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FULLER'S THEORY IN USE – THE INDEPENDENT STATE OF CROATIA LEGISLATION ANALYSIS[1]

Determining the morality of a legal order, in the end, is not an immediate subject of legal science, but of ethics. Therefore, it is possible to analyze the legality of the Ustasha order without questioning its moral assumptions, exclusively on the basis of generally accepted, strictly legal values, that is, from a purely legal point of view. Without resorting to the methods and results of other scientific disciplines such as historiography, sociology, ethics, psychology, political science, etc., but only on the basis of the concepts and values that the legal profession has been building since its existence, it is possible to determine quite precisely how a specific order corresponds to the legal concept. In this regard, a very useful and therefore very widely accepted concept was offered by the famous American legal theorist, Lon Fuller, and it will be used as the basis of the analysis. Fuller made a departure from basing the validity of law on its substantive compliance with morality, according to the formula lex iniusta non est lex. The impossibility of determining indisputable moral criteria for assessing the content of law, as well as the fact that such an assessment is performed externally, outside the framework of legal science, prompted Fuller to find the criteria of the moral correctness of law within himself. Fuller argues that the internal morality of law is embodied in eight requirements (generality of legal rules, prohibition of retroactivity, clarity, efficiency and non-contradiction of rules, etc.) that a normative order must fulfill in order to be recognized as legal. The conducted analysis shows that the system of rules that was valid in the Independent State of Croatia does not meet any of the criteria of Fuller's theory, and its character of legality must be contested.

Keywords: Independent State of Croatia (NDH); Lon Fuller; Inner morality of law; Legal system.

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1. INTRODUCTORY CONSIDERATIONS

Although the Second World War ended almost eighty years ago, it seems that the traumatic past has not been overcome yet on the territory of former Yugoslavia. The reasons are numerous, such as autocratic character of the political regime of the Second Yugoslavia, that promoted the ideology of brotherhood and unity among Yugoslav peoples and prohibited opening of painful issues from the common past from pre-war and war period, so as not to disturb the black and white conceptions of socialist society. In addition, final disintegration of Yugoslav state in the civil war, opened the old and created new wounds and traumas, preventing upraisal of a discourse on those issues to an objective and neutral scientific level.

For the legal professionals, one of the most complicated, therefore the most challenging issue from this historical period is the question of the character of the order of the Independent State of Croatia (NDH) order. The existence of the NDH between 1941 and 1945 is an undisputable historical fact. Nevertheless, the answer to the question what the NDH was, remains disputable. Numerous authors, not only scientific researchers such as historians and legal professionals, but also writers, poets, film directors and other artists, politicians, chroniclers, journalists, publicists, etc. tried to provide the answers and offer their views on those events. However, there is still no clear conception of the true nature of NDH, and what was happening during 49 months of its existence. The perceptions of that historical period differ, they are often mutually exclusive, mainly blurred.

This short analysis is an attempt to provide answer to the question whether the NDH had a character of a legal order, from the neutral, legal and scientific standpoint. The common approach to the analysis of the legality of the nazi and fascist state phenomenon, as well as of the satellite states created under their patronage as was the case with the NDH, reveals that the legality of their orders are disputed from the iusnaturalistic point of view. Essentially, the attitude of the classical nature law school may be expressed with a phrase *Lex iniusta non est lex*, that is, that an unjust law is not law at all. The problem with such evaluation position is reflected in the fact that in each legal system, there are cases of unjust legal solutions, wherefore, it does not prove that those are not legal orders. A distinguished German jurist, Gustav Radbruch, was well aware of it, so he, after the end of the Second World War, offered one of the most influential criticism of the Nazi regime, contesting the very legality of that order.

After the end of war, Radbruch somewhat modified, in fact, complemented his pre-war conception of the legal order, which was, in essence,

positivist. Being the witness of horror done in the name of his country,[2] Radbruch introduced a new element in his theory, known as "Radbruch's Formula", in his two prominent articles ("Five Minutes of Legal Philosophy" from 1945, and "Statutory Lawlessness and Supra-Statutory Law" from 1946), without fundamentally changing his pre-war positivist standpoint. In his first article, following previously developed idea about the law as a will for justice, Radbruch says: "If laws deliberately betray the will to justice – by, for example, arbitrarily granting and withholding human rights – then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character".[3] In his second article, Radbruch, analyzing a new post-war practice of German courts, based on several characteristic judgments, follows his attitude that the idea of legal security has the advantage over unjust or inexpedient laws "unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice".[4] In this way, Radbruch corrected his pre-war standpoint in that part, introducing content element in his theory, by double negative qualification, "intolerable degree" and "equality renunciation".[5]

The Ustasha regime was established on the 10th April 1941, when the armoured units of German Army entered Zagreb. It owed its establishment to its true ideological creator – Nazi Germany. It emulated nazi and fascist order in many ways. It had the leader, Ante Pavelić, its legislation was formed according to the nazi model, it had internal enemies (enemies of the state). The Ustashas operatively launched hostilities against them, almost immediately after proclaiming their state and took over. They represented a kind of avant-garde of the "new world order", since they began the implementation of their "final solution" months before their older

[2] Radbruh personally experienced that horror since he was the first Professor to be removed from the University for political reasons, after the establishment of Nazi regime. Not wishing to permanently leave his homeland, he continued to develop his scientific work on the furthest margin, working in the library. During the war, he suffered the worst personal tragedy, his son was killed in the Battle of Stalingrad, in 1942.

