

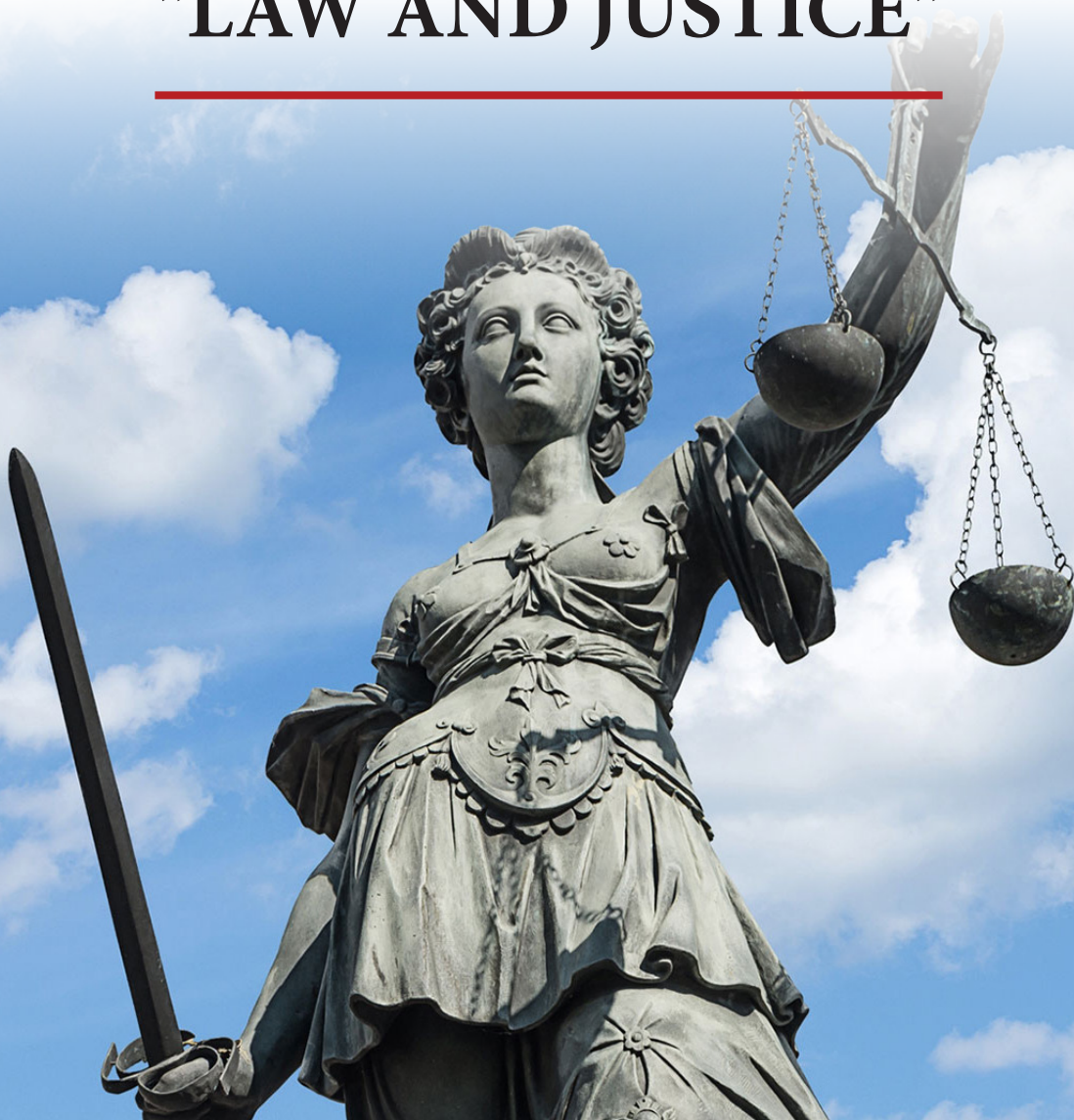


Faculty of Law for Commerce and Judiciary in Novi Sad
University Business Academy in Novi Sad

**FACULTY
OF LAW**
FOR COMMERCE
AND JUDICIARY

XXII International Scientific Conference "Legal Days -
Prof. Slavko Carić, PhD"

"LAW AND JUSTICE"



**XXII International Scientific Conference „Legal days –
Prof. Slavko Carić”
“LAW AND JUSTICE”**

The University of Business Academy in Novi Sad
The Faculty of Law for Commerce and Judiciary in Novi Sad

October 10th and 11th 2025 in Novi Sad

Proceedings of XXII International Scientific Conference

“Legal days – Prof. Slavko Carić”

“LAW AND JUSTICE”

October 10th and 11th 2025 in Novi Sad

Organized by the University of Business Academy in Novi Sad

The Faculty of Law for Commerce and Judiciary in Novi Sad

The Publisher:

The University of Business Academy in Novi Sad

The Faculty of Law for Commerce and Judiciary in Novi Sad

Geri Karolja Street no.1, telephone: 021/ 400 - 499

Web: www.pravni-fakultet.info

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Printed by:

Štamparija FELJTON

Circulation:

100

ISBN 978-86-86121-84-4

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INTRODUCTORY REMARKS

Conference “Legal Days of Prof. Slavko Carić”

Dear colleagues, esteemed guests, dear friends,

In a time that constantly puts us to the test – through global crises, wars, climate change, and technological challenges – our need for dialogue, understanding, and the pursuit of justice is greater than ever. The world is changing faster than ever before, and law, as the foundation of social order, must respond to these changes with courage, wisdom, and responsibility.

And it is precisely for this reason that, for the twenty-second time, we gather at the Faculty of Law for Commerce and Judiciary in Novi Sad, to jointly consider the most pressing issues of legal science and practice. This year, 51 papers will be published in the proceedings, with a strong international presence – we have researchers from 13 countries from abroad who contributed their work, ideas, and experiences. This number is not just a statistic, but proof that something much greater than a scientific platform has been built here over the years: friendships, trust, and a shared vision of a better world.

The international cooperation we foster at this conference is not only academic – it is humanistic. At a time when borders are once again closing, and dialogue often gives way to confrontation, we show here that another way is possible. That we can talk, listen, learn from each other, and build bridges that last.

The theme of this year’s conference reflects current challenges and the need for innovative approaches in law. The submitted papers, which have undergone rigorous and independent reviews, testify to the depth and breadth of legal thought developed here. I am convinced that the discussions ahead will be inspiring, stimulating, and beneficial for the wider academic community.

As President of the Scientific Committee, I wish to express my sincere gratitude to all participants – to those who have been with us for years, as well as to those joining us for the first time. Your presence is more than participation: it is confirmation that together we can create a space for science, reason, and humanity.

Special thanks are owed to the Provincial Secretariat for Science, which once again this year recognized the importance of the conference and supported its organization. Thanks also to my colleagues, who selflessly worked on all aspects of preparation – from logistics to communication – and without whom this event would not have been possible.

To all of you who will leaf through the pages of this proceedings volume, I wish that you may find in them new ideas, answers, and inspiration for further work. May this conference serve as a reminder that, despite all challenges, hope does not die – it lives in knowledge, cooperation, and friendship.

Welcome to Novi Sad, welcome to the “Legal Days.”

Chair of the Scientific Committee

Novi Sad, September 14, 2025

Prof. Milan Počuča, PhD

RULE OF LAW

UDC:347.6:347.95:364-787(497.11)

DOI: 10.5937/PDSC25017S

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FAMILY DISPUTES AND SPECIALIZED COURTS

Abstract:

The authors of this paper have been advocating for the expansion of the network of courts in the Republic of Serbia for a long time. In a large number of published professional papers, they advocate the introduction of specialized (special) courts for resolving disputes in family law matters. Disputes in this matter cannot be treated equally with disputes in other areas of law. It is impossible to compare the time frame for resolving, for example, child support with unpaid loans, construction contracts, property disputes, etc. In this paper, the authors emphasized the importance of special education for judges, the role of mediators, as well as the indispensable role and importance of social work centers. Education and motivation of judges working in these courts, as well as the introduction of juries in resolving disputes, appear to be a necessity. However, one of the most important proposed amendments would be the one that would allow such courts to resolve multiple disputes simultaneously, i.e., according to the authors, special provisions of the Family Law should regulate the obligation of judges to combine multiple legal protections in the same case, and to make multiple substantive decisions if the conditions are met.

Keywords: *Special courts, Mediation, Social Work Center, guardianship authority, education of judges.*

1. INTRODUCTORY NOTES

The authors of this paper have been advocating for the expansion of the network of courts in the Republic of Serbia for a long time. In a number of published professional papers, the authors advocate the introduction of specialized courts for labor disputes as well as special courts for resolving disputes in family law matters.

- There are a large number of arguments in favor of the formation of special courts for providing family legal protection. This argumentation can of course be divided into issues arising from procedural provisions, substantive legal protection and, of course, issues of the institutional framework for providing protection¹. As is known, in 2005, the court adopted provisions from the Law on Civil Procedure that speak of a special system of providing protection in family disputes. These provisions were transferred to the Family Law of the Republic of Serbia, which was then adopted as a modern and comprehensive law.² This fact, of course, had both good and bad sides. Unfortunately, over time, the provisions on family law protection have “drowned” into the regular system of protection in civil matters, and in practice, there is almost no difference between property disputes, property disputes or disputes from the protection of the rights of members of the family household. It is also not entirely clear why the provisions of the Law on Extra-Contentious Procedure, which are very important and relate to crucial issues in family law protection (underage marriage, extension of parental rights,³ deprivation of legal capacity, etc.), are still in extra-contentious matters and are resolved in a different legal regime.⁴ Also, the enforcement of decisions in this matter has been retained in the sphere of classical enforcement proceedings⁵, where very often in practice, delicate disputes in this area are not resolved adequately. We must also highlight a special argument related to the necessity of special education for judges dealing with this matter. In our opinion, this is a very delicate area that involves knowledge in the fields of: psychology, social policy, basic knowledge of medicine (psychiatry), etc. We would also mention as one of the arguments the neglect of the jury as a special institutional protection in various types of disputes. In this area, it seems to us that the voice of the people - the jury - is more than necessary. We cannot help but highlight the principles of procedure related to economy and efficiency, which are of vital interest in this area. For example, a child support lawsuit that lasts several years loses all meaning. We have left an argument for the very end that seems crucial to us. For completely unclear reasons, although it is not prohibited even now, judges very rarely (almost never) combine different procedures. For example, a criminal judge⁶ who is completely clear that the defendant caused the damage, makes a stereotypical decision by which he refers the injured party to litigation, although he could easily decide on a property claim. In family law protection, the necessity of various combinations of procedures is actually imperative, and this seems to us to be the basis from which we will start in the argument for the formation of special courts for family law protection. In order to adequately address this issue, we will briefly recall the historical and comparative law presentation of the usual court networks in countries and in our country.

1 Šarkić N, Počuča M, Porodično pravo i porodično pravna zaštita, deveto izdanje, SG, Beograd, 2023;

2 Bojević Z, Porodično pravo, Kragujevac, pp. 219;

3 Cvejić, Jančić O, Porodično pravo, roditeljsko i starateljsko pravo, Novi Sad, 2000, pp. 89

4 Đorđević, K., 2019. In preparation for amendments to the Family Law. Available at: <https://www.paragraf.rs/dnevne-vesti/130919/130919-vest10.html> 09.06.2025

5 For more information on the legal institute of valorization in enforcement proceedings, see: Šarkić, N. (1991). Izvršenje sudskih odluka u sporovima iz porodičnih odnosa, Socijalno pravo, Vol. 6, No 15, pp. 51-60.

6 Krivični zakonik, Sl. glasnik RS, br. 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35

2. TYPES OF COURTS

In legal theory and in comparative law solutions, we can find two common divisions of courts. The first division deals with state and non-state courts. The second division deals with courts of general jurisdiction (regular courts), and courts of special jurisdiction (specialized courts).

2.1. State courts

As the word itself says, these are courts organized by the state. The Constitution of the Republic of Serbia, in its Article 141, establishes that judicial power in the Republic of Serbia belongs to courts of general and special jurisdiction. The establishment and organization of jurisdiction, the structure and composition of courts are regulated by law. By courts of general jurisdiction, we mean two points: basic courts (formerly municipal); High Court (which did not previously exist), Courts of Appeal (formerly district courts); and the Supreme Court (formerly Supreme, then Supreme Cassation, and now again the Supreme Court of Serbia) as the highest judicial body in the Republic of Serbia. As specialized courts, our Constitution recognizes the Administrative Court (one for the entire territory of the Republic of Serbia), Misdemeanor Courts (which are the most numerous) and the Appellate Misdemeanor Court as the second instance and competent for the entire Republic. The Constitution also recognizes both Commercial Courts and the Commercial Court of Appeal.

2.2 Non-state courts

These are courts with a very long tradition in our country. In different periods of time, they even had a dominant role in relation to state courts. Today, when we talk about non-state courts, we primarily think of arbitrations. Arbitrations appear in the field of commercial law: Foreign Trade Arbitration at the Serbian Chamber of Commerce is an arbitration for resolving commercial disputes within the Republic of Serbia. They are also arbitrations that regulate issues of collective disputes between workers and employers in connection with strikes or the conclusion of collective agreements. Historically, various variants of non-state courts were very present in our country, such as: Peace councils, courts of good people, commercial (or trade) courts. In the period from 1974 to 1991, in the territory of the former SFRY, there was a network of so-called self-governing courts. These were courts of associated labor, arbitration, peace councils, correctional courts, other self-governing courts. In the field of family law protection, peace councils were mainly mentioned, which resolved disputes between family members, inheritance disputes, disputes within family cooperatives, disputes between two or more families regarding blood feuds, compensation for damages due to a failed marriage, dishonor of the bride, etc.

2.3. Courts of general jurisdiction

As already mentioned, this second division refers only to the substantive activity of the courts. Thus, courts of general jurisdiction, as a rule, carry out the greatest activity in the sphere of criminal law matters (juvenile delinquency, war crimes, high-tech crime...), civil matters, non-civil matters, enforcement matters...

These courts are divided into three levels, with the proviso that according to our current Law on the Organization of Courts, Basic Courts are always first instance, Appellate Courts are always second instance, and higher courts in disputes of greater value or for serious criminal offenses, decide as first instance courts (for offenses where a sentence of more than ten years in prison is threatened and for property disputes in disputes of greater value over a certain property threshold).

3/4 Currently, our legal system recognizes one Administrative Court, Misdemeanor Courts, and Commercial Courts. After World War II, working as specialized courts, we also had military courts that tried various forms of illegality of persons who were in the status of officers, non-commissioned officers and civilians in the service of the JNA or persons who were serving in the military.

3. CHARACTERISTICS OF FAMILY COURTS

3.1 Introductory notes

At the very beginning of this crucial argument, we would like to emphasize that this is a proposal that is exclusively the result of the authors' deliberations and their long-term dealing with this matter. The proposed solutions are known in comparative law and mentioned in legal theory. Our desire was to summarize in this paper only the argumentation that is "FOR" the introduction of these courts. Therefore, we see family courts (hereinafter referred to as FC) as state courts established by law. This means that no special creative activity would be necessary. These courts could be formed as special courts or as specialized panels within the High Courts. Although at first glance it seems that the first variant with the formation of special courts is more expensive and complicated, it would be incomparably more effective. The argumentation why we advocate for this type of court formation will be clearly seen in the following text, but in our opinion, the full effect can only be achieved if special Family Courts are formed along with the formation of a single Republic Court of Appeal for Family Disputes. It seems that any other solution would be a compromise and therefore insufficiently effective.

3.2. Actual jurisdiction of Family Courts

This is the crucial part of our proposal. We advocate that special provisions of the Family Law⁷ regulate the obligation of judges to combine multiple legal protections in the same case, and to make multiple decisions on the merits, if, of course, the conditions for this are met. At the very beginning, we already said that this possibility exists in our regulations, but that it is almost never applied. To clarify this situation, we will give a few examples:

- When a criminal judge conducts proceedings in which one of the parents has expressed brutality towards children⁸ (gross domestic violence⁹, sexual abuse, gross neglect of family members, etc.), he must not limit himself to imposing a criminal sanction on the

7 Porodični zakon, Službeni glasnik RS, br. 18/2005, 72/2011 – dr. zakon i 6/2015.).

8 Antović, A. R., Stojanović, J. (2017). Sudsko-medicinske karakteristike porodičnog nasilja. Srpski arhiv za celokupno lekarstvo, 145(5–6), pp. 233.

9 Krstinić D, Vasiljković J. Oblici nasilja u porodici. Pravo - teorija i praksa. 2019;36(7-9):67-81.

perpetrator¹⁰. It is the judge's obligation to resolve the problem as a whole, to the extent possible. For example, it can issue a judgment on divorce; a judgment on the deprivation of parental rights of such a parent; a decision on removal from the family and a ban on access; a decision on the payment of maintenance.¹¹ or at least a temporary measure on the obligation to pay maintenance until the situation is clarified.

- In a divorce proceeding, the judge finds that one or both parents have behaved inappropriately towards a minor child or children¹². According to our concept, in addition to issuing a judgment on divorce, the issue of, for example, complete or partial deprivation of parental rights, appointment of guardians for children, involvement of guardianship authorities in the procedure, protection of property relations, etc.

In disputes when, for example, a decision is made on divorce or deprivation of parents of parental rights, the court will be obliged to regulate the manner of implementation of such decisions.¹³ It is widely known that the biggest problem of the Serbian judicial system in civil matters is the inadequate implementation of decisions in the field of family law protection.¹⁴ This is primarily contributed to by the Law on Enforcement and Security, and the catastrophic provisions of this Law, which must be urgently reduced.¹⁵

Our legal system recognizes that commercial courts ensure the enforcement of decisions of commercial courts. It is indeed unclear why disputes in commercial law matters are more significant than disputes in family law matters. It seems that it would be incomparably more logical for decisions on enforcement to be entrusted to the enforcement of the FC. Of course, when it comes to monetary claims (e.g. maintenance of spouses, children or relatives), the general rules on enforcement proceedings can be applied with ease.¹⁶ However, when it comes to disputes about the surrender or removal of a child¹⁷, regulating the way of seeing the child, possible disputes from the alimony fund¹⁸¹⁹²⁰ It seems that it would be much more effective if the FC itself were to implement the security of these decisions.

- The Family Court would also have jurisdiction in the field of criminal law (criminal and misdemeanor liability), in the following cases: juvenile delinquency, juvenile

10 Zakon o izmenama i dopunama Krivičnog zakona RS, Sl. glasnik RS, br. 10/02. This code introduced the criminal offense of domestic violence into our legislation for the first time.

11 More at: Draškić, M. (2014). Pravo na regres roditelja koji je sam izdržavao dete, U: Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova: knj. 4 (pp. 25-35), Beograd: Pravni fakultet.

12 Krstinić, D., Počuca, M., & Sančanin, Đ. (2023). Nasilje u porodici - pozicija deteta u nasilju koje trpi roditelj žrtva. Pravo - teorija i praksa, 40(2), 1-16.

13 More at: Šarkiće, N. & Nikolić, M. (2009). Komentar Zakona o izvršnom postupku, Beograd: Službeni glasnik.

14 Mandić I, Porodično pravo, SG, Beograd, 1999.

15 Đorđević, K., 2019. U pripremi izmene i dopune Porodičnog zakona. Available at: <https://www.paragraf.rs/dnevne-vesti/130919/130919-vest10.html> 09.06.2025

16 Šarkiće, N. (2016). Građanski izvršni postupak, Beograd: Pravni fakultet Univerziteta Union

17 Jaњић, Комар, Обретковић М, Права детета, Правни живот, Београд, 1996, pp. 29.

18 More at: Novaković, U. (2016). Alimentacioni fond prema Prednacrtu Građanskog zakonika Srbije, Pravni život, Vol. 65, No. 10, pp. 103-122.

19 More at: Šarkiće, N., Krstinić D., Počuca M., (2023) Neophodnost uvođenja alimentacionog fonda u našem pravnom sistemu. U: Aktuelna pitanja savremenog zakonodavstva i pravosuđa : zbornik radova sa Savetovanja pravnika, Budva, 2-6. jun 2023. godine. Udruženje pravnika Srbije

20 Narodna Skupština Republike Srbije, usvojila je Zakon o alimentacionom fondu 16.06.2025.godine.

perpetrators under the age of 14 (when forms of child protection, enhanced supervision or placement in specialized institutions would be decided in cooperation with guardianship authorities and health institutions).

