stability in the region.

It would be wrong, however, to contend that State actors pursuing powerful narratives when trying to reinforce identities show signs of irrational behaviour. On the contrary, considerations of legitimacy or national identity are meant to provide a sense of continuity in ontological security terms where disruptions in the biographical 'self' need to be avoided, not least and quite literally by a strategy of avoidance of having to take decisions domestically perceived as painful. Somewhat irritatingly perhaps, this strategy seems to have worked thus far with regard to EU conditionality in the above cases because (i) the EU itself, in the case of Serbia vs. Kosovo, had for a long time been prone to a strategy of avoidance, too, for geopolitical reasons by shying away from all-or-nothing decisions in a region where there is fierce competition with other global actors, and one has thus to 'stay in the game', and (ii) there are no practical means of enforcing a legally binding and final settlement by arbitration[37] of a bilateral dispute both parties had committed themselves to in the first place, as in Croatia vs. Slovenia.

This brings us to the implications on established means of dispute settlement by international law. The bad news is that 'successful' pieces of identity politics not only pose a threat to proven and tested ways of resolving bilateral conflict, but cause considerable damage to the multinational dispute settlement system as a whole. Whilst Croatia may be getting away with ignoring the Arbitration Award for the time being, this constitutes a grave precedent to the integrity of arbitration as a judicial means of dispute settlement. Whatever dispute there is up for settlement in the wider region and beyond, arbitration will be left discredited. This rules out an important tool the greatest asset of which is its flexibility to accommodate political or historical circumstances compared to a more standardized judicial procedure before the International Court of Justice (ICJ). Much neglected perhaps, but worrying nevertheless is the de facto disregard of Serbia of the ICJ's Advisory Opinion on Kosovo's declaration of independence. When every allowance is made for the challenging issue of formal recognition for Serbia, refusing to acknowledge an Opinion by the ICJ that was triggered by the United Nations General Assembly and drafted by Serbia in the first place constitutes quite some collateral damage

37 Arbitration awards need to rely on the good faith (*bona fide*) of the parties and their commitment to respect treaty obligations (*pacta sunt servanda*), whilst judgements of the ICJ can be enforced, albeit only by the UN Security Council.

to the United Nation's most successful and respected institution of dispute settlement.

The way forward will be a rocky road and we cannot hope to dissolve the antagonism between identity politics and international law. It is the joint responsibility of all actors, however, to become and remain aware that there is a need to restore the trust in the universally accepted means of dispute settlement. For they continue to remain a key toolbox also for the Danube border dispute, once it is politically ripe for resolution, the Agreement on Normalisation between Serbia and Kosovo, that is its implementation and a possible future bilateral treaty, and many other territorial conflicts in the region and elsewhere. Functioning and reliable dispute settlement tools are indispensable for maintaining a peaceful world order after all.

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Prikazi

Democratization in Christian Orthodox Europe: comparing Greece, Serbia and Russia, by Marko Veković, London & New York, Routledge, 2020.

For a long time, Orthodoxy was considered a „strong obstacle" to democratization, it was believed to be a tradition that was extremely anti-democratic and anti-modern, and that it did not have a significant part in any of the waves of democratization in the way that Western Christianity did. The author of this book, starting from the fact that today we have 12 predominantly Orthodox countries and that most of them are stable democratic regimes, or on their way to becoming one, concludes that it is almost certain that the Orthodox Churches in these countries played some role in the process democratization. For his case study, he takes three Orthodox countries, Greece, Serbia and Russia, in which the Orthodox churches played completely different roles in the process of democratization, that is, the first was a free rider, the second was a leading actor and the third showed resistance to democratization. Vekovic points out that it is precisely this different engagement that speaks in favor of the idea of political ambivalence and multi-vocality of religion, and that it is therefore, wrong to characterize Orthodoxy as univocal and anti-democratic. The main argument that the author states as the reason for the different political engagement of churches belonging to the same tradition (so they have the same political theology) is a specific institutional arrangement (the relationship between the Church and the State) that crucially affects the political engagement of the church. In addition to the State-Church relationship, the historical and political context within democratization starts, the type of regime which preceded democracy, and the question who initiated democratization had an important influence on the political engagement of the Orthodox churches as well. As these factors were *differentia specifica* for post-communist, Orthodox countries, the author suggests that the wave of democratization in Orthodox countries should be called *The Orthodox Christian Cluster of Democratization.*

In the technical sense, this book consists of an acknowledgment, appendices bibliography,index, notes and the book's body is made up of an introduction, five chapters and concluding remarks.