[3] G. Radbruch, "Five Minutes of Legal Philosophy (1945)", *Oxford Journal of Legal Studies* 1/2006a, 14.

[4] G. Radbruch, "Statutory Lawlessness and Supra-Statutory Law", *Oxford Journal of Legal Studies* 1/2006b, 7.

See also B. H. Bix, "Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory", *Rechsteheorie* 37/2006, 140-142.

[5] "Legal character is also lacking in all the statutes that treated human beings as subhuman and denied them human rights, and it is lacking, too, in all the caveats that, governed solely by the momentary necessities of intimidation, disregarded the varying gravity of offences and threatened the same punishment, often death, for the slightest as well as the most serious of crimes. All these are examples of statutory lawlessness". G. Radbruch, (2006b), 8.

German colleagues who needed, by the way, nine years to reach that decision after constitution of the nazi rule.

The figures of victims under the Ustasha's regime, prove an exceptional volume of organized crime. Such scope of terror the ustashas were capable of committing, especially during 1941 and 1942, implied enactment of a whole new legislation that totally deprived numerous population categories, institution of permanent and mobile martial courts network, forming special security units, organization of camp system and railway transport, engaging state apparatus beyond its regular scope of activities, formation of ustasha militia, etc. That mechanism was used with the aim of achieving ethnically clean state, which was the main goal of the Ustasha movement from its very foundation in fascist Italy in 1932.[6] The result of its operations, measured by the number of the converted, imprisoned, deported and killed Serbs,[7] Jewish,[8] Roma[9] and disloyal Croats,[10] proves how the Ustasha regime enjoyed the monopoly of physical force. Thus, it could be argued in favour of the thesis that the NDH had all symbols of statehood, that is, that beside the territory and population, it had internationally recognized government that had the power to implement main goals of its politics.[11]

On the other hand, according to the "Radbruch's Formula", it can be easily argued that such system could not have been legal since it renounced the equality to an intolerable degree. That Epigonian variant of the Nazi order fundamentally trampled elementary values of law and morale through its legislation, but a lot more by brutally excercising force even beyond such monstrous legislative framework. Radbruch's post-war conception, that still demonstrates its attractiveness,[12] served as a good meth-

[6] F. Jelić-Butić, *Ustaše i Nezavisna Država Hrvatska 1941–1945*., Sveučilišna naklada Liber – Školska knjiga, Zagreb 1977, 26.

[7] See N. Bartulin, "The Ideology of Nation and Race: The Croatian Ustasha Regime and Its Policies Towards Serbs in Independent State of Croatia", *Croatian Studies Review (Sydney-Split-Waterloo-Zagreb)* 5/2008, 75-102.

[8] See R. Blažević, A. Alijagić, „Antižidovsko i rasno zakonodavstvo u fašističkoj Italiji, nacističkoj Njemačkoj i ustaškoj NDH", *Zbornik Pravnog fakakulteta Sveučilišta u Rijeci* 2/2010, 879–916.

[9] See N. Lengel-Krizman, „Prilog proučavanju terora u tzv. NDH: Sudbina Roma 1941-1945.", *Časopis za suvremenu povijest* 1/1986, 29–42.

[10] F. Jelić-Butić, 26.

[11] T. Marinković, „'Takozvana' Nezavisna Država Hrvatska", *Pravni poredak Nezavisne Države Hrvatske* (ur. B. Begović, Z. Mirković), Pravni fakultet Univerziteta u Beogradu, Beograd 2017, 75–106, T. Jonjić, „Pitanje državnosti Nezavisne Države Hrvatske", *Časopis za suvremenu povijest* 3/2011, 667–698.

[12] I. Vuković, „Poredak zločina – krivično pravo Nezavisne Države Hrvatske", *Pravni poredak Nezavisne Države Hrvatske* (ur. B. Begović, Z. Mirković), Pravni fakultet Univerziteta u Beogradu, Beograd 2017, 145–183.

odological instrument for disputing legality of the Nazi order, as well as its Epigonian variants.

2. FULLER'S CONCEPTION OF THE INNER MORALITY OF LAW

As opposed to the long tradition of the natural law thought, that had its ephemeric reincarnation in the years after the Second World War, concisely personified in "Radbruch's Formula", there is a distinctive conception of a well-known American legal theorist, Lon Fuller. Intuitively, majority of people are not going to perceive the system as legal, which is, according to the essence of its activities, contrary to their moral comprehension. The same idea can also be found in the basis of natural law teachings, personified in the sentence – *Lex iniusta non est lex*. However, the problem of such evaluation of an order lies in the impossibility to determine indisputable critera of that evaluation. If they were really universal, as the followers of natural school claim, then, their opinions would be more or less harmonized and not mutually exclusive, as it often happens.[13] That is why Fuller offered his law theory conception that remains distant from content issues of morale and justice.