- This court would also have jurisdiction when children are victims of violence (by parents or relatives, neighbors or godparents, sports workers, teachers, peers, etc.)²¹.

- In criminal matters, the possibility of combining decision-making methods would also be expressed. For example, a judge who found that a sports worker or educator had behaved inappropriately in a private school, sports club or organization would, in addition to deciding on criminal liability, also make a decision on, for example, suspending the operation of that school, banning the performance of activities for a certain period of time, informing the public about inadequate conditions, etc.

- In our opinion, this court would also be competent for all disputes in the field of non-contentious matters related to family law protection (marriage permit, extension of parental rights, deprivation of legal capacity, declaring a missing person deceased or establishing the fact of death) and in this type of matter, there can often be a combination of different methods of establishing facts, but also a broader authority to make a decision. For example, in our opinion, if the judge, in the procedure for granting a marriage permit, were to determine that it was: the sale of a bride, an arranged marriage, a fictitious marriage that would serve to commit various criminal offenses (prostitution, begging, theft, etc.), in addition to deciding negatively on the submitted request, he could also take certain measures against the perpetrator or organizer of the illegal actions. Aware of the fact that this solution is quite radical, we advocate for a broader discussion about the pros and cons of this and other solutions.

3.3. Local jurisdiction

We advocate the most liberal possible solutions in terms of territorial jurisdiction, which would include: the jurisdiction of the court where the crime was committed, where the family members lived, where they stayed, where they now have their residence or abode, or where the damage occurred. It is quite understandable that a court with such prerogatives must be completely open from the standpoint of territorial jurisdiction, and that it should actually serve the simplest exercise of rights. Here we refer to the principle of economy (to achieve justice with the least amount of resources invested), and the principle of efficiency (to achieve effective protection in the shortest possible time)²².

3.4. Judges in the family court

There is no doubt that the reform of the judiciary in the area of family law protection must first be achieved through differently educated judges who are specially prepared for this. In addition to general knowledge of the law in the area they will encounter (criminal law, family law, inheritance law, property relations, etc.), judges who will work in these courts must have special education in the areas of: psychology, the basics of medicine, defectology and, of course, social protection. Everyone who has dealt with family law protection at least

21 Pejak-Prokeš, O. (2006). Nasilje u porodici. Glasnik Advokatske komore Vojvodine, 78(1–2), pp. 49

22 More at: Šarkić, N. & Počuča, M. (2020). Porodično pravo i porodično pravna zaštita

minimally knows that the legal aspect is applied only in the basis of decision-making. Various other subjects related to social structure, nationality, cultural understandings of things, religious understandings, customs and customary norms, educational and upbringing level of family members, economic circumstances, traditional understandings of family relations, etc. have an incomparably greater influence on decision-making.²³ This is the reason why a special department for family law protection should be prepared within the Judicial Academy, which would, in cooperation with some of the Law Faculties, develop special studies (specialist, master, doctoral) for this area. The fact that the judges of this court would deal with criminal law as well as complete civil, non-civil and enforcement proceedings implies a comprehensive and broad knowledge of law. However, these judges must be additionally trained and monitor other social phenomena related to a particular disputed relationship.

3.5 Jury

On several occasions, the authors of this paper have expressed their firm position on the necessity of juries in our legal system. For years, we have been criticizing the partial or complete minimization of juries in various types of disputes. The jury is the voice of the people. The jury is the participation of citizens in decision-making. The jury is the public at work. The jury is of exceptional importance in the field of family law protection. Of course, the same rules as for judges will apply to jurors who will be selected for the needs of the PS. They must be specially prepared and trained. They must come from environments in which they have encountered problems of family law protection²⁴ (teachers or professors, educators, psychologists, special education teachers, sports or cultural workers, etc.). Their life experience must be important for resolving these disputes.

3.6. Mandatory participation of social work centers

One of the most significant innovations in this proposal is the fact that mandatory participation in the procedure must also be provided to social work centers²⁵ – guardianship authority (this solution was known in the period 1975 – 1990, during the existence of the courts of associated labor. Namely, the then social ombudsman of self-government as a specific ombudsman for labor disputes, was a mandatory participant in all proceedings before the courts of associated labor, so the DPS received every proposal for conducting a court dispute, first-instance and second-instance decisions. It could independently take part in the procedure, file an appeal, or propose a peaceful resolution of disputes).

This solution is, in our opinion, more than necessary. The reason for this is the fact that a huge number of court disputes (practically all) also involves an analysis of the social circumstances and circumstances in which the members of the family household who seek legal protection lived or live. The opinion of the center for social work on the causes of the crisis, on the correct decision on future steps that are necessary is the basis for a correct court decision. This further means that the social work center would be involved in each case. After a certain analysis

23 More at: Počuca, M. (2018). Izvršenje odluka u porodičnim stvarima, U: Četrdeset godina izvršnog zakonodavstva u građanskim postupcima : zbornik radova, Beograd: Pravni fakultet Univerziteta Union: Službeni glasnik, pp. 269-279.

24 Duško M, Porodično pravo i prava deteta, Beograd, 2006, pp. 207

25 Šarkić N, Nikolić M, Procesni položaj centara za socijalni rad, ZR, Glosarijum 2009.

of the situation, it would assist the court in finding the most effective solution that would involve not only resolving a particular disputed relationship but also overcoming the causes that led to a particular crisis situation or making it easier to overcome the consequences. The guardianship authority would also participate in monitoring the elimination of the consequences that arose from the disputed relationship, monitor the implementation and execution of the decision, and ensure that a disputed relationship is truly overcome in the best possible way.

3.7. Making a preliminary decision

One of the novelties we propose is the obligation of an individual judge who, immediately upon receiving the initial act (claim or proposal), after careful analysis, would decide on the necessary measures and steps to resolve the specific disputed relationship. If it could be concluded from the initial act that violence is being suffered²⁶, The judge would have to react immediately with a measure to remove the abuser. If it could be determined from the initial act that the family members are existentially threatened, the judge would issue a temporary measure to determine at least the minimum amount of support²⁷. If he were to determine in another way that the health condition or family relations were significantly disturbed, the judge would immediately react with one of the temporary measures or temporary decisions. We know from practice that inadequate and delayed court decisions are completely ineffective. If the maintenance arrives after two or more years, the family will be completely endangered and therefore the existence of the members of the family household²⁸. Inadequate protection in marital relationships leads to a huge number of fatal cases of disturbed relationships (in the first 4 months of 2025, 8 deaths from marital violence)²⁹. Since we have already indicated that our view is that in these courts a panel consisting of one judge and two lay judges would decide. In the second instance, it would be a panel of three judges. Here, an individual judge would immediately issue a preliminary decision (interim measure) and provide valid protection until the conditions for a valid decision are met.

3.8. Amendments to regulations

At the beginning, we already said that an incomplete reform in family law protection was carried out after 2005, when the new Family Law was adopted. Given that the current Family Law already contains provisions on procedural rules, it seems that it would be simplest if this law were further innovated and if provisions relating to organizational issues (the formation of special courts), procedural provisions (the unification of litigious,

26 Protection from domestic violence was achieved by initiating criminal proceedings for one of the general criminal offenses, which, as the Supreme Court itself admits, proved inadequate. More about domestic violence from the aspect of criminal law in: Matijašević-Obradović, J., Stefanović, N. (2017). *Nasilje u porodici u svetlu Porodičnog zakona, Krivičnog zakonika i Zakona o sprečavanju nasilja u porodici*. Pravo – teorija i praksa, 34(4–6), pp. 22–24.

27 Arsić, J. & Panić, M. (2018). *Analiza problema u zaštiti najboljeg interesa deteta u izvršenju sudskih odluka u porodičnim stvarima*, U: *Zbornik stručnih analiza pravnih akata u oblasti ljudskih prava*, Beograd : Kuća ljudskih prava pp. 236.

28 More at: Počuča, M. (2010). *Zakonsko izdržavanje bračnih i vanbračnih partnera*. Pravo - teorija i praksa, Vol. 27, No. 3–4, pp. 79–93.

29 Kelly, J. B., Johnson, M. P. (2008). Differentiation among types of intimate partner violence: Research update and implications for interventions. *Family court review*, 46(3), pp. 476–499.

extra-litigious and executive norms relating to family law protection) were incorporated, and of course substantive provisions that would provide a basis for the actions of judges. There are certainly other solutions that would involve, for example, the adoption of a Law on the Family Court and Proceedings before this court. Such a solution would be even more effective because it would resolve the organizational issue of court formation (bearing in mind the constitutional concept that courts are formed on the basis of law), regulate procedural issues that would imply erasing artificial boundaries between the litigious, extra-litigious and enforcement procedures when it comes to family law protection), and of course regulate substantive legal provisions on the status of judges, their powers, mandatory education, permanent training, the role of the jury, the role and powers of social work centers - as mandatory participants in the procedure, etc. This unified Law would be a beacon of light on how to regulate an area in the right way. It could also serve as the basis for the adoption of the Law on Labor Courts.

4. FINAL CONSIDERATIONS

In our understanding, the argumentation presented regarding the necessity of establishing special courts for family relations is more than clear. Disputes in this matter cannot be treated equally with disputes in other areas of law. It is impossible to compare the time frame for resolving, for example, child support with unpaid loans, construction contracts, property disputes, etc. Education and motivation of judges working in these courts, as well as the introduction of a jury in resolving disputed relations, is more than necessary. However, the most important change seems to be the one that implies that this court would simultaneously resolve multiple disputed relations that were either the initial cause for a certain disputed relationship, or its accompanying phenomenon or consequence.

We also believe that it is extremely important to include social work centers as mandatory participants in this type of dispute. Of course, in those disputes that involve, for example, only: changing the decision on the amount of maintenance, the role of the guardianship authority would not be overly significant. However, in a large number of disputes involving divorce, disturbed relationships, domestic violence, deprivation of parental rights, extension of parental rights, underage marriage, etc. A court decision without the active role of the guardianship authority and their substantiated opinion is unthinkable.

In addition to all the arguments listed so far, for the final consideration we would especially emphasize the possibility of various forms of mediation. This court would have to have a special department of mediators in its composition, which would always operate, regardless of the final outcome of the dispute. An attempt to reconcile spouses, an attempt to reconcile a dispute between parents and children, an attempt to eliminate the causes of divorce litigation or domestic violence (alcoholism, psychiatric illnesses, addictions, etc.) must be the subject of expert analysis. The mediator must try to assess, along with the court's efforts to reach a fair decision, whether there is a possibility of resolving the dispute at least partially or entirely peacefully. All those who have dealt with family law protection know the importance of mediation and the possibilities for this socially beneficial activity to be carried out in the right way. If it is combined with the method of judicial protection, then it can have exceptional effects. Despite the fact that we are aware that such a proposal, at first reading, seems like a utopia, we believe that it would be valuable if, first of all, in the legal and wider professional community, a consensus were reached on the elementary

forms of protection from family relations. This would contribute to creating a certain climate to create the material and technical conditions for the formation of these courts, i.e. an effective mechanism of protection in family law matters. The state of our birth rate, the number of divorces, the number of forms of violence in the family, the percentage of juvenile delinquency, disturbed family values, the disruption of social values affect the general climate and life in a society. The state must create such preconditions that the highest standards of protection are ensured, especially in the area of the family. No one must suffer violence, humiliation or any form of discrimination. We must especially provide this protection to children, elderly parents, single parents, people with special needs, as well as all those whose rights are threatened. We hope that the idea of forming courts for family relations represents at least a small stone in the mosaic of the general improvement of the legal system in the Republic of Serbia.



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PORODIČNI SPOROVI I SPECIJALIZOVANI (POSEBNI) SUDOVI

Abstrakt:

Autori ovoga rada, u dužem vremenskom periodu zalažu se za proširivanje mreže sudova u Republici Srbiji. U većem broju objavljenih stručnih radova, se zalažu za uvođenje specijalizovanih (posebnih) sudova za rešavanje sporova iz porodičnopšravne materije. Sporovi iz ove materije ne mogu se tretirati jednako sa sporovima iz drugih oblasti prava. Nemoguće je da se u vremenski okvir za rešavanje npr. izdržavanja deteta komparacija vrši sa neplaćenim kreditom, ugovorom o gradnji, svojinskim sporovima i sl. U ovom radu

autori su apostrofirali značaj posebne edukacije sudija, ulogu medijatora, kao i neizostavnu ulogu i značaj centara za socijalni rad. Edukacija i motivisanost sudija koji rade u ovim sudovima kao i uvođenje porote u rešavanje spornih odnosa se javlja kao neophodnost. Ipak jedna od najvažnijih predloženih izmena bi bila ona koja podrazumeva da bi ovakvi sudovi istovremeno rešavali više spornih odnosa, tj prema zalaganju auora trebalo bi posebnim odredbama Porodičnog Zakona da se uredi obaveza sudija da u jednom istom predmetu kombinuju više pravnih zaštita, te da donesu više meritornih odluka ukoliko su za to ispunjeni uslovi.

Ključne reči: Posebni sudovi, Medijacija, Cenar za socijalni rad, organ starateljstva, edukacija sudija.

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SOME ASPECTS OF THE CONSTITUTIONAL POSITION OF PARLIAMENTS IN THE POST-YUGOSLAV AREA – COMPARATIVE ANALYSIS

Abstract:

In the states that emerged from the dissolution of Yugoslavia, with the exception of Bosnia and Herzegovina, comparable systems of government have been established, which at a more general level show similarities with other countries of the former socialist bloc. Liberal-democratic concepts, essentially of a parliamentary type, with a more or less strengthened role of the president of the republic, constitute the fundamental framework of government organization in these countries. In Bosnia and Herzegovina, however, the (con) federal and consociational arrangement, as a result of an international peace agreement, has produced an atypical system of government with numerous (semi)presidential elements. This paper will analyze the constitutional position of parliaments in these states, focusing on their structure and composition, competences, and mandates. While constitutional standards and significant similarities can be observed regarding competences – comparable to other parliamentary systems – specific solutions or deviations from standard models often define the character or functionality of a given system and therefore deserve special analysis. Furthermore, there is a noticeable predominance of unicameralism, but also a unique form of bicameralism in Bosnia and Herzegovina and quasi-bicameralism in Slovenia, along with certain differences in terms of composition, election, and dissolution procedures. Through comparative analysis, with appropriate references to standards or solutions in other European countries, we will indicate the degree of similarity in the issues analyzed, their functionality, as well as the specific determinism of those solutions that are unique.

Keywords: *parliament, organization of government, parliamentary system*

INTRODUCTION

In the 1990s, alongside the process of the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the member republics (which gained state independence in 1992 and 2006) underwent a conceptual transformation of their systems of government. Following broader Eastern European processes and changes, the Yugoslav republics replaced the socialist constitutional framework, unity of power, one-party system, delegate electoral model, and self-managed social organization with concepts of liberal-democratic constitutionalism, based on the separation of powers, political pluralism, and direct elections.

However, the absence of parliamentary traditions, rooted political parties, constitutional conventions, and the political culture required by the new concept, along with the legacy of a political order marked by authoritarian elements, resulted in certain modifications or deformations of the declarative commitment to the development of a parliamentary system (politically accountable government and balance of powers). The political circumstances of the time, inherited patterns of earlier periods, and a political culture shaped by crisis and the collapse of the state and its political system were not conducive to the development of parliamentary systems.

When crafting new arrangements, models were at times sought (except in Slovenia) in systems that are theoretically or in practice considered semi-presidential,¹ but not fully so - except in Croatia between 1990 and 2000.² A similar tendency was present in other Eastern European countries as well.³ Although parliamentary-type separation of powers was proclaimed as a constitutional principle, its elaboration leaned toward a stronger role for the head of state as a stabilizing element of power, albeit not to the level of a semi-presidential system (such as in France, Finland, Russia, or to some extent Romania and Poland)⁴, but certainly beyond the standard parliamentary system.⁵ In Bosnia and Herzegovina, however, the Constitution was not the result of a domestic nor democratic constitutional process, as its dissolution occurred amid civil war, but rather of an international agreement in 1995. Although in each of these countries the parliament exercises constituent and legislative powers, political responsibility of the government, and significant appointment competencies, there are also specific differences in seemingly less important issues that affect the functioning of each system or give the constitutional design a particular tone and color.

1 Unlike the semi-presidential system, "the executive branch in a parliamentary system is only formally bicephalous, and in practice essentially monocephalous. This is because the head of state is an ineffective exerciser of executive powers." Rapajić, M. (2016). *Izvršna vlast u polupredsedničkim sistemima*. Doktorska disertacija. Kragujevac: Pravni fakultet u Kragujevcu, p. 46.

2 "In the short history of the constitutionality of the Republic of Croatia, two constitutional forms of government organization were applied: the semi-presidential system from 1990 to 2000 and a version of the parliamentary system introduced by the constitutional changes of 2000 and significantly supplemented by the constitutional changes of 2001, which abolished bicameralism." Smerdel, B. (2010). *Parlamentarni sustav i stabilnost hrvatskog ustava - slijede li nakon predsjedničkih izbora nove promjene ustrojstva vlasti?* (Retrieved on July 1, 2025) from: <https://journals.openedition.org/revus/1128>

3 Kutlešić, V. (2002). *Organizacija vlasti: uporedna studija ustava bivših socijalističkih država Evrope*. Beograd: Službeni list SRJ, p. 200.

4 The founder of the theory of the semi-presidential system, Duverger (1980) points out its key determinants: 1) direct election of the president; 2) significant (independent) powers of the president; 3) parliamentary government (Duverger, M. (1980). A New Political System Model: Semi-presidential Government. *European Journal of Political Research* 8(2), p. 166). Sartori (1994) adds additional principles: direct election is not necessary, but election by parliament is excluded; the head of state, although independent of parliament, cannot govern directly, his will must be accepted and processed by the government; independence of the government from the president; different balances of power within the executive branch, but on condition that there is an "autonomous potential", demarcated competencies between the two components of the executive branch. Sartori, G. (1994). *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*. New York: University Press.

5 In Austria, Ireland, and Portugal, a form of government with strong powers for the head of state, corresponding to a semi-presidential one, has been constitutionalized. However, political practice has been based on the parliamentary principle from the very beginning, which has become a tradition, although political circumstances can be unpredictable. Duverger, M. (1980). *op. cit.*, p. 167.

Since parliament is a classical political body, its organization and competencies are determined by the constitution.⁶ Considering that the position of parliament encompasses a wide range of issues and requires broader exposition, this paper presents a comparative analysis of its constitutional-legal status in the post-Yugoslav states, with the aim of identifying common standards, modifications of individual institutions, and specific deviations. Emphasis is placed on the composition and election, powers, and mandates of the parliaments in these countries.

COMPOSITION AND ELECTIONS

The general concept of parliament, regardless of the government system in which it exists, presumes a collective representative state body that performs legislative functions. This modern concept emerged in the 18th century – excluding England – with the first constitutions in the United States (1787) and France (1791), stemming from the idea of popular (national) sovereignty. In comparative constitutional law, however, even among similar governmental systems, parliamentary structures vary.

Parliamentary structure refers to how a parliament is organized – whether it is unicameral or bicameral. A unicameral (a one-chamber) parliament consists of representatives elected in the same way, based on the same principles, and representing the same interests. This principle is not challenged by affirmative action measures that guarantee representation for certain categories (typically national minorities), such as special electoral districts, quotas, or adjusted thresholds. Nevertheless, all members of parliament are equal. On the other hand, if the parliament is divided, then this means that different parts represent different interests, structures and parts of society. The structure of the parliament is determined by various territorial, political, historical and socio-economic reasons. Unicameral parliaments are usually directly elected, through universal and equal elections, and all members of parliament have the same rights. In comparative law, the majority of parliaments are (though often asymmetrically) bicameral, and multicameralism is very rare today. The different chambers represent different interests, with one of them (the lower) always being directly elected.

With the exception of Bosnia and Herzegovina, whose Constitution includes a softened version of a presidential system, the other countries in this region have parliamentary systems with a strengthened role of the head of state, who is directly elected and holds (independent or non-independent) powers somewhat greater than the classical parliamentary standard, though not to the level of semi-presidentialism,⁷ which can also affect the position of parliament within them. Namely, although indirect election is more typical of parliamentary systems, there are also examples of direct election, because the method of election itself does not determine the system of government.⁸

6 Marković, R. (2015). *Ustavno pravo*. Beograd: Pravni fakultet u Beogradu, p. 278.

7 Pejić (2007) also cites the possibility of the president interfering in the legislative sphere (the right to call a referendum, suspensive veto, dissolution of parliament) as an important feature of semi-presidential systems. However, the assessment of belonging to one of the theoretical models is made on the basis of a comprehensive analysis of the position of the head of state, his or her powers, the position and role of the government, and relations with parliament. Pejić, I. (2007). *Polupredsednički sistem i mogućnosti kohabitacije*. *Teme: časopis za društvena istraživanja*, 31(1), pp. 55-58.