In the introduction of his book, the author points out that it is possible to notice that in the process of democratization in dominantly Orthodox countries, the Orthodox churches could have played one of 4 roles: Leading actor, Supportive actor, Free -rider and Reactionary resister of democratization (p.27). Vekovic takes three countries as a case study: Greece (Free rider), Serbia (Leading actor) and Russia (Reactionary resister) and asks the research question *Why did different Orthodox Christian Churches, although sharing the same ideas about politics (political theology), act significantly differently in the democratization processes in Greece, Russia and Serbia?*

Vekovic opens the discussion with the case study of Greece and the role of the Greek Orthodox Church (GOC) in the process of democratization. As he states, the GOC was never just a religious actor, but its role goes much beyond that, it penetrates into the social and political life of this country. This very important institution has been the subject of numerous researches, however one period has always been overlooked, that is the period of the military junta (1964–1974), known as dark period in Greek history (p. 41) in which the GOC played very important role. During this period of Greek history, the GOC and the State had a very close relationship, which was determined by the fact that the Church was actually under State control – the state controlled it from the inside (the State directly named and changed archbishops and bishops), it exercised control through finances, as one of the the most powerful means of control, then through the establishment of Church Courts for all clergy who did not agree with regime politics. That is, it can be said that the institutional arrangement in Greece during the military junta was such that the GOC did not have any autonomy, it was, as the author emphasized, *Junta's Church* (p. 43). There were also certain common interests in building such a close relationship between the Church and the State, and they were determined by the wider political context, that is, the fear of communism that was spreading throughout Orthodox Europe at that time which was a great fear for both, the junta and the GOC. However, what makes GOC an interesting case, and why it can be identified as a "free rider" of the democratization process, is that Church supported the military junta but did not oppose its overthrow. Also, when the junta fell and the democratization process began, GOC accepted it in a very good way and began to look for its place in it. Therefore, it is a great example of the political ambivalence of religion, but also an example of how its pro-democratic or pro-authoritarian tendencies are largely determined by its relationship with the State.

The author continues the analysis with the case of Serbia and the role of the Serbian Orthodox Church (SOC) in the process of democratization after the fall of communism in 1990, trying to examine the claims of some

authors (Toft, Philpott, and Shah) that the SOC was a leading actor in the process of democratization (p. 63). Vekovic points out that the role of the SOC can be divided into two phases, one from 1990 to 2000 and the other that began with the democratic changes in October 2000. The first phase is characterized above all by SOC's return to the public sphere and the beginning of rebuilding the relationship between the State and the Church that were traditionally very good, damaged only during communism. Also, this stage is characterized by a very positive attitude of the SOC towards democratic changes (such as support for fair and free elections and a multi-party system). As the winner of the first elections was Slobodan Milosevic and his party, practically heirs of communist infrastructure, the Church found itself in a rather difficult position to impose its basic demands – the introduction of religious education in schools and the return of confiscated Church property. As Milosevic refused these demands on several occasions, the SOC distanced itself from the regime and managed to achieve a significant degree of differentiation (autonomy), which, according to the author, enabled it to take a stand against the state and state policy during the 90s and thus support the democratization process. Thus, the SOC was one of the most vocal critics of the regime when it came to the war in Bosnia and Herzegovina and the attitude towards the Serbian population on the other side of the Drina river, and it openly began to criticize the regime through the announcements of the Synod. Dissatisfaction with the regime was also shown through the support that the SOC and late Patriarch Pavle gave to the student protests in 1996. The final split between the Church and the State occurred with the Kosovo crisis and the NATO bombing of Yugoslavia in 1999, for which SOC largely blamed the regime. The second stage for SOC began after the October 5, 2000 when the Church supported liberalization and the construction of a new democratic order and began to build ever closer relations with the state, from which it received everything that the regime of Slobodan Milosevic did not enable – introduction of religious education in schools, significant progress in returning expropriated property and the introduction of religion into the army (p. 84). This was a very important step for the relationship between the SOC and the State, that is, for the increasingly high level of integrationism. This is especially important since 2012, when the Serbian Progressive Party came to power with numerous pro-authoritarian ideas, which has the SOC as its very important ally. The author points out that SOC was a leading actor in the democratization process, as some authors before him correctly noted, and that was largely determined by SOC's autonomy in relation to the State in the 90s. Vekovic ends his analysis with probably the most challenging case, Russia and the role of the Russian Orthodox Church (ROC) in the process of democratization, which the author believes showed a resist-