From their beginnings, natural law teaching has belonged more to ethics, as a philosophical discipline, than to the science of law. Still, the analysis of legality of the order of the Independent State of Croatia is possible to accomplish without interference in moral conceptions, but only on the grounds of generally accepted, strictly legal values. Therefore, the examination of the NDH legislation may be carried out based on the Fuller's theory from purely legal viewpoint, without resorting to methods and results of other disciplines like historiography, sociology, ethics, psychology, politicology. Based on the principles that legal profession has been building up from its very beginnings, it can be quite precisely determined how much a concrete order complies with the legal notion.

Contrary to the law theorists inclined to natural law reflections, who, based on certain moral standards they declared universal, evaluate law validity and in the content of legal norms discovered its grounds of validity, Fuller set on a different route. That other road meant simultaneous relying on natural law tradition, and at the same time distancing from grounding law validity in its content harmonization with morale. Impossibility to determine undisputable moral criteria of the evaluation of law content, as well as the fact that such evaluation is conducted externally, beyond the frame of the science of law, prompted Fuller to find the criteria

[13] See W. T. Stace, *A Critical History of Greek Philosophy*, Macmillan Press, London 1972, 106-126.

of moral correctness within himself. Anyhow, it is politics which ultimately determines the law content. The questions of dead penalty, eutanasia, progressive taxing, quantity of social benefits, abortion, religious freedom, etc. are the expression of political will and that is why Fuller, for good reasons, believes that they lie beyond the frames of jurisprudence. Nevertheless, it does not mean that the law is morally indifferent. The difference is that its correctness is determined according to the criteria built within the legal profession and not outside of it. That is why the subject of his research is internal, not external quality of a legal order. That particular quality Fuller names the internal morality of law.

Fundamental distinction between traditional natural law approach and that of Fuller's, reflects in the fact that Fuller exclusively engages himself in the issues of institutional and procedural correctness of law, while classical natural law deals with the very content of the law in terms of main goals it desires or needs to achieve, as well as their moral correctness. Fuller claims that internal morality of law is contained in eight requirements a normative order has to fulfill in order to have legal quality, that is, law characteristics, recognized. They are: generality, public promulgation, non-retroactivity, sufficient clarity of rules made, non-contradiction, not asking the impossible, constancy of law and congruence between what written statute declare and how officials enforce those statutes.[14]

Those eight requirements may seem to be fully neutral ethically, at least when it comes to external goals of the law. Still, as Fuller says "the law is a prerequisite of the rule of law",[15] which further implies that the requirements of internal morality of law cannot inherently secure legal order, but they can secure the grounds on which it will be built. They are necessary, but not sufficient requirement for achieving a morally correct order.

According to his opinion, the requests of inner morality of law do not say anything about its substantial goals, but that does not mean that their connection with morale can be disputed. The order based on them, provides to the people certainty and security that they may create permanent identity throughout their life and therefore represent the basic value of predictability, necessary for correct realization of main, substantial goals of the law. In the order where those requirements are fulfilled, one has the possibility to define his/her own, and his or her dignity is guaranteed to, at least, some extent. That implies that internal morality of law has signifi-

[14] L. Fuller, *Morality of Law*, Yale University press, Fredericksburg 1969, 46-91.
[15] *Ibid*., 176.

cant link with and outcome in morale, by very appreciation of human dignity.[16]

3. THE APPLICATION OF FULLER'S MODEL

The analysis based on Fuller's model, shall be directed only to normative system that the ustashas established when they took over in Croatia on the 10th April 1941. Also, the examples from the NDH legislation shall be presented for each of the eight Fuller's requirements, that normative order has to fulfill in order to be considered legal.

3.1. Breach of the first Fuller's requirement – generality of rules

The first Fuller's requirement is generality of rules, which means that the cases are solved based on general rules, and not *ad hoc*. Fuller points out in his book "The Morality of Law" that "the fact is that many legal systems, large and small, suffer grievously from a lack of general principle"[17], which is, he claims, inherent to human race, even to animals.[18] Here is an example of such failure:[19]

LEGAL PROVISION

which extends legal provision as of 19th September 1941

No. CCCVII-1485-Z. p.-1941

§1.

Legal provision about taking over the property of »Serbian institute and institutions« in Hrvatski Karlovci to the ownership of the Independent State of Croatioa as of the 19th September 1941, No. CCCVII-1485-Z. p.-1941, shall extend in whole to the property of »Karlovačka gimnazijska zaklada kuća No. 833 from »Srijemski« Karlovci, as a scholarship trust of Nikola Vasiljković«, registered in the folio No. 903; to the property of »Srpsko pravoslavne« Great Grammar School in Srijemski, now Hrvatski Karlovci, registered in the folio No. 916; to the property Karlovačke gimnazijalne zaklade kuće No. 264 from »Srijemski« Karlovci, registered in folio ul. br. 269; to the property of Gymnasium fond in »Srijemski« Karlovci, registered in folios Nos. 914, 919, 920 i 1637, all in tax municipality of Srijemski, now Hrvatski Karlovci, and to all mobile property of mentioned owners.

[16] J. Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford 2006, 270-271.

[17] L. Fuller, 48.

[18] *Ibid.*

[19] All laws and legal provisions of the NDH are stated according to the official edition *Nezavisna Država Hrvatska – Zakoni, zakonske odredbe i naredbe (knjiga I – L)* (ed. A. Mataić), Tisak i naklada knjižare St. Kugli, Zagreb 1941–1944.