8 Simović, D. (2008). *Polupredsednički sistem*. Beograd: Pravni fakultet u Beogradu i Službeni glasnik, pp. 216-248.

Parliament as a representative body, bearer of legislative and constitution-making power, is constitutionalized in each of them.

In Croatia, Serbia, and North Macedonia, the parliament (Sabor, National Assembly, Sobranie) is defined as a representative body, holder of legislative power, with Serbia explicitly stating constitution-making power as well, while in the others, although parliament is the holder of such power, it is not defined as such. In Montenegro, the general provisions define that the Assembly exercises legislative power, while the definition of parliament is functional, as is the case in Slovenia (National Assembly) and Bosnia and Herzegovina (Parliamentary Assembly), which do not contain a constitutional definition of parliament.

Unlike the strong bicameralism in BiH, whose parliament is composed of the House of Representatives and the House of Peoples, which are essentially equal, and the quasi-bicameral parliament in Slovenia (National Assembly and National Council), the other countries have unicameral parliaments. Unicameral parliaments are directly elected, based on the principle of universal and equal suffrage, with two approaches in determining the number of seats: 1) fixed (Serbia 250, Montenegro 81, Slovenia 90) and 2) in a range (Croatia 100–160 and North Macedonia 120–140).⁹ Although the electoral system is regulated by law, constitutions provide for: 1) the possibility (in Croatia, alongside general suffrage, national minorities have a special right to elect their own representatives), or 2) the obligation that the law ensures representation of national minorities (“authentic representation” in Montenegro; “Equality and representation of genders and representatives of national minorities shall be ensured in the National Assembly, in accordance with the law”; “One deputy from the Italian and Hungarian national communities shall always be elected to the National Assembly in Slovenia”). Members of national minorities, although elected through measures of affirmative action, have the same status as other members of parliament and, despite terminological differences, are considered representatives of all citizens. Pajvančić¹⁰ states that in most countries the constitution or electoral law explicitly prescribes that a member of parliament, especially in the house of citizens, represents all citizens and not only those who gave them their vote, and only exceptionally the voters of their own electoral unit. This solution is directly related to the principle of the free mandate.

In BiH, there is a bicameral parliament, which is an expression of its complex state organization (federal-confederal) and consociational democratic order.¹¹ The House of

9 The way in which European constitutions determine the number of MPs varies. More often, the absolute number of MPs is determined (Belgium, Denmark, Finland, Italy, Luxembourg, Poland, Switzerland, Sweden, Poland). The constitutions of some countries determine the minimum and maximum number (Germany, Belgium, Portugal, Spain), or determine it by law depending on other factors, e.g. the number of voters (or the number of inhabitants) for which one deputy is elected. Sometimes this basic criterion is corrected by one that takes into account the territorial division or the representation of certain communities (minimum representation of electoral units). In that case, the number of deputies will be determined by the decision to call the elections. Pajvančić, M. (2008). *Parlamentarno pravo*. Beograd: Konrad Adenauer, p. 14.

10 *Ibid.*, p. 20.

11 Consociationalism, characteristic of multinational states, basically implies: 1) horizontal division of power between communities (proportional, parity, proportional); 2) autonomy of social segments, especially in identity issues; 3) veto power or qualified majority in decision-making; 4) proportional electoral system and grand coalitions. Lijphart, A. (1977). *Democracy in Plural Societies: A comparative exploration*. New Haven/London: Yale University Press; Bieber, F. (2005). *Post-war Bosnia: Ethnicity, Inequality and Public Sector Governance*. Basingstoke: Palgrave Macmillan. It can represent a complement to territorial autonomy and federalism, based on ethnic criteria. The BiH model is consistently consociational, more so than in Belgium, or in North Macedonia and Switzerland where it is more a matter of political practice. Kasapović,

Representatives (42 members), although directly elected, is not a general representative body, because the constitutionally established distribution of seats by entities (28:14 in favor of the Federation of BiH compared to Republika Srpska), together with so-called entity voting, i.e., the possibility of a veto by 2/3 of members from the entity, on any decision (in both houses), makes this house a combined citizen representation. The House of Peoples of BiH (15 delegates) is composed of delegates elected by entity parliaments, with the delegates of the Bosniak or Croat clubs in the House of Peoples of the Federation of BiH required to be Bosniaks or Croats respectively, and the delegates of the National Assembly of Republika Srpska—Serbs. A comparable system of ethnic representation exists only in Belgium.¹² Although the electoral system is regulated by law, some constitutions imply a proportional electoral system (Slovenia even sets a 4% threshold; Serbia allows for placing the mandate at the disposal of the electoral list). Also, the free mandate is explicitly guaranteed in Slovenia, Croatia, and North Macedonia, while in Montenegro the Constitution prescribes the reasons for termination of mandate. In BiH, the issue of mandate is regulated by law, with the term “delegate” used for members of the House of Peoples, who represent the National Assembly of Republika Srpska or the Bosniak or Croat clubs of the Federation Parliament, which – by literal interpretation of the Constitution – would make the mandate imperative. In Serbia (Article 102), “A Member of Parliament is free to, under conditions determined by law, irrevocably place their mandate at the disposal of the political party at whose proposal they were elected as a Member of Parliament.” This provision allows the legislator to depart from the principle of free mandate and prescribe that its actual “holder” is the political party. However, the conditions under which this may occur are legally reserved – this is only a possibility – so the presumption is in favor of the free mandate, which may or may not be limited by law. Nevertheless, the Constitution does not unconditionally guarantee the free mandate.¹³

Although it is not a classic second house of parliament, the National Council in Slovenia has a representative function, which consists in representing socio-economic and local interests, as well as advisory, suspensive, initiative, and conditionally corrective and supervisory roles. The National Council is a representative body of holders of social, economic, professional, and local interests, with a mandate of five years, longer than that of the National Assembly, in order to ensure stabilization of the representative body. The National Council has 40 members. It consists of 4 representatives each: 1) of employers; 2) of employees; 3) of farmers, artisans, and independent professions; 6 representatives of non-economic activities; and 22 representatives of local interests. Their election and mandate termination, as well as the organization of this body, are regulated by law. In addition to being the holder of legislative initiative and a suspensive veto, at the request of the National Assembly, the Council must express its opinion on a given issue.

M. (2005). *Bosna i Hercegovina: Podijeljeno društvo i nestabilna država*. Zagreb: Politička kultura; Stojanović, N. (2007). Konsocijacija, Švajcarska i BiH. *Pregled – časopis za društvena pitanja*, 48(3-4), pp. 63-87.

12 Popelier, P. (2018). Bicameralism in Belgium: The dismantlement of the Senate for the sake of multinational confederation. *Perspectives on Federalism*, 10(2), pp. 215-237.

13 A consequence of the concept that a member of parliament represents all citizens (national sovereignty) is also a free mandate. Most constitutions in Europe guarantee a free mandate. “Every imperative mandate is null and void.” (Art. 27 of the French Constitution). “Members of the (lower house) are not bound by mandate and vote without instructions.” (Art. 96 of the Norwegian Constitution). “Members of the Bundestag are representatives of the entire people. They are not bound by orders and instructions and are subject only to their own conscience.” (Art. 38 of the German Basic Law). “Members of parliament decide freely and are not bound by any directives or instructions issued by their constituents (Paragraph 56 of the Danish Constitution). “Every member of parliament represents the nation and is not bound by the instructions of his constituents in the performance of his mandate.” (Art. 67 of the Italian Constitution).

POWERS

The role of parliament is decisively determined by the system of government. After the assembly system, the parliamentary system is characterized by the largest number of competences and greater formal significance of the parliament.¹⁴ Still, the constitutional practices of the post-Yugoslav states have not only not avoided but have been particularly affected by the tendencies of strengthening the executive at the expense of the parliament. Since the establishment of the parliamentary system, the dualism of the executive has significantly evolved, strengthening the power and dominance of the government in the system of separation of powers.¹⁵ The role of political parties is growing, and thereby also the executive power, where, as a rule, its political leadership is concentrated, and the reduction in the role is also contributed to by other phenomena such as the strengthening of constitutional judiciary, integration processes (decision-making at the EU or NATO level),¹⁶ the emergence of regulatory bodies, etc. The actual power of the head of state, but also of the parliament or government, nevertheless crucially depends on the political structure within a given country.¹⁷

Formally, the competence of parliament in each of the analyzed countries boils down to a similar scope of matters. Even where the relevant text lists them in detail, there is a possibility of extension to other issues, whether they are naturally regulated by law, provided elsewhere in the constitution (e.g., electoral or oversight competences), or a legal provision establishes parliamentary authority. In this respect, the solutions in Serbia, Montenegro, and North Macedonia are particularly similar, where competences are listed in detail with multiple examples or opportunities for extension. The Constitution of Slovenia, however, contains significantly fewer provisions, but the importance of parliament derives from general provisions on legal regulation of numerous matters (human rights, economic and social structure, president, government, defense, judiciary, Judicial Council, local

14 Stanić (2024) observes two sides of the modern constitution: the formal (division of state power functions into different bodies – “division of labor”, where very little remains of mutual limitation and control) and the political. “In the legal sense, it means, as described, the division of functions between different state bodies. In the political sense, power is exercised by the party or parties that make it up, while the opposition exercises political and legal control. This also indicates the crucial role of the opposition within representative democracies. Parties in power, while exercising power, can implement certain political decisions and most often all functions of state power are directed towards that goal, and little or nothing remains of the division of power itself, as it was conceived, because the parties that have a majority in parliament also form the government, which rarely loses confidence in the parliament itself, but only in elections.” Stanić, M. (2024). Podjela vlasti i raspuštanje parlamenta – evropski noviteti. *Revija za evropsko pravo*, 26(1), p. 64.

15 Pejić, I. (2016). Parlamentarna vlada: mogućnosti ravnoteže u sistemu podele vlasti. *Zbornik radova Pravnog fakulteta u Nišu*, 55(73), p. 69.

16 Croatia and Slovenia are members of the EU. The adoption of general legal acts at the EU level, as well as the determination of policy, is primarily the responsibility of the European Council, the Council of the EU (in which the state is represented by the executive authorities, the Government, ministers, the head of state), and the Commission. The Constitution of Croatia stipulates that the Parliament participates in the European legislative procedure in accordance with the treaties on which the European Union is founded. The Government of Croatia reports to the Parliament on proposals for legal regulations and decisions in the adoption of which it participates in the EU institutions. The Parliament may adopt conclusions on these proposals on the basis of which the Government acts in the EU institutions. The Parliament's supervision of the Government's actions in the EU institutions is regulated by law (Art. 141.b.). This nevertheless strengthens the role of the executive branch.

17 Duverger, M. (1980). *op. cit.*, pp. 167–180.

self-government, public finances, etc.), as well as on the government's responsibility. The Croatian Constitution, amended in 2000, changed the system from semi-presidential to parliamentary, though it retained numerous presidential powers, adding that they are exercised at the proposal of the government or prime minister, and/or with the co-signature of the prime minister, including shared competences of the Sabor and the president (decisions on war and peace, use of the army, etc.). Nevertheless, standard parliamentary competences are prescribed in the Constitution, in several places, with the possibility of their expansion through law. The Constitution of BiH, similarly to Slovenia, defines competences sparsely but provides legislative power to the parliament in matters within BiH's jurisdiction, as well as those agreed upon by the entities, creating significant ambiguity about the nature of such acts.

Parliamentary competences can be grouped into five groups:

1) Legislative function in a broader sense. Considering that in a material sense there is no essential difference, i.e., the constitution is the "supreme law," this function would also include the constitution-making power, which is explicitly mentioned in some constitutions. Besides passing laws, this function includes other acts that are normative in nature, such as the budget, ratification of international treaties, spatial and development plans, etc. In North Macedonia, authentic interpretation of laws is explicitly mentioned, which in other countries is encompassed within the legislative power as a unified concept. Also, in Croatia, Serbia, and Montenegro, the adoption of defense (and national security) strategy is listed as a parliamentary competence — a political act by nature but entrusted to parliament due to its significance, whereas similar political acts in other areas are adopted by the government. In Serbia, the National Assembly gives prior consent to the statute of the autonomous province (decides also on its creation, abolition, or merger), and in Montenegro it is explicitly stated that the Assembly regulates the system of state administration. In BiH, ratification of international treaties includes consent from the Presidency. Regarding the legislative function, a suspensive veto by the head of state exists in all countries, except BiH (except for state symbols, where there is an absolute veto) and Croatia¹⁸, with the veto being broader in North Macedonia (no constitutional deadline, which can transform it into an absolute veto, though not applicable to laws adopted by a 2/3 majority). In that country, a constitutional convention has been established by which the 7-day deadline for promulgating a law is considered the timeframe in which the president must declare their stance.¹⁹ Although present in comparative law (France, Italy), delegated legislation (outside of emergencies) is only recognized by the Croatian Constitution. The Croatian Sabor may authorize the Government for up to one year to regulate specific issues within its scope by decrees, except those relating to elaboration of constitutionally defined human rights, national rights, electoral system, organization, jurisdiction and operation of state bodies and local self-government. Afterward, the decrees cease to be valid unless the Sabor decides otherwise.

2) Matters constitutionalized as parliamentary competences that, due to their importance, transcend the standard tri- or quadripartite division of powers and reflect state sovereignty, which is exercised by citizens through a directly elected representative body. These include decisions on war and peace, declarations of emergencies (war or

18 Golić, D. (2021). Predsednik republike na razmeđu parlamentarnog i polupredsedničkog sistema. *Kultura polisa, drugo posebno izdanje*, pp. 105-122.

19 Pilipović, M. (2025). Neki aspekti ustavnog položaja predsjednika republike u državama nastalim disolucijom Jugoslavije u svjetlu komparativnog prava. *Strani pravni život*, (1), p. 86; Klimovski, S., Deskoska, R., & Karakamiševa, T. (2012). *Ustavno pravo*. Skopje: Prosvetno delo, pp. 432-433.

state of emergency), use of armed forces beyond national borders, state territory, calling referendums²⁰ (except in BiH). In North Macedonia, the Saborie decides on accession to or withdrawal from unions or communities with other states, whereas in Croatia such a decision by the Sabor is confirmed by a referendum. In Montenegro and North Macedonia, the constitution assigns parliament the authority to decide on state borrowing, and in Montenegro also on managing property above a value determined by law. In Croatia, the Sabor's competence regarding the use of armed forces, especially abroad, is detailed. Based on the Sabor's decision, the President declares war and concludes peace; the Sabor grants permission for foreign forces to enter or operate on Croatian territory, for Croatian forces to operate abroad, to assist an allied country, including exercises and training outside Croatia, on the government's proposal and with the president's consent. Nevertheless, the Sabor may generally substitute the president's consent with a qualified majority. A specific solution reducing the government's role is the provision that the Sabor determines its own policy.²¹ In all these states, parliaments adopt political documents expressing the body's commitment, goals, or stance – such as conclusions, declarations, resolutions, recommendations – some of which are defined in the constitution (Montenegro, North Macedonia, Croatia), and others by law or rules of procedure.

3) Government oversight by parliament is a feature of parliamentary and mixed systems, where the government and many executive agencies (central bank, security services, regulatory bodies) are accountable to parliament. A wide range of oversight instruments are available, including the possibility of dismissal. The most important are constitutionally regulated, but parliamentary standards dictate that many are detailed in rules of procedure or rely on constitutional conventions. Oversight instruments typical of rationalized parliamentarism exist in each of these countries.²² Constructive votes of no confidence (electing a new government, modeled after Germany), confidence votes tied to legislation, confidence votes initiated by the prime minister, and interpellations are features of Slovenia's constitutional arrangements. However, the most characteristic solution concerns parliamentary investigations. The National Assembly may initiate investigations on matters of public concern, at the request of 1/3 of MPs or the State Council. It appoints a commission with powers equal to judicial authorities in terms of investigation and examination (Art. 93). Given that judicial authorities hold numerous coercive powers (summoning, detaining, arresting), this surpasses standard parliamentary oversight and represents an original, non-aligned approach. In Croatia, the Constitution defines classical instruments such as votes of no confidence or confidence in the government or its members, and a ban on repeating failed no-confidence motions by the same sponsors for 6 months. The constitutions of Serbia, Montenegro, and North Macedonia include classical provisions on votes of confidence, no confidence, interpellation, with similar bans (180 or 90 days). In North Macedonia, the ban does not apply if the new motion is submitted by more than half the MPs, and if the prime minister proposes dismissing over a third of the initial cabinet, the Saborie must elect a new government, effectively terminating the government's mandate. In Montenegro, the Constitution provides an incomplete

20 Calling a referendum is not the exclusive right of the parliament in Croatia.

21 Unlike other means of control, which have the properties of indirect, future influence, this Croatian solution, similar to those in Hungary, Romania, and Slovakia, has an immediate impact, and represents the introduction of elements of unity of power and strengthening of parliament. Kutlešić, V. (2002). *op. cit.*, p. 177.

22 A request for a vote of no confidence is not an individual right of an MP; in the event of an unsuccessful vote, there is a time ban on the same MPs submitting a proposal, deadlines for voting, an obligation to elect a new government within a certain period, etc.

interpellation mechanism, and without a convention, this instrument may fade or atrophy entirely, since there's no sanction if the government's or minister's response is rejected. In BiH, the Constitution recognizes only votes of no confidence in the Council of Ministers and an obligation to submit a report to the Parliamentary Assembly – not a standard parliamentary system instrument (nor is the Council of Ministers a proper government). Regarding oversight of other institutions, Montenegro's Assembly oversees the military and security services, whereas regarding the Central Bank and the State Audit Institution (independent and accountable, reporting), explicit oversight is not mentioned, but left to legal regulation — which should imply parliamentary accountability. In Serbia, the National Assembly oversees the security services, Governor of the National Bank, Ombudsman, and State Audit Institution (some declared independent). In Croatia, the Sabor oversees the armed forces and security services, while the Croatian National Bank and State Audit Office are defined as independent and autonomous, submitting reports to the Sabor, implying a lower level of oversight in line with legal provisions. Still, in multiparty systems, oversight – as a power of criticism – essentially belongs to the opposition. It doesn't necessarily mean dismissal but rather conditioning (the majority, through party organization, more effectively controls the government), which is theoretically considered an autonomous function, not parliamentary direction of the government (majority) through oversight.²³

4) Electoral functions of parliament in comparable systems of governance may include a narrower or broader set of officials – primarily the election of the government in parliamentary and mixed systems, the election of the governor of the central bank, judges, prosecutors, and in some cases even the head of state (as in Germany, Italy, Hungary, Greece). When exercising electoral functions, the parliament is often bound by a proposal from the head of state, government, or special bodies such as the judicial or prosecutorial councils. In the analyzed countries, the head of state is directly elected, but in BiH, the Parliamentary Assembly, i.e. its members from the relevant entity, elect a member of the Presidency in case of premature termination of the mandate. Regarding the election of the government, all these countries have a similar solution – the involvement of the head of state and parliament as involved entities. The head of state proposes a candidate for prime minister, usually preceded by mandatory consultations with elected party lists (with all political parties in Parliament in Montenegro). His role is more formal, since the overall parliament-government relationship implies the substantive role of parliament in government formation. However, that role is not always merely declarative – depending on political circumstances, especially in a fragmented parliament, the president may play a mediating role in forming a majority. In all countries, the method of selection implies a parliamentary, not a chancellor-type government, since all its members are elected, not just the prime minister (a system once present in the 1992 Constitution of the FRY). The procedure is somewhat specific in Slovenia, where the president is not the exclusive proposer of the prime minister (after the first proposal, groups of MPs may also nominate, with a vote on the president's proposal held first – similar to solutions in Poland). Nevertheless, a parliamentary government as a standard in each of these states (except BiH, whose Council of Ministers cannot be labeled a government in the true sense) stems from parliamentary will, not the head of state, who is limited by the parliamentary majority (explicitly stated in the constitutions of Croatia and North Macedonia). Participation in the election of constitutional court judges is standard in all these countries, except BiH. In Serbia, parliament elects 10 (out of 15) Constitutional Court judges, together with the president; in Croatia all 13; in Montenegro all 7; in North Macedonia²⁴ and Slovenia all

23 De Vergotini, Đ. (2015). *Uporedno ustavno pravo*. Beograd: JP Službeni glasnik, p. 620.

24 In Montenegro and North Macedonia, two constitutional court judges are nominated by the head of state.

9, based on appropriate proposals. In BiH, six constitutional judges are elected by entity parliaments, and three by the President of the European Court of Human Rights, after consultations with the BiH Presidency. Although the election of judges is generally under the jurisdiction of judicial councils as independent bodies, parliaments have certain electoral competences in this branch of government.²⁵ In Slovenia and North Macedonia, parliament appoints judges based on the proposal of the judicial council,²⁶ while in other countries this role is smaller. In Croatia, it elects and dismisses only the president of the Supreme Court (on the proposal of the president of the Republic).²⁷ Parliament plays a somewhat larger role in electing members of judicial councils, which are constitutional bodies in all these countries.²⁸ In North Macedonia it elects all members, in Montenegro 4 out of 10, in Slovenia 5 out of 11 (on the proposal of the president), in Croatia at least 2 out of 11, and in Serbia 4 out of 11 members of the High Judicial Council (in BiH this is not a constitutional category). In North Macedonia, parliament elects public prosecutors, while in Serbia, Montenegro, and Croatia it elects the public prosecutor general (on the proposal of the prosecutorial council, or in Croatia the government); in Serbia also 4 (of 11) members of the High Prosecutorial Council, in Croatia at least 2 (of 11), while in the remaining countries this is regulated by law.²⁹ In Slovenia, parliament elects the governor of the Central Bank and members of the Court of Audit; in Serbia and Montenegro it elects the governor and governor's council; in Montenegro the president of the State Audit Institution (in Croatia these matters are regulated by law). In Serbia, North Macedonia, and Montenegro, parliament also elects the human rights ombudsman. In North Macedonia, the Sobranie also elects the (advisory) Committee for Inter-ethnic Relations. Based on constitutional provisions or legal regulation, parliaments may also perform other electoral competences.