ance to democratization and he explains it by the specific institutional engagement, that is, the relationship between the State and the Church, as in the previous two cases. With the collapse of the Soviet Union and the fall of communism, an ideological vacuum was created that was filled by Orthodoxy and the Russian Orthodox Church, which, according to the author, found an important place in the emerging system because identity and culture were the two basic pillars of the new Russia, and the ROC was seen as a great ally in construction of it (p. 115). Thus, a new history began to be written in the relations between the Church and the State in Russia, which in the period from 1990–2000 was characterized by significant autonomy of the Church from the State. The role of the ROC in the process of democratization in post-communist Russia is a great example of the ambivalence of religion. In fact, at the beginning, the ROC showed a very positive attitude towards liberalization and even democratization, which can be seen through its role in the crises that broke out in 1993 and 1995, in which ROC sided with the regime. However, a major turning point occurred in 1997 when the ROC decided to insist on the adoption of the Law, which largely propagated what cannot be labeled as democratic. This turn, that is, the willingness to show authoritarian tendencies, further deepened with the arrival of Vladimir Putin in power in 2000, when begins a new era in the construction of extremely close relations between the Church and the State, i.e. increasing integrationism, which was not oriented towards democratization but towards the construction of a new Russia as a superpower that would be a „controlled democracy." In building a new, strong Russia, the ROC was an instrument of soft power and this role suited the Church, which supported Putin and received numerous privileges in return. And if the author believes that this was a win-win situation for both parties, he still emphasizes that it is necessary to understand that the Church was not the stronger side here, rather it can be label as *asymmetric symphonia* – the State adheres to the opinion of the Church in what is going on in favor of State, if there is a difference of opinion between the Church and the State, the State follows its own opinion. The additional strengthening of integrationism between the Church and the State continues especially since Putin's second election for president in 2012, which moved Russia even more towards authoritarianism in which the ROC continued to be the most important ally of the regime. Therefore, the ROC, which today is most often associated with authoritarian models of behavior, actually has an ambivalent character, but as in the first two cases, it is conditioned by the relationship with the State.

All three case studies show that Orthodoxy is not necessarily an obstacle to democratization, rather it is characterized by political ambivalence or multi-vocality. The three different paths that Orthodox churches

chose in three different countries were largely determined by State-Church relations. In Greece, the Church had no autonomy in relation to the State and supported what suited the regime at the given moment, that is, it was a free rider. In Serbia, the Church was the biggest leader of democratic changes in the 90s, mostly because it was autonomous from the State, however, the October 5, 2000 led to greater integrationism, and since 2012 this Church has shown significant support for pro-authoritarian tendencies. Russia, certainly the most challenging case, showed a certain potential to support democratic changes in the years when it was autonomous in relation to the State. With increasing integrationism in the „controlled democracy" of Vladimir Putin, this Church has increasingly begun to show its anti-democratic tendencies.

This book represents a significant contribution to the understanding of the relationship between Orthodoxy and democratization, which for decades were considered completely incompatible, and the literature dealing with this area was almost non-existent. As Eastern Orthodox Europe nowadays becomes the center of many important political events in which Orthodoxy plays a significant role, Vekovic's book is a great basis for understanding the political nature of Orthodox churches, but also a basis for understanding the way of researching the political behavior of these religious institutions. Nevertheless, Vekovic's book should not be taken as the last word on Orthodox Christianity and its political potential, nor would I think he intended it as such, yet it should be a great motivation for further research into the dynamic relations between Orthodoxy and politics.

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Upute suradnicima

(hrvatska redakcija)

Rukopisi se podnose redakciji preko portala: https://hrcak.srce.hr/ojs/index.php/politicke-perspektive/about/submissions, ili elektroničkom poštom kao Word dokument na adresu perspektive@fpn.bg.ac.rs ili perspektive@fpzg.hr. Poželjno je priložiti anoniman rukopis (bez informacija o pošiljatelju), a u zasebnom elektroničkom dokumentu naslov teksta, ime i prezime (svih) autora i naziv ustanove u kojoj je autor zaposlen, ključne riječi i kontakt (adresa, elektronička pošta, telefon i faks). Sažetak (do 120 riječi) mora jasno naznačiti narav razmatranog intelektualnog problema, korišteni postupak ili argument i zaključke autora. Poželjna je dužina izvornog znanstvenog članka 6000 ili 8000 riječi (42000–56000 slovnih znakova s razmacima), uključujući bibliografiju i napomene. Prije slanja osvrta i recenzija neophodno se konzultirati s redakcijom.

Stil pisanja referenci i navođenja izvora:

Reference se pišu u tekstu na sljedeći način: (Dahl 1989, 45); (Geddes 1999, 134–43); (Linz 1975)

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Reference se pišu u tekstu na sledeći način: (Dahl 1989, 45); (Geddes 1999, 134–43); (Linz 1975)

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