§2.

This legal provision shall become effective on the day of its announcement in Narodne novine, and its enforcement is entrusted with the Minsitry of Education.

Zagreb, 1st October 1941

Poglavnik (the Head)
of the Independent State of Croatia:
Dr. Ante Pavelic, v.r.[20]

The abovementioned example may be individual, but under no circumstance general legal act, that is, the Law.

3.2. Breach of the second Fuller's requirement – Public Promulgation

Public promulgation of general rules that make them accessible to other subjects they refer to, is the second Fuller's requirement. Its disregard is easy to observe in a sequence of legal regulations that came into force even before they were published in "Narodne novine", for example:

Article 5 Legal provisions for Defence of People and the State as of the 17 April 1941: "This legal provision shall enter into force immediately".[21]

Article 11 The Orders about motor vehicles reporting and handover as of the 21 April 1941: "This Order shall enter into force immediately".[22]

Article 3 The Orders about enforcement of Legal Provision on Punishment of Hoarding and Price Increases as of 17 April 1941, brought on 19 April: "This Order shall come into force immediately".[23]

[20] Zakonska odredba kojom se proširuje zakonska odredba od 1941. broj CCCVII-1485-Z.p.-1941: §1. Zakonska odredba o preuzimanju imovine »srbskih zavoda i ustanova« u Hrvatskim Karlovcima u vlastničtvo Nezavisne Države Hrvatske od 19. rujna 1941. broj CCCVII-1485- Z. p.-1941. proteže se u cielosti i na nekretnine »Karlovačke gimnazijske zaklade kuće broj 833 iz »Srijemskih« Karlovaca kao stipendialne zaklade Nikole Vasiljkovića«, upisane u gr. ul. broj 903; na nekretnine »Srpsko pravoslavne« velike gimnazije u Srijemskim sada Hrvatskim Karlovcima, upisane u gr. ul. br. 916; na nekretnine karlovačke gimnazijalne zaklade kuće broj 264 iz »Srijemskih« Karlovaca, upisane u gr. ul. br. 269; na nekretnine Gimnazijskog fonda u »Srijemskim« Karlovcima, upisane u gr. ul. broj 914, 919, 920 i 1637, sve to u poreznoj općini Srijemski, sada Hrvatski Karlovci, te na svu pokretnu imovinu spomenutih vlastnik §2. Ova zakonska odredba stupa na snagu danom proglašenja u Narodnim novinama, a provedba se njezina povjerava ministarstvu nastave.

[21] Čl. 5 Zakonske odredbe za obranu naroda i države od 17 aprila 1941: „Ova zakonska odredba stupa odmah na snagu."

[22] Čl. 11 Naredbe o prijavi i predaji motornih voila od 21. aprila 1941: "Ova Naredba stupa odmah na snagu."

[23] Čl. 3 Provedbene naredbe Zakonske odredbe o kažnjavanju sakrivanju i povisavanja cijena živeža od 17. aprila 1941, doneta 19. aprila: „Ova naredba stupa odmah na snagu."

Unusual urgency is noticeable in the Ustasha legislation, wherefore a great number of published laws became effective immediately, not leaving the inhabitants of the NDH any period of time to be informed about them. In the first law of the NDH, in Article 10 of the Law on the formation of Army and Navy of the NDH, the following reads: "This law shall enter into force on the day of its publication in the "Narodne Novine". The Commander of the whole defence force shall provide, when needed, the authentic law interpretation."[24]

Article 10 specifies that the Law enters into force on the day of its publication in the ustasha official gazette, which is how the last article of the NDH legal provisions usually looked like. Under regular circumstances, the Law provides *vacatio legis* – the period of time during which the law enters into force, starting from the day of its publishment. Some period is left for the interested subjects to get introduced to the provisions of law and adjust to them. When the law enters into force on the day of its publishment, it means that there is the situation which deviates from the regular one, when the urgency is required in order to prevent unwanted consequences or achieve wanted effects. So, on the very same day, on the 10 April 1941, when the formation of the Independent State of Croatia was announced, the first Law of NDH was passed – the Law on the formation of the Army and Navy of the State of Croatia, which was published in the first number of "Narodne Novine" on the following day, wherefore it is obvious that no period of time existed for getting introduced or for the adjustment to the rules made.

3.3. Breach of the third Fuller's principle – prohibition of retroactivity

The third principle is prohibition, i.e., the requirement that rules apply only to future cases. Ustasha legislation is full of examples of violating the prohibition of retroactivity. Even in the legislative provision adopted on 17 April 1941, the departure from the principle of legality was complete. By the legal provision for the defense of the people and the state, the prohibition of retroactivity was violated, as Pavelic used both the present and the past tense ("or has violated"),[25] thereby extending its validity to a period

[23] Čl. 10 Zakona o osnutnu vojske i mornarice NDH: „Ovaj zakon stupa na snagu danom proglašenja u 'Narodnim Novinama'. Zapovjednik cijele obrambene snage davat će po potrebi autentična tumačenja zakona."