5) Quasi-judicial function: parliament's role in determining the responsibility of high state officials (ministers or the president of the republic) for acts related to their office, with a specific sanction – dismissal (impeachment) due to constitutional violations or serious criminal offenses. This often combines with the involvement of a constitutional

25 Golić, D. (2019). Izbor sudija u Srbiji, Crnoj Gori i Bosni i Hercegovini - nezavisnost i(li) legitimitet. *Pravni život*, 4(12), pp. 715-733.

26 The powers of the Councils for the Judiciary are such that the Parliament accepts or rejects their proposal, thus practically ensuring the Venice Commission's recommendation that the Council should have "a decisive influence on the appointment and promotion of judges and on disciplinary measures against them." Venice Commission, CDL-JD(2007)001rev, p. 11.

27 In Hungary, the President of the Supreme Court is elected by Parliament on the proposal of the President of the Republic, while the Deputy Presidents are appointed by the President of the Republic on the proposal of the President of the Supreme Court.

28 In Spain, there is a General Council of the Judiciary that appoints, promotes and supervises the work of judicial office holders. It consists of the President of the Supreme Court and 20 members, 12 of whom are from the judiciary, who are elected by the Head of State on the recommendation of Parliament. In Portugal, in addition to the President of the Supreme Court, the Council consists of 16 regular members - two appointed by the Head of State, seven elected by Parliament, and seven members from the judiciary. In France, judges and prosecutors are appointed by the Head of State on the recommendation of the Council, with a majority of judicial members. The Presidents of the Republic, Parliament, and the Council of State participate in the election of non-judicial members. Voermans, W., & Pim Albers, P. (2003). *Pravosudni saveti u zemljama EU*. Hag: Evropska komisija za efikasnost pravosuđa (CEPEJ), p. 9.

29 The Venice Commission suggests that "a significant part or the majority of the members of the Council for the Judiciary should be elected by the judiciary itself. In order to ensure that the Council for the Judiciary has democratic legitimacy, the remaining members should be elected by parliament from among persons with appropriate legal qualifications, taking into account possible conflicts of interest." Venice Commission, *op. cit.*, p. 7.

or other high court (without excluding criminal liability). Sometimes, parliament only files the charges, and the violation is determined by the court (Denmark, Finland, Belgium, the Netherlands, Spain, Italy) or by a constitutional court (Austria, Germany), or a specially established judicial body (Greece, France).³⁰ This group of competences also includes the power to grant amnesty.

Theoretically, the president bears legal but not political responsibility. Comparative systems include mixed forms of responsibility (Austria, Romania) for high treason, constitutional violations, and serious criminal acts, where the decision on the sanction (dismissal or recall referendum) is made by parliament; however, a court necessarily participates in the procedure, making this responsibility different from political responsibility. The parliamentary decision on dismissal, as a sanction for constitutional violation (unlike in Croatia and North Macedonia, where a constitutional court decision on a constitutional violation automatically terminates the function), and the conditions and procedure for indictment (qualified majority may initiate proceedings, "serious violation of the constitution," high treason, qualified majority required for dismissal) grant this institute (though not completely) a political character, balancing these two bodies.³¹ Parliament's role in this process is strongest in Montenegro and Serbia. It initiates the procedure, and when the constitutional court determines that the president has violated the Constitution, the National Assembly may (but need not) adopt a dismissal decision by a 2/3 majority, whereas in Montenegro, the decision is made by a simple majority. In Slovenia, the Constitutional Court has discretionary authority: "The National Assembly files charges against the president. Charges for violation of the constitution or law are brought before the Constitutional Court. The Constitutional Court decides on the merit of the charges or acquits the accused by a 2/3 vote of all judges and may decide on removal from office." Until a decision is made, the Constitutional Court may temporarily suspend the president (Art. 109 of the Constitution). In Slovenia, there is also a legal responsibility mechanism for government members. The National Assembly may initiate proceedings to dismiss the prime minister or a minister before the Constitutional Court for constitutional or legal violations committed in office. The procedure is conducted as in the case of the president.

TERM OF OFFICE

The mandate of parliament in all the countries of the post-Yugoslav space lasts 4 years. However, only in BiH does the lower house always serve the full term; it cannot be dissolved. In connection with early termination of mandate, three situations are observed: 1) mandatory dissolution (*ex constitutione*); 2) optional dissolution; 3) self-dissolution. Also, under certain circumstances, its mandate is extended. In parliamentary and semi-presidential systems, dissolution of parliament represents a standard right of the executive branch, through which (theoretically) balance and mutual control of the executive and the parliament are achieved. However, in political practice, the reasons for dissolution exceed

30 De Vergotini, Đ. (2015). *op. cit.*, p. 588.

31 Classical legal liability similar to political office is provided for in the constitutions of Croatia and North Macedonia (the office ceases by force of the constitution), similar to legal liability in Austria. In Romania, in addition to legal liability (a decision of the Supreme Court on guilt for high treason means the termination of office), there is also mixed liability (for violation of the Constitution), where the decision of the Constitutional Court is consultative, the parliament calls a referendum (which can suspend it beforehand), and the voters decide on the removal. Rapajić, M. (2016). *op. cit.*, pp. 481-482.

the initial theoretical justification.³² The original purpose of dissolution was to eliminate conflict between the legislative and executive branches, or between the president and the government (government majority). Over time, it took on a political character; the executive uses it due to a crisis of legitimacy, expectations of a more favorable electoral result, internal relations, estimation of the “political moment,” so-called tactical dissolution.³³ “Dissolution of parliament served as a means of consolidating power, i.e., prolonging the stay in power; reasons included conflicts between political parties, intra-party conflicts in the form of defeat in party leadership elections, personal problems of certain party leaders or prime ministers and suspicion of their corruption, non-acceptance of decisions of the highest judicial instances, or the decisions on dissolution were of tactical and technical nature, without explanation.”³⁴

The questions of who holds this power, the reasons for dissolution, and possible limitations are regulated differently. In the parliamentary system, this power essentially belongs to the government, and in the semi-presidential system, the decision is made jointly by the government and the president or is an independent authority of the president (France, Romania). Due to certain interferences which, however, do not call into question the dominance of the parliamentary system, the head of state and the government may both participate in the decision on dissolution (in Serbia, in Croatia). In Montenegro, this power is held by the government (the president only issues the decree of dissolution). The Presidency dissolves the House of Peoples of BiH, which is a rarity – only the upper, indirectly elected house is dissolved. Mandatory dissolution (*ex constitutione*) implies precisely defined situations (e.g., failure to elect a government or adopt a budget), so the decision of the head of state is declarative in nature. In the case of optional dissolution, the reasons may be precisely or generally formulated, and upon their occurrence, the holder of the power decides whether to use it (Croatia, Poland, Romania, Czech Republic); or, 3) the reasons may not be defined at all (Serbia). Limitations may relate to the prohibition of dissolution in emergency situations, a specific period after or before elections (Russia and France, Czech Republic, among the analyzed countries Montenegro), during the process of deciding on confidence in the government or legal responsibility of the head of state (Croatia), etc.

In Slovenia, the institute of optional dissolution of parliament by the executive branch does not exist. Dissolution occurs by force of the Constitution in cases of failure to elect the Government within the constitutionally established deadlines and refers, logically, only to the National Assembly. If the first election of the Government is unsuccessful after 3 attempts, dissolution follows. The second case is in a situation where the Government loses the confidence of parliament (a vote of no confidence or a confidence vote requested by the Government) and, thereafter, within the prescribed deadlines, a new Prime Minister is not elected or confidence is not regranted to the current Prime Minister. The National Assembly has no possibility of dissolving itself.

32 Petrov (2015) emphasizes the so-called functionalist approach, whose supporters “analyze dissolution in a concrete socio-political reality, study what functions the constitution-maker intended for dissolution and what are the concrete consequences of applying this mechanism in constitutional reality. They especially emphasize the role of political parties in the constitutional system, which through their actions determine the content and concrete effects of constitutional institutions. Thus, even if it is possible to speak of the dissolution of parliament as a means of resolving disputes, these are undoubtedly not disputes between the legislative and executive branches, but between the relevant political parties.” Petrov, V. (2015). *Parlamentarno pravo*. Beograd: Pravni fakultet u Beogradu, p. 144.

33 Stanić, M. (2024). *op. cit.*, pp. 57-77.

34 Pilipović, M. (2019). Uloga i razlozi raspuštanja parlamenta u zemljama regiona. *Zbornik radova Pravnog fakulteta u Nišu*, 58(82), p. 240.

In Croatia, in addition to mandatory, optional dissolution also exists, but with significantly narrower discretionary power of the executive branch. The first case of mandatory dissolution refers to failure to elect the first Government (after elections) in 2 attempts (then the head of state appoints a provisional government and calls elections). The second case refers to failure to elect the Government within 30 days from the moment the parliament (Sabor) voted no confidence. The third case concerns the failure to elect the Government following its resignation (Art. 113, para. 9). In these situations, the president's act only confirms the constitutional facts that produce constitutional effects. Optional dissolution may occur in two cases: 1) if the Government raises the question of its confidence and the Sabor votes no confidence in the Government, then the president, at the proposal of the Government and with the countersignature of the Prime Minister, after consulting representatives of parliamentary party groups, may dissolve the Croatian Sabor; 2) in the case where the Sabor fails to adopt a budget within 120 days from its proposal. These two cases serve more as instruments of mutual control between the Government and parliament, but the president's role cannot be considered purely formal. The Sabor certainly cannot be dissolved if it initiated the vote of no confidence in the Government itself. The restricted possibility of dissolving the Sabor is not a classic power of the parliamentary system — it is more a mechanism for balancing parliament and the executive. The Constitution allows the possibility of self-dissolution of the Sabor, for the purpose of calling early elections, by a decision of a majority of all representatives, which is not a unique example but is also not a typical institute of the parliamentary system. The president may not dissolve the Sabor during proceedings to determine his legal responsibility. The term of the Sabor may be extended by law in times of war, threat to state independence or unity, natural disasters, or when state bodies are prevented from functioning normally (Arts. 17 and 101).

The Constitution of Serbia distinguishes dissolution by force of the Constitution in four precisely defined situations: 1) if it does not elect a new Government within 30 days from the day no confidence was voted; 2) if it does not elect a new Government within 30 days from the day confidence was denied; 3) if it does not elect a new Government within 30 days from the day the Government's resignation was acknowledged; 4) if the Government is not elected within 90 days from the constitution of the new National Assembly. The Constitution also foresees the possibility of optional dissolution. The National Assembly may be dissolved only on a reasoned proposal of the Government, for which no reasons are specified in the Constitution – it may be for any reason, at the discretion of the Government. The President of the Republic may, but does not have to, accept the Government's proposal – it is thus a joint decision. The National Assembly may not be dissolved during a state of emergency or war, or if the issue of confidence in the Government has been raised (not in the case of the president's responsibility). The Constitution expressly stipulates that a dissolved assembly continues performing current or urgent tasks, defined by law. If it is dissolved, its mandate is reinstated by the proclamation of a state of emergency or war. The mandate of the National Assembly cannot be extended (while the mandate of the President and Government can be extended during war or emergency, which represents a constitutional deficiency). It has no right to shorten its mandate by itself.

The lower house of the Parliamentary Assembly of BiH cannot be dissolved, nor is there a possibility of self-dissolution. The Presidency of BiH, however, has the right to dissolve the House of Peoples. The reasons for dissolution are not determined. Considering that the dissolution does not concern the House of Representatives, this cannot be seen as a standard justification of this institution. Given the indirect (delegated, according to the Constitution) election of the House of Peoples (which does not participate in the election of the Council of Ministers), it is more likely a matter of conflict between two levels of

government, possibly a desire to align the composition of the House of Peoples with the changed political composition of entity parliaments.³⁵ The House of Peoples may dissolve itself, with a majority that includes a majority from at least two national clubs.

In North Macedonia, the executive branch does not have the power to dissolve the Assembly, and no cases of mandatory dissolution are foreseen. Accordingly, the absence of instruments of mutual control is evident, as neither the head of state nor the Government possesses the basic mechanism for balancing power against the Assembly – the possibility of dissolving it. The Assembly, however, may dissolve itself by an absolute majority of MPs. The term of the Assembly is extended during a state of war or emergency.

In Montenegro, both mandatory and optional dissolution exist, as well as prohibitions on dissolution and extension of mandate. Nevertheless, imprecision and incompleteness of the mandatory dissolution solution are noticeable. Optional dissolution is under the authority of the Government, while the president's role is only formal (he issues the decree). The Assembly is dissolved if it fails to elect a Government within 90 days from the day the president first proposes a mandate holder. It is questionable whether this case refers only to the election of a Government after elections or also to cases of early termination of its mandate. In cases of a vote of no confidence or Government resignation, there is no prescribed deadline for the election of a new Government, which may lead to an indefinite mandate of a technical Government (when there is no parliamentary majority). If the provision on mandatory dissolution is extended to these situations, the damage would be less. This is especially important because a Government that has received a vote of no confidence or is in resignation cannot dissolve the Assembly. If the Assembly does not perform its constitutional duties for a long time, the Government may dissolve it after hearing the opinion of the President of the Assembly and heads of parliamentary groups. This broad formulation allows the Government to resort to tactical dissolution of the Assembly. It cannot be dissolved during a state of war or emergency; if a vote of no confidence is underway; nor in the first 3 months after constitution or 3 months before the end of its mandate. During a state of war or emergency, its mandate is extended for up to 90 days after the cessation of the circumstances that caused that state. Upon proposal by the president, Government, or 25 MPs, the Assembly may shorten its mandate.

CONCLUDING CONSIDERATIONS

A comparative analysis of the provisions related to the composition, powers, and mandate of parliaments in the post-Yugoslav space reveals similarities stemming from their belonging to the same system of government, but also specific solutions, which arose from the need for different balances between the parliament, the head of state, and the government, sometimes even from the inconsistent application of the principle of flexible separation of powers, the need for originality, or due to various political circumstances (especially concerning the dissolution of parliament). The solutions in BiH are in every sense and aspect unique, which, in addition to the way its constitution was created, is also a result of a different

35 In comparative law, the dissolution of only the upper house is not common. The traditional justification for the dissolution of parliament in a semi-presidential system is the dispute between the head of state and parliament, which is brought before the citizens who will arbitrate in elections about who should receive primacy within the executive branch. Simović, D. (2008). *op. cit.*. Orlović (2018) states that by doing so, the executive branch “disciplines the parliament to the utmost extent, bringing their political conflict before the voters.” Orlović, S. (2018). *Ustavno pravo*. Novi Sad: Pravni fakultet, p. 223. These arguments can hardly be applied to BiH. Golić, D. (2020). Kolektivni šef države i sistem vlasti - bosanskohercegovačka rešenja u svetlu uporednog prava. *Strani pravni život*, (2), pp. 27-42.

system of government in which the Presidency is the dominant executive body. Also, the combination of federal, confederal, and elements of consociational democracy through parliament (but also all other bodies) gives its constitutional system a special character.

Although balance and mutual control in contemporary constitutional practice are political concepts and, depending on political relations, gain specific content, the absence of a theoretically implied element of the parliamentary system is observed – the right of the executive to dissolve parliament – in Slovenia and North Macedonia. Thus, the role of parliament, beyond the standard “division of labor,” is formally elevated above the level of the theoretically defined “balance and control.” In other countries (except BiH), standard solutions regarding dissolution typical of rationalized parliamentarism have been constitutionalized, with the executive’s power being the broadest in Serbia, followed by Montenegro, and somewhat narrower in Croatia. Also, the right to self-dissolution exists in each (except in Serbia and BiH with respect to the lower house), which also represents a departure from the parliamentary standard.

The specific solutions contained in the analyzed constitutions provide them with a certain originality. The State Council as a quasi-chamber, parliamentary investigations in Slovenia with the powers of judicial authorities, the general definition of competences – these are some of the specificities of the Constitution of Slovenia. The balance between the government and the President of the Republic is also reflected in the relationship of the executive with the Croatian Sabor, where every initiative, decision, or policy sent to the Sabor must be harmonized between the two executive bodies. As a consequence of the reduced competences of the president, the role of the Government and the Sabor has been strengthened. Also, the Constitution defines the role of the Sabor in shaping policies and making decisions at the EU level. In Serbia, there is a balanced relationship between the National Assembly and the executive, characteristic of the standards of rationalized parliamentarism. However, some solutions are distinctive, such as the possibility for an MP to place their mandate at the disposal of the political party under conditions determined by law, i.e., the absence of a guarantee of a free mandate. Also, the Constitution does not contain provisions on the extension of the mandate during wartime or a state of emergency, and it includes specific solutions concerning the responsibility of the President of the Republic. The Constitution of Montenegro does not contain precise provisions on mandatory dissolution in the event of a failure to elect a Government. This may result in a long existence of a Government without confidence, holding all powers. In this way, the role of the Government in the political system is strengthened. The Constitution of North Macedonia does not contain solutions typical of rationalized parliamentarism regarding mandatory dissolution, nor the right of the executive to shorten the mandate of the Assembly. Also, the undefined deadline for the proclamation of laws and the president’s suspensive veto may be transformed into an absolute one. Nevertheless, constitutional conventions, which are not a strong suit of the constitutional systems of the analyzed countries, may produce solutions for contentious situations and give constitutional provisions a more favorable and effective form and content even without formal constitutional amendments.



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НЕКИ АСПЕКТИ УСТАВНОГ ПОЛОЖАЈ ПАРЛАМЕНАТА НА ПОСТ-ЈУГОСЛОВЕНСКОМ ПРОСТОРУ – УПОРЕДНА АНАЛИЗА

Апстракт:

У државама насталим распадом Југославије успостављени су, са изузетком БиХ, упоредиви системи власти, који на нешто општијем нивоу имају сличности са другим државама бившег социјалистичког блока. Либерално-демократске концепције, у основи парламентарног типа, са више или мање ојачаном улогом председника државе, представљају темељна одредишта организације власти у њима. У БиХ, пак, (кон)федерално и консоцијално уређење, као резултат међународног мировног споразума изнедрило је атипичан систем власти, са бројним елементима (полу)председничког. У погледу уставног положаја парламената у овим државама анализираће се питање структуре и састава, надлежности и мандата. Иако се у питањима надлежности могу уочити конституционализовани стандарди и значајне сличности, упоредиве са другим парламентарним системима, специфична решења или одступања од стандардних неретко конкретном систему одређују физиономију или функционалност, те заслужују и посебну анализу. Такође, уочава се доминантност једнодомности, али и особена дводомност у БиХ и квази-дводомност у Словенији, те извесне разлике у погледу састава, избора и распуштања. Компаративном анализом, уз одговарајуће осврте на стандарде или решења у другим европским државама, указаћемо на ниво сродности решења у анализираним питањима, њихову функционалност, као и специфичну детерминисаност оних која су особена.

Кључне речи: *парламент, организација власти, парламентарни систем*

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THE MORAL BASIS OF LAW

Abstract:

The paper analyzes the complex relationship between law and morality. The aim of the paper is to investigate, through a critical analysis of different positions, to what extent law must be morally grounded, that is, to what extent morality constitutes an integral or necessary element of law, as well as what consequences this relationship has for the legitimacy and validity of legal norms. The issue of the relationship between law and morality becomes relevant in the case of regulating morally controversial social phenomena, as well as in cases where positive law contradicts the prevailing moral understanding of the social community.

The authors point out that the moral component of law refers to the ethical principles and values that underlie legal norms and influence their creation, interpretation, and application. Not everything that is legal is moral. Morality serves as a criterion for reviewing legal norms and their fairness. When law is separated from morality, it can become a means of injustice.

Keywords: *law, morality, legitimacy, justice, fairness.*

1. INTRODUCTORY CONSIDERATIONS

The relationship between law and morality is complex, multi-layered and dynamic. This relationship can be viewed from several aspects of legal theory and philosophy of law. Law is a concrete phenomenon, consisting of certain elements. It is not only a set of norms that regulate social relations, but also an expression of the moral principles of society, that is, it must be connected to the moral values that shape society, which provides it with an institutional framework that ensures their legitimacy and application.

Law should not be approached formally, focusing only on its legal and technical aspects, without a deeper understanding of its essence. It must also be understood from the aspect of its moral elements. Practitioners often ignore this ethical context when interpreting and applying laws. They lack awareness of how legal norms are shaped, among other things, and under the influence of moral principles.

In contrast to morality, law is a set of norms that are based on prescribing rules, and in the case of non-compliance, adequate sanctions. The legal order is based on the rules of behavior of people, their actions or inactions, while moral principles deal with the reason and justification of certain actions. The harmony of society in terms of legality and legitimacy, the regulation of legal norms and compliance with regulations directly depends on the harmony of the above factors. In the event that there is a discrepancy between legality and legitimacy, there is a fear of incompatibility of moral and legal norms in the social order.

Every legal norm, in essence, contains prescribed certain behavior. A norm that is considered valid is set as a standard for permissible behavior and can have positive and negative value. The question of morality is reflected in how to correctly define a norm depending on what is good and what is not. What is good for some, may be bad for others.

In order to understand a certain personal preference as morally and socially acceptable, inappropriate or morally neutral, a detailed understanding of morality is required, which would indicate whether a certain behavior is commendable, impermissible or similar.¹ In this regard, the binding of legal norms to individual behaviors in society, prescribed sanctions and proclaimed moral values is observed. Moral values oblige people who independently accept them, while the correlation of prescribed norms and moral values is based on generally accepted postulates.

The issue of the relationship between law and morality gains particular relevance in the context of legal regulation of morally controversial social phenomena, as well as in cases where positive law openly contradicts the moral intuition of the community. The aim of this paper is to investigate, through a critical analysis of key legal and philosophical positions, the extent to which morality constitutes an integral or necessary element of law, and what consequences this relationship has for the legitimacy and validity of legal norms.

2. THE RELATIONSHIP BETWEEN LAW AND MORALITY

There is considerable debate in legal scholarship about the extent to which morality is present in law, the various ways in which morality influences the normative content of law, and its significance in individual branches of law. The complex relationship between law and morality is one of the key themes in legal philosophy. Different legal schools and theories have different views on how law and morality relate to each other.

Supporters of the natural law theory believe that law and morality are inextricably linked. They believe that there are universal moral principles that precede positive (enacted) rules and that law must be in accordance with morality in order to be valid. If a law is deeply immoral (e.g., legalizing slavery), then it is not, by its very nature, valid law. Representatives of this school include Thomas Aquinas, John Locke, Lon Fuller, and Ronald Dworkin.

Gustav Radbruch, one of the most important legal philosophers of the 20th century, was a legal positivist at the beginning of his career, but after World War II and the horrors of the Nazi regime, he became a supporter of natural law. That is why many today consider him a bridge between legal positivism and natural law. One could say that he is a neo-natural law theorist, i.e. a neo-positivist who respects the moral limits of law.

1 Peger, K. (2005). Pravo, moral i vrlina [Law, morality and virtue]. *Analitičko-pravna fakulteta u Beogradu*, 53(2), 59–78.

Defining the relationship between law and morality, Radbruch states that if “law and ethical good are placed side by side, it means that incommensurable magnitudes are compared”. Law is a cultural concept, an ethical good, or a value concept. Just as the idea of justice becomes a cultural value in law, so the idea of ethical good becomes one in morality, i.e. in the psychological fact of conscience. Either two value concepts can be compared: justice and ethical good, or two cultural concepts: law and morality.²

Radbruch argues that law must be viewed through three basic values: justice, legal certainty, and the purposefulness (usefulness) of law. Justice represents equality, i.e. equal treatment of equals and, consequently, unequal treatment of different people and relationships. However, this concept does not make it clear how something should be characterized as equal or unequal, nor does it show the way in which equals or unequals should be treated. These two questions can only be answered by starting from the purpose of law. Thus, purposefulness appears as another integral part of the idea of law. It denotes the social utility of law and its adaptation to specific circumstances. Laws need to be stable, predictable, and applicable in practice, which represents legal certainty.³

Only morality can explain the binding force of law. Law does not serve morality by means of the legal obligations it imposes, but by means of the subjective rights it grants. It is not turned to morality by its side on which obligations are, but by its side on which subjective rights are. Law is precisely the possibility of morality, and therefore also the possibility of immorality. Law can only enable morality, not force it, because a moral act, conceptually, can only necessarily be an act of freedom; but since law can only enable morality, it must inevitably also make immorality impossible.⁴

Radbruch believes that above positive law there is a universal moral order, the so-called *supralegal law*, by which he means a set of basic moral principles (e.g. dignity, freedom, equality). If positive law grossly violates these principles, morality has precedence. The law is valid only until it exceeds the limits of elementary justice. The moral order stands above positive law in extreme cases. He argues that a law that is “unbearably unjust” has no binding force. This became known as the Radbruch formula, which arose in response to Nazi laws and abuses, whose wrongdoings were “legal” under the law in force at the time.⁵

According to the view of supporters of legal positivism, law and morality are separate systems. The validity of a legal regulation depends only on whether it was adopted in accordance with a formally prescribed procedure and whether it provides for a sanction for its non-compliance, while it does not depend on whether it is morally correct. Many positivists believe that morality can influence the content of law, but is not necessary for its validity. Representatives of legal positivism are John Austin, Hans Kelsen, Herbert Hart and Joseph Raz.

Hans Kelsen introduces and develops the thesis of separating law from ethics. In his opinion, law should be the subject of a pure science, which is not a mixture of moral, political or sociological categories. A legal norm is a norm about what should be done, regardless of moral correctness. Legal science must be normative, but not moral, i.e. ethics

2 G. Radbruch, *Filozofija prava* [Philosophy of law]. Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu, 2006, p. 44.

3 G. Radbruch, op. cit., pp. 77-82.

4 G. Radbruch, op. cit., pp. 50-53.

5 G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* [Statutory injustice and supra-statutory law], *Süddeutsche Juristen-Zeitung*, Heidelberg, Year 1, No. 5, 1946, pp. 105-108.

and law are separate spheres. Kelsen considers it impossible to assume that morality and positive law, which are in fact completely independent of it, coexist.⁶ “This, of course, in no way rejects the claim that the law be moral, i.e. good. This claim is self-evident; what it actually means is another question. What is rejected is only the view that law as such is a component of morality, that therefore every law, as law, is moral in some sense and to some extent.”⁷

Representatives of the sociological school of law believe that law and morality are closely related in social practice. Law cannot be understood without understanding social values and morality. Law is closely related to social morality, but does not necessarily coincide with it. Representatives of this school are Eugene Ehrlich and Roscoe Pound.

Theorists of legal realism believe that morality influences the application of law. The practical application of law is more important than the formal structure. Legal realists believe that in practice law is often applied subjectively and that the morality of lawyers is an important factor. They are not so much interested in what the law is formally, but in how it works in reality. Supporters of legal realism are Jerome Frank and Karl Llewellyn.

Representatives of critical legal theory do not deny that there is a connection between law and morality, but they reject the idea that this connection is stable, universal or neutral. They believe that morality in law is politically, ideologically and historically conditioned. The morality that dominates society is not necessarily just. Law often supports the interests of certain groups. Among the prominent representatives of critical legal theory, who have dealt with the relationship between law and morality, are Roberto Unger, Duncan Kennedy, Mark Tushnet, Peter Gabel and Karl Klare.

When it comes to the relationship between law and morality, our opinion is that we should strive for an integrative approach that recognizes the moral aspects of law, but retains the formal structure of the legal system. Law and morality have, in essence, a common goal, which is the regulation of social relations between people. Law and morality cannot be completely separated, since law is increasingly taking on moral values. However, morality and law remain distinct categories, since not every moral norm is necessarily legal, nor is every legal norm moral. In other words, law and morality are two different but closely related systems of norms. A law is valid if it is formally correct, not necessarily moral. Law derives its force from the state, while morality derives its force from the inner convictions of individuals and general public opinion. Morality may influence the content of law, but it is not a condition for something to be law.

Although law and morality differ as separate normative systems, there is a close connection between them. Morality plays an important role in the evolution of law. It can be a precursor to law, that is, certain moral norms eventually become part of positive law. Law often takes over moral norms and turns them into legally binding ones. The moral beliefs of a community influence the content of law. As social morality changes, so does law. For example, under the influence of changing morality, same-sex marriages were legalized in many countries. In other words, under the influence of criticism of legal norms that are unjust because they are not based on morality, they are changed in order to bring them into line with morality.

The legislator cannot help but respect morality, as a set of social norms that regulate the behavior of people in society based on the criteria of good and evil, that is, what is

6 H. Kelsen, *Reine Rechtslehre* [Pure Theory of Law], F. Deuticke, 1934, p. 147.

7 H. Kelsen, cit. work, p. 25.

considered morally acceptable or unacceptable. Academician Radomir Lukić, one of the most important Serbian legal and philosophical thinkers, considers good to be “what contributes to the maintenance and development of man. And since man does not exist in isolation, that means – what contributes to the survival and development of society. And since again, there is no society at all, but only concrete, given, historical societies, that means – what contributes to the survival of a concrete society, that is, a concrete social community. Evil is what is the opposite of that, what undermines and destroys a concrete society”.⁸

Law differs from morality on the basis of origin, obligation and sanctions, content and sphere of validity. When it comes to origin, law differs from morality in that it is created by the state, that is, it is institutionalized and formally prescribed. On the other hand, morality is a form of social consciousness, and it consists of unwritten rules of behavior. In terms of obligation and sanctions, the difference is reflected in the fact that legal norms are formally binding, bearing in mind that their implementation is ensured by the state through coercion, while moral norms are not formally binding, since their implementation is not sanctioned by the state, but their respect is ensured by the action of conscience and public opinion. Starting from its content, the difference is reflected in the fact that law mainly relates to external behavior, and moral norms – mainly to internal attitudes and intentions. When it comes to the sphere of validity, law regulates certain, legally relevant relationships, often only those important for maintaining public order, while morality has general importance, as it relates to the overall behavior of individuals in society.

3. THE MORAL COMPONENT OF LAW

The moral component of law refers to the ethical principles and values that underlie legal norms and influence their creation, interpretation, and application. It is the link between what is “legal” and what is “right” or “just.”

The fact that law has a moral component does not mean that everything that is legal is also moral, but it serves as a criterion for reviewing legal norms and their justice. When law is separated from morality, it can become a means of injustice (e.g., apartheid laws). The moral component of law appears most clearly in borderline situations - when formal law conflicts with what we understand as morally right. It is precisely these cases that show why an ethical analysis of law is needed, and not just a technical interpretation.

Morality distinguishes good from evil, and law often incorporates this division in determining what is permissible and what is not. Thus, for example, murder is prohibited not only as a legal act but also as morally unacceptable. Legal systems often aim to protect human dignity, which is a moral value.

Understanding the moral component of law is essential for anyone involved in law, politics, philosophy, or other related fields. It is especially important for those who apply the law, whose work should be imbued with moral responsibility, to understand these relationships. They need to perceive the broader context of legal norms and their application, as well as to develop an ethical relationship to law. This will help them to understand how legal norms arise, how they are applied, and how they may evolve.

8 R. Lukić, *Teorija države i prava: Teorija prava*, [Theory of state and law: Theory of law], Zavod za udzbenike i nastavna sredstva; Beogradski izdavačko-graficki zavod, 1995, p. 31.

Discussing the moral character of law, Kelsen states: “By presenting law as a sub-field of morality and leaving it unclear whether this simply means the obvious requirement that law should be morally shaped, or whether it means that law, as a component of morality, actually has a moral character, one attempts to give law the absolute value that morality demands.”⁹

Every law is related to morality in some sense, which indicates the need for moral justification of norms. First of all, the reasons for moral justification of legal norms depend on several factors. In certain social circumstances, in which morality cannot fully ensure a just and stable social order, the establishment of an adequate legal system is a moral imperative. The ultimate goal of law is to ensure a just and prosperous society. Then, every legal order must take into account moral convictions in order to be accepted and effective. Although every legal system strives for moral obligation and has a need for moral justification, the legitimacy of law nevertheless differs from the rational justification of moral norms. Also, the legitimacy of legal norms is not based only on moral arguments, but also takes into account the criteria of efficiency and practicality.¹⁰

Moral practice cannot rely only on moral norms, but also requires adequate human activities and actions that motivate people to behave in accordance with the stated norms. The goal of achieving a just and functional social life requires the ability to connect moral and legal norms into a single whole.¹¹

A society based on justice is possible only when a relationship of interdependence between legal norms and morality is established. Morality fulfills its role by strengthening the application of legal norms while preventing abuse. However, the risk of abuse of legal norms through the prism of “moral justification” is always present.

A moral position differs from an immoral one in the level and degree of foundation, argumentation, principle, and consistency of the position being advocated. It follows from this that disrespect for deeply rooted moral principles can threaten the survival of society as a whole.¹²

The problem of the stability of the legal order is simultaneously a problem of morality and different understandings of virtue. The instability of the legal order is very often caused by a conflict of moral values. In developing awareness with the aim of maintaining the stability of the legal order, it is clear that there is a moral obligation to obey values, but not a moral obligation to obey laws regardless of their content. Therefore, it is precisely this content that governs us, and not the proclaimed sanction highlighted in the legal norm.¹³

9 H. Kelsen, cit. work, p. 25-26

10 Peger, K., cit. work, p. 59-78.

11 Pavićević, O., & Bulatović, A. (2015). Moralne osnove društvenog poretka i kriminal [Moral foundations of social order and crime]. *Zbornik Instituta za kriminološka i sociološka istraživanja*, 34(1), p. 25.

12 Trajković, M. (2011). Moralna komponenta ljudskih prava [The Moral Component of Human Rights], *Zbornik radova Pravnog fakulteta Novi Sad*, 45(1), pp. 257–269.

13 Trajković, M. (2018). Vrednosti koje utiču na stabilnost pravnog poretka [Values that influence the stability of the legal order]. *Vojno delo*, 70(7), 80-90.

4. THE MORAL ASPECT OF JUSTICE AND FAIRNESS

Morality is an instrument for ensuring justice and fairness. Justice is an ethical principle that implies fairness and equality in treating everyone. It denotes the aspiration to create a state in which everyone's rights are respected and protected. It is a moral ideal that refers to the fair distribution of rights and obligations in society. Justice is a goal that the creators of legal norms should strive for, but which is rarely fully achieved. It manifests itself through fair treatment of all subjects and ensuring that everyone is given what is due to them according to regulations and moral norms.

Law is considered morally justified if it serves to achieve justice. This implies: equality before the law, a fair distribution of goods and obligations, as well as the protection of the fundamental rights of individuals. Many legal systems are based on the idea that every person has innate dignity and moral value. This results in the protection of human rights, as well as the prohibition of torture, discrimination, slavery, etc.

Speaking of justice, Kelsen states: "As a moral category, law means justice. It is the expression of an absolutely correct social order; an order that perfectly achieves its goal by satisfying everyone. The desire for justice is – psychologically speaking – the eternal human desire for happiness, which they cannot find as individuals and therefore seek in society. Social happiness is called *justice*."¹⁴ Kelsen further states: "If justice existed in the sense in which its existence is usually invoked when one wants to assert certain interests over others, then positive law would be completely superfluous, and its existence completely incomprehensible."¹⁵

Equity is a specific aspect of justice that applies to individual cases. If the ultimate goal sought is that justice be done to all, then equity is a means to that end. Equity refers to the application of justice to specific situations, taking into account the specific circumstances of each case. It involves striking a balance between the rigid application of the law and the need to adapt legal norms to specific situations in order to take into account moral principles. Fair treatment within the legal system helps to achieve justice for all. In legal terms, equity refers to the fair and impartial application of the law. Equity requires the adaptation of general legal norms to the specific circumstances of each case in order to achieve a just end. This means that the application of the law takes into account the specific characteristics and context of each case, ensuring that the rules are not applied rigidly, but with understanding and a sense of justice. Fairness in the application of law is essential for building citizens' trust in state institutions.

Justice and fairness are closely related concepts, often used interchangeably and with similar meanings, although there is a certain difference between them. This difference is subtle but significant, and often depends on the context in which they are used. Emphasizing justice aims for formal equality before the law, while fairness implies striving for ethical fairness, taking into account the different circumstances and needs of individual subjects. Thus, both concepts are based on issues of morality and on the respect for equality and impartiality. Justice and fairness imply that all people are treated equally and that decisions are made without bias. Both justice and fairness are essential for maintaining social order. Justice involves the application of the law in a way that is equal for everyone, regardless of personal circumstances. In practical terms, fairness involves treating people in a way that is

14 H. Kelsen, cit. work, p. 26.

15 H. Kelsen, cit. work, p. 28.

fair given their specific circumstances and needs, which may mean treating different people differently. For example, from the perspective of justice, all lawbreakers should be treated equally, while equity requires that all circumstances that influence whether a sentence is lighter or heavier (mitigating and aggravating circumstances) be taken into account, in particular: the degree of guilt, the motives for the crime, the circumstances under which the crime was committed, the perpetrator's previous life, etc.

The relationship between morality, justice, and fairness is dynamic and interactive. Law should be based on morality and principles of justice, while fairness encourages the flexible application of those principles in specific cases. This relationship ensures that the legal system is not just a set of inflexible rules, but a living structure that can adequately respond to the diverse challenges and needs of society. For the well-functioning of the state, it is important to establish a balance between legal norms and individual circumstances, as well as between legal justice and moral fairness.

Understanding the moral aspect of justice and fairness helps to develop a sense of what is morally right and encourages individuals to be active participants in creating more just relations in society. This knowledge leads to critical thinking and to more easily distinguish when something is just and fair, and when it is not. Respect for the principles of justice and fairness is crucial for public trust in the legal system.

5. CONCLUDING CONSIDERATIONS

When we talk about the moral basis of law, we mean a set of ethical principles that justify the existence of legal norms, their validity and application. The moral basis of law refers to everything that makes law legitimate, that is, what makes a system of rules of conduct in a society justified.

The moral basis of law is based on the idea that law must not be just a system of formal rules but must serve justice, dignity, freedom and the common good. This basis is based on the view that people should be treated as rational and morally responsible beings. This means that people should have freedom of choice, but also be responsible for their actions. Law that contradicts these moral values, no matter how modern, can be unethical and illegitimate.

Law is not neutral, but often reflects the interests of certain groups. Therefore, the moral basis of law must be critically examined in the context of social justice and real equality. A law that formally offers equal rights but in practice favors certain groups of people cannot be morally justified, even if it is legitimate.

Law has a moral dimension, but it is not its necessary basis - but one of its elements. Law is not necessarily the same as morality. Positive law can be in accordance with morality, but this is not mandatory. It gains legal force through legal form and legal procedure, not through moral content. Although the law is valid independently of morality, law should strive for moral values, especially justice.