[25] "Anyone who in any way violates or has violated the honor and vital interests of the Croatian people or in any way jeopardizes the survival of the Independent State of Croatia or state authorities, even if the act remains only an attempt, shall be considered guilty of the crime of high treason."

before its adoption. Second, due to its extreme vagueness, this legal provision could not represent any guidance for the residents of the Independent State of Croatia in their behaviour. Phrases like "anyone who in any way violates," "the honor of the Croatian people," "the vital interests of the Croatian people," "anyone who in any way jeopardizes," "the survival of the NDH," are, to put it simply, maliciously and not particularly imaginatively concocted clichés under which any human behaviour could be subsumed, making the Ustashe the entire population of the NDH potential perpetrators of the crime of high treason.

Among the plethora of examples, there are also those that are almost banal. For example, Article 49 of the School Disciplinary Regulations for students of commercial academies, two-year commercial schools, commercial-maritime academies, Women's professional teaching and professional domestic teaching schools, as well as all women's professional and domestic schools, as of 1 October 1941, overlooked: "These school disciplinary regulations shall come into force from the beginning of academic year 1941-1942 and thus all existing disciplinary regulations in secondary vocational schools shall cease to be valid."[26] The problem is that these disciplinary regulations for academic year 1941-42 were published in Narodne novine on 21 October 1941, issue 158, when the school year was already well underway, meaning that they retroactively applied.

As an example of disregarding this Fuller's principle, Article 10 of the aforementioned Law on the Foundation of the Army and Navy of the State of Croatia can serve: "This law shall enter into force on the day announcements in the "Narodne Novine". The commander of the entire defence force shall provide, as necessary, authentic interpretations of the law,"[27] which foresees a special kind of retroactivity. Since the interpretation of law is an activity carried out by judges, not lawmakers, this involves retroactive legislation because the legislator can amend the law after it has come into force under the pretext of its clarification. These changes have a retroactive effect, i.e., they apply backward from the moment the law came into force, not from the moment the "authentic interpretation" was given.

[25] Čl. 49 Školskih stegovnih propisa za učenike i učenice trgovačkih akademija, dvorazrednih trgovačkih škola, trgovačko-pomorskih akademija, ženskih stručnih učiteljskih i stručnih kućanskih učiteljskih škola, kao i svih ženskih stručnih i kućanskih škola od 1. oktobra 1941: „Ovi školski stegovni propisi stupaju na snagu od početka školske godine 1941.–1942. i time prestaju vrijedeti svi dosadašnji stegovni propisi u srednjim stručnim školama."

[26] Čl. 10 Zakona o osnutku vojske i mornarice Države Hrvatske: „Ovaj zakon stupa na snagu danom proglašenja u 'Narodnim Novinama'. Zapovjednik cijele obrambene snage davat će po potrebi autentična tumačenja zakona."

3.4. Breach of the fourth Fuller's condition – clarity of enacted rules

Fuller emphasizes that "the desideratum of clarity represents one of the most essential ingredients of legality".[28] He also says that "to put a high value on legislative clarity is not to condemn out of hand rules that make legal consequences depend on standards such as "good faith" and "due care." Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls".[29] Therefore, the idea of the fourth condition is to formulate rules so that the largest number of subjects can understand them, which is contrary to the following examples from NDH legislation.

Article 1 of the Legal Provisions on the Punishment of Hoarding and Price Increases of April 17, 1941: "Hoarding and putting out of circulation of any goods necessary for life are prohibited, as well as the purchase and sale of such goods to an extent exceeding the regular most essential need."[30]

Article 1 of the Legal Provisions on Prohibited and Null Contracts for Prices of Goods and Labor of September 24, 1941: "All agreements and contracts regarding the prices of essential foodstuffs, clothing, or items necessary for life, or regarding the prices and wages for services and labor necessary for the production of all mentioned items or necessary for orderly life are prohibited and nullified if by such agreement or contract those involved in the agreement or contract or that they will not work for such prices."[31]

In addition to a few mentioned examples of highly indefinite and unclear definitions of legal obligations, Ustasha legislation is also full of various other similar clichés such as: "the welfare of the Croatian people," "the liberation of Croatia," "the honor of the Croatian people," "readiness

[28] L. Fuller, 63.

[29] *Ibid*., 64.

[30] Čl. 1 Zakonske odredbe o kažnjavanju sakrivanja i povisivanja cijena živeža od 17. aprila 1941: „Zabranjuje se sakrivanje i stavljanje izvan prometa svake robe neophodno potrebne za život, kao i kupnja i prodaja te robe u mjeri, koja prelazi redovitu najnužniju potrebu".

[31] Čl. 1 Zakonske odredbe o nedopuštenom i ništavom ugovaranju ciena za robu i rad od 24. septembra 1941: „Zabranjuju se i ništavi su svi sporazumi i pogodbe o cienama živežnih namirnica, odjevnih predmeta ili predmeta neobhodno potrebnih za život, ili o cienama i plaćama za službe i rad, koji je potreban za proizvodnju svih spomenutih predmeta ili koji jepotreban za uredan život, ako se tim sporazumom ili pogodbom oni, koji kod tog sporazuma ili pogodbe sudjeluju, obvezuju, da ne će prodavati spomenute predmete izpod tih ciena ili da ne će raditi izpod tih ciena."

to serve loyally," etc., leaving ample room for arbitrary behavior and abuse.

3.5. Breachlation of the fifth Fuller's condition – consistency of prescribed rules

Article 21, paragraph 2 of the Lawyers Act of 17 March 1929, as amended and supplemented on 8 March 1941, and 29 October 1941, states that a lawyer is: "obliged to represent the party who has engaged him in accordance with the law, and to defend the interests of that party against anyone zealously, faithfully, and conscientiously."[32] Contrary to this rule, in a series of legal provisions regulating proceedings before summary courts, a rule is repeated which is in conflict with the previous one: "Proceedings before the summary court are public and oral. The trial before the summary court begins with the oral accusation of the state prosecutor."[33]

Article 1 of the Criminal Code taken from the previous state: "No one shall be punished for an act unless the law, before it was committed, prescribed that it would be punished and how the person committing it would be punished." Article 1 of the Legal Provisions for the Defense of the People and State: "Anyone who in any way violates or has violated the honor and vital interests of the Croatian people or in any way jeopardizes the survival of the Independent State of Croatia or state authorities, even if the act remains only an attempt, shall be considered guilty of the crime of high treason."[34]

Of course, modern legal systems are so extensive and longstanding that it is not uncommon for some legal rules to occasionally collide. Contradictions are resolved according to (often unwritten, but implied) principles of legal profession, such as *Lex posterior derogat legi priori*, or *Lex specialis derogat legi generali*, etc. However, since the legislation of the NDH is full of such examples, it seems that the intention was precisely to create legal contradictions. For example, Article 6 of the Law on the Foun-

[32] Čl. 21, st. 2 Zakona o odvjetnicima od 17. ožujka 1929. s izmjenama i dopunama od 8. ožujka 1941. i od 29. oktobra 1941, određuje da je advokat „dužan zastupanje, koga se primio, vršiti po zakonu i prava svoje stranke braniti protiv svakoga revnosno, verno i savesno."

[33] "Postupak pred prijekim sudom je javan i usmen. Rasprava pred prijekim sudom počinje usmenom optužbom državnoga tužitelja."

[34] Čl. 1 KZ-a: „Niko ne može biti kažnjen za delo, za koje nije zakon, pre nego što je učinjeno, propisao da će se i kako će se kazniti onaj koji ga učini". Čl. 1 Zakonske odredbe za odbranu naroda i države: „Tko bilo na koji način povrjedi ili je povrjedio čast i životne interese hrvatskog naroda ili na bilo koji način ugrozi opstanak Nezavisne Države Hrvatske ili državne vlasti, pa makar djelo i ostalo samo u pokušaju, čini se krivcem zločinstva veleizdaje."

dation of the Army and Navy of the Independent State of Croatia clearly states that: "All previous military regulations that were valid in the Kingdom of Yugoslavia [...] to the extent that their structure is not contrary to the state of Croatia and this law, remain in force until amended"[35], only to immediately in Article 7 once, and in Article 8 twice, provide: "regardless of previous regulations."

3.6. Breach of the sixth Fuller's condition – prohibition of norming behavior that is impossible to comply with

LEGAL PROVISION

on the Expansion of Literacy in the Population and the Maintenance of Literacy Courses

§1.

All illiterate Croats in the Independent State of Croatia, who are exempt from attending regular public school according to the law on public schools due to their age, but are mentally and physically capable and not older than 50 years, must learn to read and write within 6 years. This duty is considered honorable and national.

§ 2.

An illiterate person is also considered to be someone who has completed a part of public school, or who has not completed a literacy course completely, and has consequently forgotten how to read and write.

§ 3.

The illiterates, as envisaged in §1, will be taught in literacy courses. Attendance is mandatory. Unjustified absences will be punished according to the law on public schools. [...]

In Zagreb, on September 11, 1941

Poglavnik

of the Independent State of Croatia:

Dr. Ante Pavelić[36]

[35] Čl. 6 Zakona o osnutku vojske i mornarice Države Hrvatske: „Svi dosadašnji propisi, koji su važili u Kraljevini Jugoslaviji […] u koliko nisu protivni ustrojstvu Države Hrvatske i ovom zakonu, ostaju na snazi dok se ne izmene."

[36] Zakonska odredba o širenju pismenosti u narodu i održavanju tečajeva za nepismene, čl. 1: „Svi nepismeni Hrvati i Hrvatice u Nezavisnoj Državi Hrvatskoj, koji su po zakonu o pučkim školama oslobodjeni od polaženja redovite pučke škole poradi svoje dobi, a sposobni su duševno i tjelesno i nisu stariji od 50 godina, moraju u roku od 6 godina naučiti čitati i pisati. Ova dužnost smatra se častnom i narodnom". Čl. 2: „Nepismenom smatra se i ona osoba, koja je svrsila jedan dio pučke škole, ili koja nije podpuno svršila tečaj za nepismene, pa je poslie toga zaboravila čitati i pisati." Čl. 3: „Nepismeni, predvidjeni u § 1.,

Likewise, in Article 1 of the School Disciplinary Regulations for students of commercial academies from October 1, 1941: "Students of vocational schools are obliged to behave in school and outside of school in such a way that their enthusiasm for everything beautiful and good can be inferred from their behavior. Youth must be aware of their future role in the Croatian nation, in their Independent State of Croatia. Every advice and regulation of the school authorities will be welcomed with an open heart and will thus enable proper school work and proper order as a prerequisite for successful teaching. [...]."[37]