Morality appears as a measure of value and as the goal of law, but not as a condition for its validity. Morality serves as a criterion for reviewing the expediency of legal norms and their justice. The ultimate goal of law is to ensure a just and prosperous society. The creators of the legal order must respect moral convictions in order for it to be accepted and effective.



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МОРАЛНИ ОСНОВ ПРАВА

Апстракт:

У раду се анализира сложени однос између права и морала. Циљ рада је да се кроз критичку анализу различитих ставова истражи у којој мери право мора бити морално утемељено, односно у којој мери морал чини саставни или нужни елеменат права, као и какве последице тај однос има по легитимитет и ваљаност правних норми. Питање односа права и морала постаје актуелно у случају регулисања морално спорних друштвених појава, као и у случајевима када позитивно право противуречи владајућем моралном схватању друштвене заједнице.

Аутори указују да се морална компонента права односи на етичке принципе и вредности који стоје у основи правних норми и утичу на њихово стварање, тумачење и примену. Све што је правно, не значи и да је морално. Морал служи као критеријум за преиспитивање правних норми и њихову праведност. Када се право одвоји од морала, може постати средство неправде.

Кључне речи: право, морал, легитимитет, правда, правичност.

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COLLECTIVE HOUSING AND THE LEGAL POSITION OF PROFESSIONAL BUILDING MANAGERS

Abstract:

Collective housing, which means living in multi-apartment buildings, has become the dominant form of housing in urban areas, both here and around the world. This way of life brings numerous advantages, such as more rational use of space, shared infrastructure and lower maintenance costs. However, at the same time, it imposes special challenges in terms of organization, communication and management of common spaces.

Precisely because of the complexity of managing common assets, such as corridors, elevators, roofs and installations, the need to hire professional building managers is growing. Their role is not only technical, but also organizational, legal and communicative. Professional building managers should enable more efficient functioning of housing communities, improve the quality of housing and contribute to preserving the value of real estate. The authors of this work aim to analyze collective housing and show the importance of managing residential buildings, in general, the legal position of professional building managers, and their role and responsibilities in managing residential buildings, as well as the benefits that this system brings to tenants and the entire community.

Key words: *collective housing, shared property, professional building managers*

INTRODUCTION

Modern lifestyles, urbanization and the growing need for functional and efficient forms of housing have led to collective housing becoming the dominant model in many cities around the world. Living in apartment buildings with multiple owners and tenants requires a coordinated functioning of the community, especially when it comes to maintaining the common areas of the building and managing day-to-day technical, administrative and legal obligations¹.

¹ Although there are authors who are of the opinion that urbanization is an indicator of poverty and the level of social development, more in: Perić, R. (2020). Pokazatelji urbanizacije – siromaštvo i društveni razvoj [Indicators of urbanization - poverty and social development], Sociološki godišnjak, br. 10, Časopis

According to the data of the Statistical Office of the Republic of Serbia collected after the 2022 population census, there are 3,613,352 apartments in Serbia, of which 2,625,711 are inhabited, 510,258 are temporarily uninhabited, and 123,584 are abandoned².

The Statistical Office of the Republic of Serbia defines an apartment as “a structurally connected unit intended for housing, which consists of one or more rooms with appropriate auxiliary rooms (kitchen, pantry, hall, bathroom, toilet, etc.) or without auxiliary rooms and has one or more separate entrances”. An apartment also means a house, with the fact that a house can have one or more apartments. The purpose of the apartment in the census is determined according to the way the apartment is used at the time of the Census. Inhabited apartments are apartments that at the time of the census were used for the permanent residence of at least one regular resident, while temporarily uninhabited apartments are apartments that were empty at the time of the census because they were new and not yet occupied, or were vacated due to relocation, adaptation, repair, as well as apartments that are used as a whole only by persons who reside in the place of the census for work or education and whose households permanently live in another place.

Despite the fact that the Statistical Office of the Republic of Serbia does not distinguish between collective and individual housing, the number of apartments itself clearly shows that this is a very important area that needs organization and legal regulation, because, through the analysis of the number of apartments in urban areas, it can be concluded that close to, if not more than half of the enumerated population lives in some form of collective housing, i.e. in apartment buildings.³

Collective housing brings with it numerous advantages, such as economy, rational use of space and infrastructure, but also a number of challenges, especially in terms of responsibility and mutual relations between tenants. Management of common property often becomes a problem if there are no clear rules, professional supervision and an organized decision-making system. In this context, there is a need to professionalize the management of residential buildings, which is achieved in practice by hiring professional managers.

Professional building managers represent a new, institutionalized solution in the management of residential communities, which is increasingly becoming a standard practice in urban areas. Their role is multiple - from technical maintenance, through communication with tenants and contractors, to compliance with legal norms and management of administration. Managers also assume part of the responsibility in resolving conflicts and in implementing the decisions of the tenants' assembly, thereby contributing to the functionality and stability of the community.

The aim of this paper is to present the legal framework of collective housing, the role and importance of professional building managers, as well as their legal position in the modern legislative system.

sociološkog društve Republike Srpske, Banja Luka, str. 347-361.

2 <https://publikacije.stat.gov.rs/G2022/HtmlL/G20221350.html> - Retrieved May 5, 2025.

3 *Ibid.*

COLLECTIVE HOUSING - CONCEPT AND CHARACTERISTICS

Collective housing can be shown through the historical development of housing described in housing policies in the world, where different stages of development are distinguished - from the socialist period, when it was the dominant form of housing in the cities of the former Yugoslavia, and the parallel development of collective housing in capitalist countries, up to the present day, when elements of market and institutionalized management are increasingly being introduced in modern housing complexes.⁴

When defining the concept and characteristics of collective housing, it is necessary to take into account several aspects from which it must be viewed. In the positive law of the Republic of Serbia, the general concept of collective housing is not found in legal regulations, while theoretically it is more the subject of other sciences, such as architecture, construction, sociology, etc. However, a systematic analysis of certain characteristics that includes housing in general⁵, collective housing can also be defined as follows: Collective housing is a form of organized housing of several households within a common residential building, where each household uses its own separate part (apartment), while certain parts of the building (entrances, corridors, facade, roof, installations, etc.) are jointly owned or used by all tenants.

This form of housing is especially developed in urban areas as a response to spatial, infrastructural and social challenges brought about by the modern way of life. Collective housing enables more economical use of space, resources and communal infrastructure, but at the same time requires clearly defined relations between tenants, as well as rules for managing common property.

From the previously systemically derived definition of the concept of collective housing, basic characteristics can be singled out, such as:

- Organized housing - where there are several housing units within one physical building where there is a need for organization and management, i.e. a mechanism for decision-making, maintenance, fundraising and communication is needed.
- Common property - parts of the building that are common and necessary for the functioning of the entire building, which are defined as such by law.
- Dependence and interdependence of tenants, which implies that decisions affecting all tenants cannot be made individually.

All forms of housing, regardless of type, have both individual and collective characteristics. The ratio of the level of individual and collective in housing affects the spatial solution and quality of the apartment. If the housing has significant individual properties, its quality is improved, but at the same time the urbanity is reduced. On the other hand, with increasing urbanity, individuality in housing decreases.⁶

4 More in: Petrović, M. (2004). Sociologija stanovanja – stambena politika: izazovi i mogućnosti [Sociology of housing - housing policy: challenges and opportunities], Institut za sociološka istraživanja, Filozofski fakultet u Beogradu, str. 16-26.

5 Zakon o stanovanju i održavanju zgrada [Law on Housing and Building Maintenance], "Official Gazette of RS" no. 104/2016 and 9/2020 - other Law, Art. 3.

6 Stojiljković, B. (2009). O fenomenu individualnog i kolektivnog u arhitekturi stanovanja [About the phenomenon of individual and collective in housing architecture], Nauka i praksa, br. 12.2, 29-32, Institut

LEGAL FRAMEWORK OF COLLECTIVE HOUSING IN SERBIA

The legal framework of collective housing in the Republic of Serbia is based on several legal and by-laws, the most important of which are:

Law on housing and maintenance of buildings (“Official Gazette of RS”, No. 104/2016 and 9/2020 - other laws);

Law on Property and Other Real Rights (“Official Gazette of RS”, No. 18/2020);

Law on Obligations (“Official Gazette of the SFRY”, No. 29/78, 39/85, 45/89 - decision of the Supreme Court of Justice and 57/89, “Official Gazette of the SFRY”, No. 31/93, “Official Gazette of the SCG”, No. 1/2003 - Constitutional Charter and “Official Gazette of the RS”, No. 18/2020).

Also, certain legal provisions are elaborated in more detail in by-laws and regulations⁷ and decisions of local self-government units.

Given that collective housing must be organized as precisely as possible, due to the coexistence of several or a large number of people, the statutes and decisions of the assemblies of housing communities are also considered a source of law in this area.

Therefore, the above regulations define and regulate the legal status of the housing community, the management of common property, the rights and obligations of the owners of separate parts, as well as the role of the professional building manager.

Law on Housing and Building Maintenance⁸ for the first time introduces a residential community as a special form of organizing owners of apartments and business premises in collective housing. According to the provisions of the Law, a residential community is defined as:

“A residential community consists of all the owners of separate parts of a residential, or residential-commercial building. A residential community has the status of a legal entity, which it acquires when at least two persons become the owners of two separate parts.

In public-legal relations and proceedings in which it is prescribed that the owner of the building appears as a party, the property of a party in those proceedings belongs to the housing association.

If the building has several units with separate entrances, the owners of separate parts of each of those units can form a residential community of entrances to which all the provisions of this law relating to the residential community of the building as a whole are applied accordingly.

In a situation where separate residential communities are formed by entrances, the consent of the majority of the total number of residential communities by entrances is required for works on the construction of the building as a whole, as well as for deciding on the method of using and maintaining the land for regular use of the building.

za građevinarstvo i arhitekturu Niš, str. 29.

⁷ Such as, for example, the Rulebook on the conditions, method and program of taking the exam for a professional manager, „Official Gazette of the RS” no. 54/2017.

⁸ Article 16 of the Law.

In the case referred to in paragraph 5 of this article, the consent for building on behalf of the residential community of the entrance is signed by the manager of the residential community of the entrance, and the contract with the investor is signed by the person authorized to do so managers of residential communities of the entrance who gave their consent.

The residential community is registered in the register of residential communities.⁹

The business name of the housing association under which it appears in legal transactions must contain the designation “housing association” and the address of the building for which it was formed. The business name can also be registered in the language of the national minority by entering the business name in the language of the national minority in addition to the business name in the Serbian language.

The housing association has an identity number, tax number and current account¹⁰

The housing community is represented by a manager, who can be a tenant or a professional building manager.

RESIDENTIAL BUILDING MANAGEMENT

The Law on Housing and Building Maintenance foresees two models of housing management, namely:

1. manager from among the tenants - a person chosen from among the tenants who performs managerial functions on a voluntary basis i
2. professional manager – a licensed person registered in the register who professionally deals with building management.

Regardless of the model by which the residential building is managed, the manager has the following powers:

- represents the residential community to third parties,
- convenes and conducts meetings of the tenants’ assembly,
- keeps records and documentation of the community,
- organizes regular and investment maintenance of the building,
- implements the decisions of the assembly and acts according to the law.

The tenants’ assembly is the highest decision-making body and consists of all the owners of special parts. The assembly makes decisions by majority vote and can replace the manager, adopt plans and financial reports, decide on works and other important issues.

9 Which is maintained by the Republic Geodetic Authority as a unique database available at <https://katastar.rgz.gov.rs/StambeneZajednice/?&LanguageID=1> – Retrived, May 8, 2025.

10 Article 16 of the Law.

Each tenant who is the owner of a separate part of the building (apartment, shop, garage) automatically becomes a member of the housing association and has the following rights and obligations:

Participates in decision-making at the assembly of the residential community, participates in the maintenance costs of common parts of the building, has the obligation not to disturb others in the use of common parts, is obliged to respect the regulations and decisions of the community.

The law specifies that the owners jointly decide on all issues related to the management and maintenance of the building, by voting in accordance with the rules of the majority (simple or qualified, depending on the type of decision).

PROFESSIONAL BUILDING MANAGERS - CONCEPT, AUTHORIZATIONS AND RESPONSIBILITIES

The implementation of the institute of professional building managers in Serbia began after the entry into force of the Law on Housing and Building Maintenance from 2016. Local self-governments, in cooperation with the Serbian Chamber of Commerce and the Ministry of Construction, Transport and Infrastructure, initiated the process of education and licensing of managers, as well as the organization of housing communities.

The introduction of professional building managers proved to be particularly useful in buildings where there were not enough tenants interested in the office of manager, and where relations between tenants are broken and the community does not function, where there are complex technical problems that require professional management, where buildings are large, with multiple entrances, elevators, special installations or business premises.

Nevertheless, despite the formal introduction of this practice, the number of engaged professional managers is still relatively small compared to the total number of residential buildings, which indicates the need for further promotion, education and support of this system.

A professional manager is a natural person who has acquired a license to perform building management activities. In order to obtain the qualification of a professional manager, it is necessary to meet the following conditions:

- has at least a four-year secondary education;
- pass the exam for a professional administrator and obtain a license in accordance with this law;
- be registered in the register maintained by the Serbian Chamber of Commerce.¹¹

Management tasks can be entrusted to a professional manager by the decision of the housing association or by the decision of the competent body of the local self-government unit in the case of forced administration.

11 <https://www.stanovanje.gov.rs/latinica/profesionalni-upravnik.php> - Retrieved May 5, 2025.

Compulsory administration in a residential community is an administration that is introduced to a residential community as a legal entity if management is not organized and a manager is elected in accordance with the law governing the area of housing. The procedure is initiated by the submission of an application by the competent inspector or the owner of a special part, and this procedure is led by the competent local self-government, which appoints a professional administrator from the Register of Professional Administrators maintained by the Serbian Chamber of Commerce.

The Chamber of Commerce of Serbia issues and revokes a license for a professional manager in accordance with the Law on Housing and Building Maintenance.¹²

Professional building managers were introduced as a legal category in order to professionalize and more efficiently manage housing communities, especially in cases where tenants are unable to organize management independently or when there are pronounced problems in the functioning of the community.

The law makes a distinction between organizers of professional building management and professional building management. Namely, the organizer of professional management can be a company, i.e. a legal entity or an entrepreneur, as a natural person, if it hires a natural person who meets the requirements for performing the duties of a professional manager.¹³ The employment must be full-time and concluded for an indefinite period. Also, the person, that is, the professional manager, must be registered in the register maintained by the Serbian Chamber of Commerce.

The Law on Housing and Building Maintenance clearly defines the conditions that a person must fulfill in order to be able to perform this function, as well as the rights, obligations and responsibilities that come with it.

The Register of professional building managers is a public record maintained by the Serbian Chamber of Commerce, which contains personal data on professional managers¹⁴ as well as data on the contracts concluded by the housing association with the organizer of professional building management, namely:

1. list of active contracts with housing associations;
2. list of expired contracts with housing associations;
3. list of terminated contracts with housing associations.¹⁵

The contract on entrusting management tasks to a professional manager is concluded in writing, between the housing association, i.e. a person authorized by the housing association and the organizer of professional management, i.e. his representative.

12 *Ibid.*

13 Article 51 of the Law on Housing and Building Maintenance.

14 <https://usluge.pks.rs/portal/registar-upravnika-zgrada> - Retrieved May 5, 2025.

15 <https://www.stanovanje.gov.rs/latinica/profesionalni-upravnik.php> – Retrieved May 5, 2025, with the fact that on the official website of the Serbian Chamber of Commerce, only the register of professional managers is publicly available, while it is not clear whether the listed lists are kept at all, or, if they are kept, whether they have limited access, only for interested persons or for persons who have a special application, etc. That is why the information from the Ministry of Construction, Transport and Infrastructure, which states that all lists and records are public, should be taken with a grain of salt, because it is not possible to find them through a public search.

In addition to the duties of the building manager (activities such as organizing building maintenance, deciding on the use of financial resources and ensuring the use of the building, as well as other matters of importance for the management of the building), the professional manager also performs the following tasks: he takes care of the maintenance of the land that serves for the regular use of the building, receives reports of breakdowns or other problems (disobedience of house rules, noise and other harmful effects in the building) every day of the week in the period from 00-24 hours, based on notifies the received reports and requires appropriate measures to be taken by the competent authority, records each received report with data on the problem and the time of receipt, as well as with other data if known (name and surname of the applicant, the person who caused the problems, etc.), ensures the execution of work on emergency interventions, proposes to the assembly of the housing community the amount of the fee for the maintenance of common parts of the building and land based on at least three collected bids from persons dealing with the maintenance of common parts of the building and land.

Fees for professional management tasks are paid to the organizer of professional management, and he settles the obligations of payment of fees to the professional manager. In the case of a compulsorily appointed professional manager, the amount of compensation to be paid by the owners of special parts is determined by the decision of the local self-government unit.

The administrator must act in accordance with the law, the rules of the community, as well as the rules of the profession. His duty is to be impartial, objective and transparent in his work. The professional manager is obliged to perform his work conscientiously, professionally and in the best interest of the community, respecting ethical norms and regulations governing the field of building management. Its activities are subject to supervision by the local self-government and the Serbian Chamber of Commerce, which maintains the register and decides on disciplinary measures.

Supervision over the implementation of the law is carried out by communal inspections, which can impose measures and fines for housing associations that do not fulfill legal obligations (eg they do not have a manager, do not maintain the building, do not implement the decisions of the assembly, etc.)¹⁶.

COMPARATIVE LEGAL ANALYSIS - PROFESSIONAL BUILDING MANAGERS IN THE LEGISLATION OF EU COUNTRIES

Although the legal regulation of collective housing differs greatly from country to country in the EU, common trends can be observed in terms of the professionalization of the management of housing buildings, the protection of common property, the provision of energy efficiency and the institutionalization of relations within housing communities¹⁷.

For the purposes of this analysis, the focus will be on three representative examples: Germany, France and Slovenia.

16 Article 122-131 of the Law on Housing and Building Maintenance.

17 European Parliament and Council. (2010). Directive 2010/31/EU on the energy performance of buildings. Preuzeto sa: <https://eur-lex.europa.eu> – Retrieved May 5, 2025.

GERMANY

In Germany, collective housing is regulated primarily through the Condominium Act (Wohnungseigentumsgesetz – WEG)¹⁸. The building manager (Hausverwalter) has a key role in the functioning of the residential community and its position is precisely regulated. According to this law, the administrator can be a natural or legal person and must be contractually appointed by the community of apartment owners. There is no legal obligation for a professional license, but in practice it is preferred that the manager has professional qualifications and is a member of chambers or associations. The manager performs financial management, organizes maintenance, maintains documentation and implements the decisions of the owners' assembly. The law foresees a high legal responsibility of managers, with the possibility of judicial dismissal in case of irregular work.

FRANCE

In France, the building management system is regulated through the Law on Common Property (Loi sur la copropriété)¹⁹. Management is carried out by a syndic de copropriété (community manager), who can be professional or non-professional. According to this law, professional managers must have a special license, appropriate liability insurance, and a guaranteed damage deposit. Their competence includes: budget management, maintenance, dispute resolution, execution of owners' assembly decisions.

The manager's work is subject to regular audits and evaluations by the tenants, and there is a special public record and rating system for managers. French legislative practice strongly protects the interests of condominium owners, and professional managers are legally bound and subject to supervision.

SLOVENIA

In Slovenia, collective housing is regulated through the Law on Housing Ownership and Building Management (Stanovanjski zakon – SZ-1)²⁰, which precisely regulates the rules of managing residential buildings, the obligations of tenants and the role of professional managers, known as "upravniki večstanovanjskih stavb". According to this law, there is an obligation to hire a manager for all multi-apartment buildings with more than two co-owners and it is mandatory by law to have a manager. Tenants can choose a professional or co-owner manager, but in practice the professional one prevails.

Professional managers must be registered with the Ministry of Environment and Space and meet certain professional requirements. There is also a system of control of the work of managers by the state and tenant boards.

According to the Law of Slovenia, the manager must have a contract with the housing association, and the law regulates in detail the minimum content of the contract, including financial management, maintenance, reporting and legal representation.

18 German Condominium Act (Wohnungseigentumsgesetz – WEG), Federal Law Gazette, Germany.

19 Code de la construction et de l'habitation (CCH), France.

20 Stanovanjski zakon (SZ-1), Uradni list RS, št. 69/2003 i kasnije izmene, dostupan na: www.pisrs.si – Retrieved May 5, 2025.

Slovenia has an advanced system of keeping a central register of buildings and managers, where citizens can check the status of the building, the manager, the state of funds and the works in the plan.

CONCLUSION

Collective housing, as the dominant form of housing in modern urban areas, imposes the need for organized and efficient management of common property. Experiences from practice show that the functionality and sustainability of housing communities largely depend on the way of management, mutual cooperation of tenants and compliance with the legal framework governing this area.

The introduction of professional building managers into the legislative system of the Republic of Serbia represents an important step towards improving the management of collective housing. Professional building managers contribute to greater legal certainty, technical arrangement of buildings and a more functional life of tenants, assuming responsibility for daily administrative, technical and legal tasks.

Nevertheless, numerous challenges still stand in the way of the full affirmation of this profession. Problems such as insufficient tenant cooperation, administrative obstacles, legal inconsistency and limited institutional support require systemic solutions. It is necessary to further strengthen the regulatory framework, continuous education of managers, as well as raising the awareness of citizens about the importance of active participation in the life of the housing community.

According to the author of this paper, in the future, professional building managers will have an even more significant role in preserving the infrastructure of residential buildings, increasing energy efficiency, implementing digital management tools and improving the quality of life in collective housing. Their legal position, clearly defined by legal norms, will be the foundation for the development of responsible and sustainable housing in urban areas of Serbia.



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**KOLEKTIVNO STANOVANJE I PRAVNI
POLOŽAJ PROFESIONALNIH UPRAVNIKA ZGRADA**

Apstrakt:

Kolektivno stanovanje, koje podrazumeva život u stambenim zgradama sa više stanova, postalo je dominantan oblik stanovanja u urbanim sredinama, kako kod nas tako i svuda u svetu. Ovakav način života donosi brojne prednosti, poput racionalnijeg korišćenja prostora, zajedničke infrastrukture i nižih troškova održavanja. Međutim, istovremeno nameće i posebne izazove u pogledu organizacije, komunikacije i upravljanjem zajedničkim prostorima.

Upravo zbog složenosti upravljanja zajedničkom imovinom, kao što su hodnici, liftovi, krovovi i instalacije, raste potreba za angažovanjem profesionalnih upravnika zgrada. Njihova uloga nije samo tehnička, već i organizaciona, pravna i komunikacijska. Profesionalni upravnici treba da moguće efikasnije funkcionisanje stambenih zajednica, da unapređuju kvalitet stanovanja i da doprinose očuvanju vrednosti nekretnine. Autori ovog rada postavljaju za cilj rada analizu kolektivnog stanovanja i prikaz značaja upravljanja stambenim zgradama, uopšte, pravni položaj profesionalnih upravnika, te njihovu ulogu i odgovornosti koje imaju u upravljanju stambenim zgradama, kao i koristi koje ovaj sistem donosi stanarima i celokupnoj zajednici.

Ključne reči: kolektivno stanovanje, zajednička imovina, profesionalni upravnici stambenih zgrada

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THE PRINCIPLE OF THE RULE OF LAW AND HUMAN RIGHTS FROM ANCIENT ROME TO THE PRESENT DAY

*“A slave is a man just like you;
although lower in status,
he is equal by nature.”*
(Seneca, *Epistulae Morales*, 47.1.)¹

Abstract:

The objective of this paper is to explore the origins, development, and evolution of core European values, with a particular focus on the principle of the rule of law and the protection of human rights, beginning in Ancient Rome and continuing to the modern era. The authors seek to present the historical transformation of these values and assess their influence on the formation of contemporary European legal systems and society. Special consideration is given to Roman law, which serves as the bedrock of the European legal tradition, and to the pressing contemporary issues surrounding the preservation of the rule of law and human rights. The paper analyzes the emergence and development of the concepts of human rights and the rule of law within Roman law, through the work of legal schools and their most prominent representatives, examining the continuity and evolution of these values over time. The methodological approach incorporates comparative, historical, analytical, and deductive methods.

Keywords: *human rights, rule of law, Roman law, Roman legal schools.*

INTRODUCTION

The ideas of the rule of law, as well as the protection of human rights, are most commonly associated in practice today with international standards proclaimed in

¹ According to the translation, 2020, Seneca. (2020). *Moral Letters to Lucilius* (R. Gummere, Trans.). Harvard University Press. (Original work published ca. 65 CE), Letter 47.1.

international conventions and recommendations, which are interconnected. However, the key question arises – where does the principle of the rule of law originate from? Did human rights, as we understand them today, even exist in Roman law? If they did, were they guaranteed to every individual, or were they reserved for specific groups? The primary aim of this paper, as the authors emphasize, is to examine how the principle of the rule of law and norms related to human rights and their protection emerged, how they evolved, and how they influenced the European continental legal system, the legal status of citizens, and their fundamental rights and freedoms.

1. CONTRIBUTION OF ROMAN LAW

Europe adopted the Roman understanding that without law there can be no organized society, and that law is the key instrument for regulating social relations.² A correct interpretation of Roman legal norms and the perceptions it offers represents the foundation and *conditio sine qua non* for understanding the principle of the rule of law and the evolution of fundamental human rights.

a) Archaic Period

The archaic period spans from the founding of the city of Rome (*ad urbe condita*) in 753 BC until the adoption of the Law of the Twelve Tables between 451 and 450 BC.³ In this period, the most significant source of law was custom, and we cannot speak with certainty of a fully formed legal system. It is known that priests interpreted the law; however, the Romans did not perceive these customs and rules as “law” in the modern sense. Human relations were regulated by magic and the will of the gods, and priests (*pontifices*) were the only ones who know the rules and rituals. Later, the high priest (*pontifex maximus*) was the one interpreting legal norms. The topic of this paper are the rule of law and human rights. What is relevant from this period, in relation to the topic, is the social and class differentiation. Already at that time, divisions emerged in Roman society, which was divided into patricians, plebeians, clients, and slaves. The class differences between patricians (Lat. *patricii*, from *pater* – father) and plebeians (Lat. *plebs*, from *pleo* – multitude) and their conflicts are a prime example of the struggle for better social status. Patricians were the privileged social class. They appropriated all war spoils and could participate in political life as well. In contrast, plebeians had no rights. Although they fought alongside patricians in wars, they received little or none of the war prize. One of the leading examples of class differentiation is the fact that until the enactment of the Canuleian Law (*Lex Canuleia*) in 445 BC, patricians and plebeians were not allowed to marry each other. This means that the guarantee of universal human rights was not even remotely present.⁴

We can conclude that in the archaic period, the rule of law did not exist in its modern sense, as there was no general equality before the law. Furthermore, human rights did not exist—especially considering the status of slaves—but the plebeians’ struggles eventually resulted in more rights for broader layers of society.

2 Malenica, A. & Deretić, N. (2011). *Rimsko pravo*. Univerzitet u Novom Sadu, Pravni fakultet u Novom Sadu – Centar za izdavačku delatnost, Novi Sad. p. 3.

3 *Ibid.* p. 33.

4 Stefanović, N. (2022). Human rights and the social position of citizens in ancient Rome. *Pravo teorija i praksa*, 39(3), 38–51, pp. 42–43.

b) Pre-Classical Period

In the pre-classical period, new legal institutes began to develop, and a distinction was made between two types of law: *ius civile* and *ius gentium*. The former applied to Roman citizens, while *ius gentium* was applied to foreigners. *Ius gentium* marked a significant step toward the universality of human rights, as it recognized legal protection for foreigners. Therefore, we can observe some progress in the direction of the rule of law, primarily through the strengthening of judicial practice. Of course, the idea of equal rights for all was still far off, although certain population groups, such as merchants, craftsmen and free men (*libertini*), acquired more favorable legal positions.

c) Classical Period

The classical period is also referred as the “golden age of Roman legal science.” Although the *princeps senatus*⁵ was equated with the position of a ruler, even he was obliged to obey legal norms. The title of *princeps* had symbolic and honorary significance, granting him only the right to speak first in the Senate. In essence, the *princeps* held unlimited monarchical power—it was a dictatorship, even it was not given that name. During this period, legal norms had absolute authority and applied to everyone. So, it is only in the classical period that the idea of the rule of law crystallized within the Roman Empire. For the first time, we see the idea of natural rights, especially in preserved texts of the prominent jurist Ulpian, who spoke about the right of equality and freedom. This can be connected to the roots of human rights, and the status of Roman citizenship expanded.⁶

d) Post-Classical Period

The post-classical period ended with the enactment of the most cited and most important act of that era – *Corpus Iuris Civilis*. However, during this time, we cannot discuss of the rule of law, since all power was concentrated in the hands of the emperors, who were above the law. Still, the idea of universal law began to emerge in outlines, which represented a significant step toward the ideal of equality of all individuals before the law.

Roman law is the foundation of European legal tradition because it established principles that form the basis of modern legal protection. Above all, these include equality before the law and legal certainty. Therefore, even though it did not recognize human rights in the modern sense, we can still observe the early foundations of both human rights and the rule of law.

2. THE INFLUENCE OF NATURAL LAW IDEAS FROM ANCIENT GREECE TO ANCIENT ROME

The Romans had taken many ideas from the Greeks, including the idea of natural law, which can be considered as the basic of the human rights. Although people differed in social status and rank, as well as in abilities, all had to be equal before the law (Greek: *isonomia*). Also, a certain minimum of rights was recognized as necessary for the

5 This term originates from the period of the Roman Republic, where the *princeps senatus* was the most influential senator in the Senate, known as the “first among equals.” Generally, the Principate as a period is associated with Augustus, who chose this title to conceal his true monarchical power.

6 Malenica, A., & Deretić, N. op. cit. p. 79-81.

preservation of human dignity.⁷ Thus, here for the first time we notice elements of human rights in the Roman state. Stoicism contributed the most to this.

Cicero, in his work “Republic”, studies natural law and believes that there is one universal law – reason – which applies to all people and is constant. Any attempt by man to abolish or alter such an eternal law would basically be unsuccessful, and ultimately, it is not easily achieved.⁸

Ancient thinkers did not have uniform views on slavery. For example, the Stoics were the first to begin denying the concepts of slavery and the then-traditional ideas about the naturalness of nobility.⁹ On the other hand, Aristotle believed that some people are born to be free, and others are not. “Where then there is such a difference as that between soul and body, or between men and animals (as in the case of those whose business is to use their body, and who can do nothing better), the lower sort are by nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master. For he who can be, and therefore is, another’s and he who participates in rational principle enough to apprehend, but not to have, such a principle, is a slave by nature. Whereas the lower animals cannot even apprehend a principle; they obey their instincts. And indeed the use made of slaves and of tame animals is not very different; for both with their bodies minister to the needs of life. It is clear, then, that some men are by nature free, and others slaves, and that for these latter slavery is both expedient and right.” (Aristotle, *Politics*, 1254b16–21/ Rackham, 1932)¹⁰

3. THE BEGINNINGS OF THE RULE OF LAW AND LEGAL SCHOOLS

Although today’s study of Roman law focuses primarily on private law, which was indeed more developed than public law, it is indisputable that one document was of crucial importance to the topic of the rule of law—and that is the *Lex Duodecim Tabularum* (around 450 BC), or the Law of the Twelve Tables. Created primarily as an attempt to reconcile the two opposing social classes—patricians and plebeians—this law ultimately led to an improvement in the position of citizens in relation to the authorities, which is considered highly progressive and significant for that period.¹¹

a) Glossators

The Glossators ensured legal certainty by insisting that law is applied based on objective interpretation rather than the arbitrary will of rulers. They also made no distinctions in applying the law based on individuals’ social status, which aligns with the principle of legal equality.

The greatest importance of the Glossator school lies in the fact that they established

7 Zajec, A. P., & Pohoryelova, Z. O. (2021). Formation of the idea of natural law in ancient Greece and ancient Rome. *Journal of the National Academy of Legal Sciences of Ukraine*, 28(4), 15–28, p. 25.

8 Barham, F. (1842). The political works of Marcus Tullius Cicero: Comprising his treatise on the commonwealth; and his treatise on the laws (Vol. 1). London: Edmund Spettigue. <https://oll.libertyfund.org/titles/cicero-treatise-on-the-laws>

9 Zajec, A. P., & Pohoryelova, Z. O. op. cit. p. 26.

10 Aristotle. (c. 340 BC). *Politics* (H. T. Rackham, Trans.). Harvard University Press. (Original work published c. 340 BC)

11 Malenica, A., & Deretić, N. op. cit. p. 38.

a scholarly framework for studying Roman law.¹² The school of Glossators was active from the 11th to the 13th century. In that context, we cannot speak of their awareness of human rights in the modern sense. However, they emphasized that the role of a jurist is to interpret laws and other legal acts, not to arbitrarily create the law.

The Glossators' school raised many questions that remain relevant today, such as the concept of a just war (*bellum iustum*) and issues concerning rulers, including property rights, legislative authority, and relations with the church.¹³

The contribution of the Glossators was far more significant regarding the rule of law. They proclaimed the idea that laws must apply equally to everyone and be based on reason (*ratio legis*). Here we can identify the basis of the notion that the law is above the ruler.

The Glossators laid the foundation for both rational interpretation and the systematization of law in general. In doing so, they had a significant influence on the creation of a legal tradition from which, centuries later, the most important legal values—such as human rights and the rule of law—would emerge. Jurists in Northern Europe began to apply Roman law as valid, or positive, law. The core of their judicial practice was Accursius's *Glossa Ordinaria*.¹⁴

b) Post-Glossators

Also known as commentators, the post-glossators engaged in analysis of the Glossators' work, pointing out positive and negative aspects of both. They primarily relied on Accursius's *Glossa Ordinaria*. While they continued to study Roman law, they gradually distanced themselves from some of the legal positions held by their predecessors, relying instead on Justinian's codification.¹⁵ However, it is incorrect to claim that the post-glossators had no significant impact on the reception of Roman law. In fact, they were more practical than the Glossators—they combined Roman law with local customs. In doing so, the law began to be applied even to the lower classes of society, representing a step forward toward the emergence and development of human rights.

c) The Humanist School

Also referred to as the Old Historical School, the Humanist School emerged and operated in France. Its representatives sought to rediscover the original Roman law, cleared of later layers such as glosses and commentaries. Unlike the Glossators and Post-Glossators, the Humanists did not advocate for the reception of Roman law. For them, law was a product of historical development, which is why they studied French customs while also analyzing Roman law.

When it comes to the reception of Roman law, their contribution is undeniable, as they enabled its practical application.¹⁶ They believed that law must be based on reason—a concept known as rational law—which can be loosely linked to the idea of the rule of law.

12 Zorić, M., & Župljanić, M. (2019). Recepcija rimskog prava. *Oditor: Časopis za menadžment, pravo i finansije*, 5(1), p. 87.

13 Malenica, A., & Deretić, N. op. cit. p. 111-113.

14 Šarac, M., & Lučić, Z. (2006). *Rimsko privatno pravo*. Sarajevo: Pravni fakultet, p. 50.

15 Crevar, T. (2024). *Odnos ius divinum i ius humanum u Rimu i kod jusnaturalista* (Master rad). Novi Sad: Pravni fakultet, p. 14.

16 Malenica, A., & Deretić, N. op. cit. p. 132.

d) The School of Natural Law

“There are eternal laws that have never been written down and are unchangeable, and the written laws of state authority cannot change these eternal unwritten laws.”¹⁷ Natural law (lat. *ius naturale*) is a set of unchangeable, objective, and eternal rules of human behavior that in this sense resemble the laws of nature.

The emergence of the school of natural law is linked to ancient Greece, where natural law was equated with the concept of justice. At that time, natural law stood in opposition to positive law. In the Middle Ages, natural law acquired an absolute theological foundation and dimension. Representatives of the school of natural law, Saint Thomas Aquinas and Gratian, equated natural law with divine law. Men can only partially, with the help of reason, grasp the essence of natural law.

In the 17th century, incredible scientific achievements influenced the emergence of the modern school of natural law. All representatives of the school believed that people are born free and that the institution of slavery should be abolished. This represents significant progress compared to ancient Greece, where even Aristotle, one of the greatest thinkers of that time, justified slavery and the degrading treatment of certain groups of people.

The ideas of the school of natural law represent an ethical corrective to legal systems, especially in the area of human rights.¹⁸

Confirmation of the ideas of the school of natural law can be found in:

- The English Bill of Rights,
- The American Declaration of Independence, and
- The Declaration of the Rights of Man and of the Citizen.¹⁹

In relation to the rule of law, natural law was positioned in such a way that even the government had to respect it unconditionally. Here we see the first theoretical foundation for the idea of human rights as we know them today, in terms of proclaiming the ideas of liberty, equality of all people, and property.

Thomas Hobbes

Thomas Hobbes did not believe in the guarantee of human rights as understood today. The only right he recognized was the right to self-defense—the right to preserve one's life. This is clearly seen in his views on the so-called “state of nature”, i.e., the status before the existence of the state. He believed that the state has no obligation to guarantee basic human rights to its citizens.

In his most famous work “Leviathan”, Hobbes argued that democracy is a necessary evil, and that unconditional dictatorship by an individual is the ideal form of government. He believed that natural rights as such belonged to the ruler, but not to individuals. The ruler had

17 Karajović, E. (1996). Ideja prirodnog prava u delima antičkih mislioca. In D. Stojanović (Ed.), *Srbija i evropsko pravo* (Knj. 1, p. 17). Kragujevac: Pravni fakultet.

18 Crevar, T. op.cit. p. 16-19.

19 Matić, I. (2019). *Doktrina prirodnog prava u klasičnoj ugovornoj teoriji* (Doktorska disertacija). Beograd: Pravni fakultet, p. 70

full authority over the lives of his subjects.²⁰ Hobbes was not completely consistent when it comes to total subordination to the will of the ruler. Namely, he acknowledged that in certain situations, when the ruler's command is unjust, the subject has the right to refuse to obey it.

John Locke

John Locke held that certain modern human rights, such as the right to liberty and the right to life, are universal and inalienable. Unlike Thomas Hobbes, Locke did not believe that state authority is absolute, but rather that it is conditioned by respect for the rights of individuals. Therefore, when there is a violation of the rights that are absolutely guaranteed to people, they have the right to rebel against state authority.²¹ Liberty, according to Locke, is based on human reason, which is the basis for understanding natural laws. Reason teaches individuals that all people are equal, that no one has the right to violate another's freedom, to harm them, to endanger their health, or to seize their property.²²

Jean-Jacques Rousseau

Writing about the state of nature and people of that time, Jean-Jacques Rousseau claimed that no man has any right over another, especially not to deprive them of life. He believed that in the early community, equality prevailed among people and that it was property that disturbed this equality. His famous statement is well known: "Man is born free, and everywhere he is in chains."²³ He was the first to articulate democratic demands for equality among all people, and his ideas served as inspiration for the French bourgeois revolution of 1789.²⁴

e) The Historical School of Law

The historical school of law emerged as a kind of response to the school of natural law, marked by a conflict of opinion between two prominent German professors, Thibaut and Savigny, about the idea of natural law and the need for codification of law. "It arose in Germany after the French bourgeois revolution, when the question was raised whether legal rules should be codified in Germany as well." As a response to Thibaut's advocacy for codification, Savigny published the book "Vom Beruf unser Zeit fur Gesetzgebung und Rechtswissenschaft", which had a decisive impact on delaying the adoption of a civil code. The ideas and arguments presented in this work represent the foundation of the historical school of law. The concept of the "Volksgeist", or national spirit as a common and general belief, gives birth to a people's law just as it does to their language. Law born in the national spirit develops slowly and evolutionarily, and, without changing the essence that is "given" by the spirit, passes through three stages of development: unconscious and underdeveloped customary law, scholarly law, and legislation.²⁵ Representatives of the historical school of law remained critical toward the ideas of universal human rights. Their view of law as an expression of the national spirit denies the existence of any universal law, which can be considered a step backward when observing the modern universality of human rights.

20 Hobz, T. (1991). *Levijatan ili materija, oblik i vlast države crkvene i građanske* (M. Marković, Trans.; M. Đurić, Predgovor i priredio). Beograd: Gradina, pp. 16–17.

21 Locke, J. (2003). *Two Treatises of Government and A Letter Concerning Toleration*. New Haven, CT: Yale University Press, p. 144.