3.7. Breach of the seventh Fuller's condition – constancy of laws over time

An excellent example of disregarding the seventh Fuller's requirement is provided by the Law on the Oath of Loyalty to the State of Croatia, which was enacted by Slavko Kvaternik on behalf of the Poglavnik in the early hours of the NDH. In Article 5, it is provided: "For public notaries: I swear to Almighty God that I will be faithful to the State of Croatia and to the Poglavnik, as the representative of its sovereignty, that I will respect its constitutional provisions and laws, and that I will faithfully, accurately, and conscientiously perform my duties as a notary public according to the laws and legal provisions. So help me God!"[38] Just a week later, in the official gazette of the NDH, public notaries could read the following:

poučavat će se u tečajevima za nepismene. Polazak tečaja je obvezatan. Neopravdani izostanci kaznit će se po zakonu o pučkim školama. [...]"

[37] Čl. 1 Školskih stegovnih propisa za učenike i učenice trgovačkih akademija od 1. oktobra 1941: „Učenici i učenice srednjih stručnih škola dužni su se u školi i izvan škole vladati tako, da se iz vladanja može zaključiti na njihov polet i oduševljenje za sve, što je lijepo i dobro. Mladost mora biti svijesna svoje buduće uloge u hrvatskom narodu, u svojoj Nezavisnoj Drzavi Hrvatskoj. Svaki savjet i propis školskih oblasti primat će otvorena srca i na taj način omogućit će pravilan školski rad i valjan red kao preduvjet za uspješnu nastavu. [...]."

[38] Čl. 5 Zakona o prisezi vjernosti Državi Hrvatskoj: „Za javne bilježnike: Prisižem Bogu Svemogućemu, da u Državi Hrvatskoj i Poglavniku, kao predstavniku njenog suvereniteta vjeran biti, da u njene ustavne odredbe i zakone poštovati, da ću kao javni bilježnik vršiti svoju dužnost po zakonima i zakonskim odredbama vjerno, točno i savjestno. Tako mi Bog pomogao!"

MINISTRY OF JUSTICE

Number: 19180-1941.

Upon the proposal of the Minister of Justice, I prescribe and proclaim

LEGAL PROVISION

on the abolition of notary public services

1. Notary public services are abolished, and the Law on Notaries Public of September 11, 1930, with all its amendments and supplements, is hereby repealed.

2. All public notaries are required to submit all their notarial documents, registers, and seals for safekeeping to the competent district court within eight days after the entry into force of this Legal Provision, as well as for depositing with the court and cashing by the parties, deeds, and items of value. The competent judge shall inform the parties about the deposit.

3. The implementation of this Legal Provision is entrusted to the Minister of Justice.

4. This Legal Provision shall enter into force on the day of its publishment in the „Narodne Novine" and on that day all regulations contrary to this Legal Provision shall be repealed.

Zagreb, April 18, 1941.

Poglavnik of the Independent State of Croatia:

Dr. Ante Pavelić.[39]

3.8. Breach of the eighth Fuller's requirement – congruence between the law as declared and as applied

The final Fuller's requirement relates to the effectiveness of the legal order as a measure of the relationship between prescribed rules and their actual implementation. The rules of NDH legislation expressed the basic political ideas of that movement, which undertook to solve the Croatian

[39] Zakonska odredba o ukidanju javnog bilježništva čl. 1: „Javno bilježništvo se ukida, a Zakon o javnim bilježnicima od 11. rujna 1930. godine sa svim njegovim izmjenama i dopunamastavlja se izvan snage." Čl. 2: „Svi javni bilježnici imaju predati sve svoje javnobilježnicke spise, registre i pečate radi čuvanja nadležnom kotarskom sudu u roku od osam dana nakon stupanja na snagu Zakonske odredbe, a isto tako radi stavljanja u sudbeni polog i gotovinu stranaka, isprave i predmete od vrijednosti. Nadležni sud će o sudbenom pologu obavijestiti stranke." Čl. 3: „Provedenje ove Zakonske odredbe povjerava se Ministru pravosudja." Čl. 4: „Ova Zakonska odredba stupa na snagu danom proglašenja u „Narodnim Novinama" i tim danom se stavljaju izvan snage svi propisi, koji su protivni ovoj Zakonskoj odredbi."

issue in a hitherto unknown manner, resulting in tension between proclaimed rules and the actual situation in the NDH. As the question of the effectiveness of the NDH regime is too extensive, only a rough overview will be provided here.

Like the Nazis, the Ustasha authorities aimed to implement a final solution to the Serbian question by extreme methods. However, significant differences emerged because the Ustasha leadership neither had the same power as the Third Reich, nor were all parts of the Ustasha organization and state structures as robust and coordinated. Above all, proportionally speaking, there were many more Serbs in the territory of the NDH than Jews in the Third Reich, and many lived in concentrated areas. After the initial pogroms, the trust between Serbs and the NDH authorities was permanently shattered.[40] Fleeing from rampant terror, they quickly began to offer organized resistance, and the first partisan and Chetnik groups were formed. Since the norms of NDH legislation, and especially their implementation by Ustasha authorities, did not ensure the survival of a large number of people but actually jeopardized their existence, those affected had no reason to respect such rules anymore. In those parts of the NDH where the concentration of those whose lives were endangered was large enough, the motive for survival not only influenced the refusal to obey laws and authorities of the NDH but also led to the formation of a new order to ensure that survival. This is the key to understanding why effective control of the territory by the NDH authorities gradually diminished over time.

4. CONCLUSION

Based on the conducted exemplary analysis, it can easily be determined that, from the perspective of Fuller's theory of internal morality of law, the NDH regime cannot even conditionally be called legal. From the above examples (abundant in NDH legislation), it is clear that this regime did not fulfill the formal conditions to be considered legal. Countless cases

[40] In the report of the German general Hefner dated August 7, 1941, it was written: "Since the Serbian population, absolutely the largest, was exposed to nightly bandit and executioner attacks by the Ustashas, it was driven from its villages into the forests, where there are no conditions to sustain for a longer period, it was necessary to resist force, which is now being attempted to suppress with the pretext of a supposed Serbian uprising. It is not about Serbs fighting against the Croatian state, nor are they either Chetniks or communists, but simply persecuted people who, driven to desperation, would rather die with a weapon in hand, even if it were just a piece of wood or stone, which was indeed the case during the last battles around Krupe, than to be slaughtered like cattle from night to night, or to starve to death in the forests". V. Kazimirović, *NDH u svetlu nemačkih dokumenata i dnevnika Glez fon Horstenau 1941-1944*, Nova knjiga – Narodna knjiga, Beograd 1987, 112.

were not resolved based on general rules, but rather *ad hoc*. Additionally, although legal provisions were published in the "Narodne novine", they were not accessible to the majority of subjects, and even if they were, no time was given for interested parties to align their actions with them. Furthermore, the prohibition of retroactivity was grossly violated throughout the existence of the NDH. The rules were generally unclear and demanded behaviours that were difficult to ascertain. As already mentioned, there existed a contradiction between formal rules, as well as a lack of congruence between the law as proclaimed and its actual application. Therefore, the NDH regime, from Fuller's perspective, does not fulfill any of the 8 requirements of the internal morality of law. And for that reason, its legal character must be challenged.

Today, modern natural law theory has moved considerably away from these murky questions of determining the legality of a certain regime. This is easily understandable when considering the context in which contemporary natural law was developed, namely the regular framework of functioning of a legally regulated, liberal-democratic state in which its most prominent representatives operate. In that regard, they have relativized the traditional stance of *lex iniusta non est lex* as excessive, emphasizing the thesis that laws that are not in accordance with justice in their content are still laws provided they are enacted in a predetermined manner, regularly applied by the courts, and commonly referred to as laws.[41] Such reasoning is appropriate for legal systems that realize values such as legal security, certainty, safety, political and other equality, etc. On the other hand, such developed concepts prove to be unsuitable models for assessing the legality of regimes such as the Ustasha regime in the NDH. It is precisely for this reason that Fuller's peculiar approach, rooted in the heritage of the basic tenets of the legal profession developed over the past two and a half millennia, reveals a kind of enduring charm and appeal.

[41] J. Finnis, *ibid*., 363-366. L. Weinreb, "The Moral Point of View", *Natural Law, Liberalism and Morality* (ed. by R. George), Oxford University Press, Oxford 2002, 195-209.

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ФУЛЕРОВА ТЕОРИЈА НА ДЕЛУ – АНАЛИЗА ЗАКОНОДАВСТВА НЕЗАВИСНЕ ДРЖАВЕ ХРВАТСКЕ

Сажетак

Утврђивање моралности неког правног поретка, у крајњој линији, није непосредан предмет правне науке, већ етике. Анализу правности усташког поретка могуће је зато спровести без преиспитивања његових моралних претпоставки, искључиво на основу општеприхваћених, строго правних вредности, дакле, са једног, чисто правничког становишта. Без посезања за методама и резултатима других дисциплина попут историографије, социологије, етике, психологије, политикологије итд, већ само на основу појмова и вредности које је правничка струка изграђивала од када и сама постоји, може се прилично прецизно одредити колико неки конкретан поредак одговара појму правног. У том погледу, веома употребљиву и зато веома широко прихваћену концепцију, понудио је чувени амерички теоретичар права, Лон Фулер и она ће ове бити искоришћена као основ анализе. Фулер је извршио отклон од заснивања важења права у његовој садржинској усклађености с моралом, према формули *lex iniusta non est lex*. Немогућност одређивања неспорних моралних критеријума процене садржине права, као и чињеница да се таква процена врши споља, ван оквира правне науке, понукала је Фулера да критеријуме моралне исправности права пронађе у њему самом. Фулер аргументује да је унутрашња моралност права оличена у осам услова (општост правних правила, забрана ретроактивности, јасност, ефикасност и неротивречност правила итд.) које неки нормативни поредак мора да испуни да би уопште могао да му се призна правни квалитет. Спроведена анализа показује да систем правила који је важио у Независној Држави Хрватској не задовољава ниједан критеријум Фулерове теорије, те му се мора оспорити карактер правности.

Кључне речи: *Независна Држава Хрватска; Лон Фулер; Унутрашња моралност права; Правни систем.*