22 Lok, Dž. (2002). *Dve rasprave o vladi* (K. Čavoški & N. Savčić, Prev.). Beograd: Utopija, p. 238.

23 Ruso, Ž.-Ž. (1892). *Društveni ugovor* (K. Petrović, Prev.). Beograd: V. Valožić, p. 12.

24 Bećirović, E. (2019). Žan-Žak Ruso i Francuska revolucija. *Univerzitetska misao – časopis za nauku, kulturu i umjetnost*, 18, p. 55.

25 Vasić, R. R. (1991). Istorijaska škola prava. *Analiz Pravnog fakulteta u Beogradu*, 39(1-3), p. 58.

f) Pandectist Science

The pandectists recognize freedom and equality only formally, through legal institutions that define and specify them, but this is far from a political concept. The most famous critic of the historical school of law was Rudolf von Jhering.²⁶ As previously noted, representatives of the historical school believed that law arises as an expression of the national spirit. Jhering, on the other hand, evaluated the advancement of law based on its universal applicability, that is, beyond the borders of a single state or culture. Even the Romans realized that *ius civile* had a limited domain, since it applied only to Roman citizens. They gradually introduced the institution of *ius gentium* (law of nations), which applied even to those who were not Roman citizens and had a supranational application. Law should not focus solely on the culture and history of a single nation, but must be comprehensive and practically effective everywhere.²⁷

Although different in approach and understanding of law, each of the mentioned schools played a role in shaping the modern concept and idea of the rule of law. When we talk about human rights, they are truly affirmed only in the school of natural law, but this does not diminish the contribution of the other legal schools to the development of legal certainty.

Therefore, to conclude: the first ideas of human rights did exist as early as ancient Greece and Rome, but the form in which we recognize them today is more closely related to the school of natural law and its ideas, even though they were not defined or specified in the way we know them now.

3. HUMAN RIGHTS TODAY

Human rights as a concept are indeed intriguing because each of us knows what we are talking about when we mention them. Yet, interestingly, the Universal Declaration of Human Rights does not contain a precise definition of human rights. This lack of an attempt to define human rights actually confirms the universalist doctrine that was passed down from Greece to Rome.²⁸

But has it always been this way? In the few preserved documents from the time of the kings, one of them, Tullus Hostilius, justified the punishment of people as a kind of warning to all.²⁹

The key document for understanding human rights is the Universal Declaration of Human Rights. From the second to the twenty-ninth article, it explicitly lists and defines the rights and freedoms that the state and society must respect – from the right to life, the prohibition of discrimination, slavery, and torture, to the right to security, education, work, social protection, and freedom of expression, all the way to the duties of individuals toward the community.

RULE OF LAW

26 Malenica, A., & Deretić, N. op. cit. p. 127.

27 Nicholas, B. (1962). *An Introduction to Roman Law*. Oxford: OUP, 54-57.

28 Bauman, R. A. (2000). *Human rights in Ancient Rome*. London and New York: Routledge, p. 2.

29 Bauman, R. A. op. cit. p. 2.

As Ulpian states (*Digesta*, 1.1.10.1), the fundamental principles of law are: “to live honorably, to harm no one, and to give each person what is rightfully theirs”.³⁰ In literature, the terms “legal state” and “rule of law” are often mentioned as synonyms, with the first term more commonly associated with the European-continental legal system, and the second with Anglo-Saxon law³¹, which defines the rule of law as a political and legal concept according to which all citizens (whether in power or not) are subject to the law, rather than to arbitrary decisions or the will of individuals. It implies equality of all before the law, respect for human rights and freedoms, and an independent judiciary that protects these values.

CONCLUSION

The path from ancient Rome to modern democratic societies has unfolded through complex historical processes – in terms of change, conflict, and ultimately the restoration of fundamental values. The rule of law today means that the law applies equally to everyone, that the judiciary is independent, and that there is a right to a fair trial and legal certainty. International organizations such as the United Nations, the European Union, and the Council of Europe emphasize the protection of fundamental human rights and the rule of law, which is also a precondition for membership in these organizations. Human rights have come a long way from classic civil and political rights to today, where contemporary challenges such as the right to environmental protection and digital rights are in focus.

30 Ulp. D. 1.1.10.1 *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. Stojčević, D. & Romac, A. (1971). *Dicta et regulae iuris: latinska pravna pravila, izreke i definicije sa prevodom na srpskohrvatski jezik i objašnjenjima*. Savremena administracija. Beograd.

31 Lauc, Z. (2016). Načelo vladavine prava u teoriji i praksi. *Pravni vjesnik*, 32(3-4), 49–50.



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NAČELO VLADAVINE PRAVA I LJUDSKA PRAVA OD ANTIČKOG RIMA DO DANAS

Rezime:

Cilj ovog rada jeste da prikaže korene, genezu i razvoj osnovnih evropskih vrednosti, sa posebnim naglaskom na načelo vladavine prava i zaštitu ljudskih prava, počev od Antičkog Rima pa sve do savremenog doba. Autori nastoje da prikažu istorijsku transformaciju ovih vrednosti i sagledaju njihov uticaj na oblikovanje savremenog evropskog pravnog sistema i društva. Posebna pažnja posvećena je rimskom pravu kao temelju evropske pravne tradicije, kao i savremenim izazovima u pogledu očuvanja vladavine prava i ljudskih prava danas. U radu se analizira nastanak i razvoj ideje ljudskih prava i vladavine prava u rimskom pravu, kroz delovanje pravnih škola i njihovih najznačajnijih predstavnika, te se razmatra kontinuitet i evolucija ovih vrednosti. Metodološki okvir rada čine komparativni, istorijski, analitički i deduktivni metod.

Ključne reči: *ljudska prava, vladavina prava, rimsko pravo, škole rimskog prava*

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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA IN THE APPLICATION AND PROTECTION OF THE CONSTITUTIONAL VALUE OF THE RULE OF LAW

Summary:

In the Constitution of the Republic of Croatia, the framer of the Constitution defines and prescribes the highest values of the constitutional order of the Republic of Croatia, which also form the basis for the interpretation of the Constitution.

The highest values of the constitutional order are binding for all subjects that implement the Constitution of the Republic of Croatia, from the legislative, executive and judicial branches to the Constitutional Court of the Republic of Croatia.

The rule of law is one of the highest values of the constitutional order of the Republic of Croatia. The Croatian Constitution recognises that all the highest values of the Croatian constitutional order are of equal value. In concrete cases, however, there may be contradictions between individual values, so it is necessary to find the right balance between them. Another characteristic of the highest values of the Croatian constitutional order is the fact that the Constitution does not define their content in detail. Their content is identifiable, but not explicit. All subjects that implement the Constitution are obliged to interpret it on the basis of the highest constitutional values. However, only one of these bodies, the Constitutional Court, enjoys such a constitutional status that enables it to interpret these values, and this interpretation, which is expressed in its decisions, has a generally binding force *erga omnes*.

In its jurisprudence, the Constitutional Court of the Republic of Croatia has in several cases encountered the need to decide what it understands by the rule of law, as one of the highest values of the constitutional order of the Republic of Croatia. On the basis of its constitutional jurisdiction and its constitutional status as the guardian and protector of the Constitution, the Constitutional Court has expressed in several of its decisions what it considers to be the rule of law. These positions of the Constitutional Court are highly important for the implementation and protection of the rule of law as one of the highest values of the constitutional and legal order of the Republic of Croatia.

In this paper, I will examine the concept of the rule of law as the highest value of the constitutional legal order from a theoretical perspective, as well as the case law of the Constitutional Court of the Republic of Croatia, which also includes its activist role in defining the content of this value.

Keywords: *rule of law, values of the constitutional order, Constitutional Court, constitutional judicial activism, interpretation of the values of the constitutional order*

INTRODUCTION

By adopting the Constitution of the Republic of Croatia in 1990, the framer of the Constitution fundamentally changed the system of values¹ on which it is based and which constitute its highest values and those for the entire constitutional order.² These values include the rule of law, which is of particular significance for defining, from a legal perspective, the constitutional identity of the Republic of Croatia.³ However, before I say a few words on that issue, I consider it necessary to briefly address the significance of the highest values of the constitutional order of the Republic of Croatia. First, as I have already mentioned, they entirely and radically transformed the system of values on which the constitutional order of the Socialist Republic of Croatia had previously been based. On the other hand, through this change, the framer of the Croatian Constitution embraced a new value-based foundation for the establishment and legal regulation, in its Constitution, of an entirely new socio-political and overall social system, and thereby fully abandoned the one that had been in force until then. Constitutional legal theory refers to such constitution-making as revolutionary constitution-making.⁴ Second, it is partly mistaken to think that, through revolutionary constitution-making, the framer of the Croatian Constitution in 1990 merely abolished and abandoned the socialist self-management system and replaced it with a civic, capitalist system. Although this is essentially true, it must nevertheless be said that it is neither entirely accurate nor fully correct. Quite simply, it is necessary to answer the question of what kind of capitalist social and state system the framer of the Croatian Constitution adopted and regulated in the 1990 Constitution. In the 1990 Constitution, the framer chose to constitutionalise the Republic of Croatia

1 The Republic of Croatia was among the first states to embrace the value of the rule of law as the foundation of their constitutional order in the new wave of constitutionalisation in 1990. On that path, it was followed by Romania and Bulgaria in 1991, Macedonia in 1992, the Russian Federation in 1993, and Poland in 1996. This model, in terms of the rule of law, was also adopted by the Republic of Serbia in 2006, when Article 3 of its Constitution recognised the rule of law as a fundamental principle. This clearly follows from the content of Article 3, which prescribes: "The rule of law is a fundamental prerequisite of the Constitution and rests on inalienable human rights" (paragraph 1), while paragraph 2 of the same Article which prescribes how the rule of law is realised reads as follows: "The rule of law shall be realised through free and direct elections, constitutional guarantees of human and minority rights, the separation of powers, an independent judicial power and the subordination of the authorities to the Constitution and the law" (Constitution of the Republic of Serbia, 2006, Official Gazette of the Republic of Serbia nos. 98/2006 and 115/2021).

2 Article 3 of the Constitution of the Republic of Croatia (Official Gazette no. 85/10 - consolidated text) reads as follows: "Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution". The underlined parts of the text were added to Article 3 through the constitutional amendments adopted in 2000.

3 The position that the highest values of the constitutional order form an integral part of the constitutional identity of the Republic of Croatia was expressly accepted and stated by the Constitutional Court of the Republic of Croatia in its Decision no. U-VIIR-1159/2015 of 8 April 2015 (Official Gazette no. 43/15), where in point 33.4, paragraph 2, it is stated: "Moreover, when as regards the amendment of the Constitution itself, the Constitutional Court has an obligation based on general supervisory powers not to allow the holding of any referendum 'when it finds such formal and/or substantial unconstitutionality of the referendum question or such a grave procedural error which threatens to undermine the structural characteristics of the Croatian constitutional state, or its constitutional identity, including the highest values of the constitutional order Republic of Croatia (....)'. In such cases, the Constitutional Court bases its assessment on the Constitution as a whole" (all underlining by the author).

4 For more on revolutionary and state-building constitution-making, see Isensee J., *Država, ustav, demokracija, Politička kultura*, Zagreb, 2004, p. 99.

according to the model of a state governed by the rule of law, thereby taking a significant step forward by moving away from the model of “Rechtsstaat” (legal state) on which most of the old European capitalist states had been constitutionalised. In my view, by embracing the model of the rule of law, the framer of the Croatian Constitution simultaneously incorporated into it all the key elements of the legal state while also enriching them with the most important and essential elements and characteristics of a state governed by the rule of law, thereby achieving a new quality which is reflected, in particular, in the constitutional identity of the Republic of Croatia, as mirrored in its constitutional order.

By the will of its framer, the Constitution of the Republic of Croatia in its Article 3 expressly prescribes the highest values of the constitutional order of the Republic of Croatia. One of these is the rule of law. Among the prescribed highest values of the constitutional order, the Constitution makes no distinction as to which of them is more significant and/or more valuable for the constitutional and legal order. According to the Constitution, they are all equally important and of equal standing. However, the highest values of the constitutional order are by their very nature, first and foremost, ethical concepts, or more precisely, categories of concepts.⁵ As such, in a legally prescribed substantive sense they are not defined, but they are definable. It is self-evident that when we speak of the contemporary, constitutionalised democratic state governed by the rule of law, we refer to a state organised and regulated by law in all forms of its expression and action, regulated by the highest legal act, which is at the same time the supreme law of the land. Naturally, this refers to the Constitution of the given state, which, in its substantive content and from a constitutional and legal perspective, expresses the intention of the framer of the Constitution as to what kind of state it should and must be. Thus, it determines not only that the state should exist, but also what kind of state it should be. In this sense, one should understand Isensee's conception of the state and the constitution as being mutually connected and interdependent.⁶

When it comes to the constitutional order of a state based on the model of the rule of law as one of the highest values of its constitutional order, the rule of law should be understood not merely as the rule of statutes grounded in the principles of constitutionality and legality, but as rule according to the law.⁷ In this sense, the value of the rule of law is manifested as a value to which even the very principles of constitutionality and legality are subject. More precisely, these principles appear as key instruments for realising the rule of law in the full scope of its content.

5 There is no doubt that the highest values of the constitutional order are above all ethical values. However, in the Constitution, the framer assigned them a *sui generis* regulatory role by defining them as the foundation for interpreting the Constitution. Thereby it obliged the legislator to rely on them when interpreting the Constitution in the process of enacting statutes and other legal acts within its competence, and at the same time enabled the Constitutional Court of the Republic of Croatia to “interpret constitutional provisions progressively and dynamically in the light of these living, conceptually and methodologically complex, value-based concepts” (see p. 2 of the National Report of the Constitutional Court of the Republic of Croatia, Answers to Questionnaire for the XVII Congress of the Conference of European Constitutional Courts, Batumi, 29 June - 1 July 2017, Zagreb 2016 at <https://www.usud.hr>).

6 Isensee J., op. cit., p. 41.

7 See also the decision and ruling of the Constitutional Court of the Republic of Croatia nos. U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996 and U-I-589/1999 of 15 March 2000 (Official Gazette no. 31/00), where point 11 of the reasoning states, inter alia: “Therefore, the rule of law, in itself, cannot be law in the same sense as the statutes enacted by the legislator”. The rule of law is not only the rule of statutes, but the rule according to the law which, in addition to the requirement of constitutionality and legality, as the most important principle of any regulated legal order, also contains supplementary requirements concerning the statutes themselves and their content.

The rule of law, understood as one of the highest values of the constitutional order and as a concept of a constitutional order in which everyone acts in accordance with the law, that is, in line with the rights, obligations and responsibilities prescribed and established by law to which they are entitled as addressees within the social and state community. In that sense, the rule of law, both as a value and as a right, is the starting point (basis) for the depersonalisation of power, which we achieve through the rule of law, and not through the rule of people over people.⁸ The rule of law, both as a value and as a principle that everyone has powers, duties and responsibilities established by law and exercises them in accordance with the law, becomes the foundation for the constitutional order: the separation of powers (both horizontal and vertical), the guarantee of free multiparty elections, the limitation of power, the guarantees and protection of human rights and freedoms, the exercise of rights and freedoms in accordance with the law (through procedures prescribed by law), and, in a substantive sense, in line with the rights, obligations and responsibilities as prescribed by the objective constitutional and legal order for every natural and legal person.

However, when it comes to state authorities and other bodies of public authority, including bodies of legal entities vested with public powers, the rule of law requires that the constitutional and legal order be more stringent towards them by prescribing that their actions must be in accordance with the law, in a state governed by the rule of law. Above all, this is to ensure, in a democratic state governed by the rule of law, there is the necessary, democratically required and open space for the exercise of human rights and freedoms based on the principles of equality, equal treatment, proportionality, constitutionality and legality, as well as legal certainty and stability. Therefore, constitutional orders founded on the rule of law start from the principle that all state authorities and other bodies of public authority, as well as bodies of legal entities vested with public powers, may exercise their competences according to the law only within the constitutional and legal framework in which they are expressly authorised to do so by the Constitution, statute, or other law in conformity with the Constitution and the statute. In contrast, the sphere of freedom for natural and legal persons governed by civil law in exercising human rights and freedoms in all segments of social life is broader in scope and more comprehensive in content. This is because in the exercise of their rights and freedoms, starting from the principle of the rule of law, they may do (or refrain from doing) anything that is not prohibited by law (the Constitution, statute, or other legal acts).⁹ In this context, the principle *Non sub homine sed sub lege* (Not under another individual, but under the law) is fully affirmed.

The abovementioned clearly shows how significant the rule of law is in a democratic state governed by the rule of law, both as a value and as a law. Whether directly or indirectly, it connects with and affects the entire constitutional and legal order, and thus also the other values with which it collectively forms the entirety of the highest values of the constitutional order. As already emphasised, the highest values of the constitutional order of the Republic of Croatia (including the rule of law) are, in their substantive content, ethical norms which are definable but are not defined. There should be the highest possible degree of consensus regarding their content, as such consensus is essential on the one hand for the development and coherence of the constitutional and legal order, and on the other for uniformity (in order to avoid any arbitrariness) in the interpretation of the Constitution and the constitutional and legal order based on it. In the Republic of Croatia, this is a constitutional imperative, as Article 3 of its

8 The principle "*Non sub homine sed sub lege*" (not under another individual, but under the law) is also discussed by Stanovčić. See Stanovčić V., "Democracy, Constitutionalism and the Rule of Law", in Podunavac M., (ed.), *State and Democracy*, Official Journal, Belgrade, 2010, p. 152.

9 See Smerdel B. and Sokol S., "Ustavno pravo", Faculty of Law, University of Zagreb, 2006, p. 163.

Constitution prescribes not only what constitutes the highest values of the constitutional order of the Republic of Croatia, but also that they are “the basis for interpreting the Constitution”.¹⁰

Regardless of the processes and substantive forms in which the Constitution of the Republic of Croatia is implemented and/or applied, everyone is obliged to interpret it on the basis of the highest values of the constitutional order enshrined in Article 3 of the Constitution.

However, in the interpretation of the individual highest values, precisely because their content is not expressly defined, it is possible (and indeed it happens) that different understandings arise as to what is meant by a particular highest value in a specific substantive context. In terms of uniform implementation, legal certainty and stability of the constitutional and legal order, such situations are unacceptable. For that reason, the framer of the Croatian Constitution, while retaining the right and obligation of everyone to interpret the Croatian Constitution starting from the highest values, has designated a body with the competence to do so, whose interpretations, that is, the positions it adopts as to the substantive meaning of each highest value of the constitutional order, are generally binding and “must be respected by every natural and legal person”.¹¹

In interpreting the Constitution, and starting from the highest values of the constitutional order in determining what is to be understood as the content of such a value, the competent authority – the Constitutional Court of the Republic of Croatia – expresses its positions on the one hand in its decisions and rulings adopted in the exercise of its powers and on the other in fulfilling its role as the “guardian and protector” of the Constitution of the Republic of Croatia.¹²

This is an opportunity to emphasise that the powers, responsibilities and legal force of the decisions and rulings of the Constitutional Court of the Republic of Croatia are governed by rules which have constitutional force.¹³

Starting from the above, it is no longer disputed in the Republic of Croatia that the decisions and rulings of the Constitutional Court are generally binding and must be respected by every natural and legal person. Such a norm which has constitutional force clearly shows that in the Republic of Croatia the decisions and rulings of the Constitutional Court of the Republic of Croatia (both in the operative part and in the positions taken in its statement of reasons) have the legal force of a statute.

In this sense, it is important to consider and understand the value of the rule of law as one of the highest values of the constitutional order in the Republic of Croatia. The interpretation of the Constitutional Court of what is understood by the value of the rule of law, how its content is realised as law in the objective sense, that is, what

10 The Constitution of the Republic of Croatia (Official Gazette no. 85/10 - consolidated text).

11 See in more detail Article 31.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette no. 49/02 – consolidated text).

12 Häberle P., “Uloga i utjecaj ustavnih sudova iz komparativne perspektive”, in Bačić A. and Bačić P., (eds.), *Ustavna demokracija i sudovi*, Split, 2009, p. 353.

13 That is to say, the position, powers, appointment of judges of the Constitutional Court, the procedure before it, as well as other matters relevant to the performance of duties and the work of the Constitutional Court of the Republic of Croatia, are regulated solely by the Constitution of the Republic of Croatia and the Constitutional Act on the Constitutional Court of the Republic of Croatia, which in its entirety has the legal force of a constitutional act, as it is adopted in an identical procedure as prescribed for the “amendment of the Constitution” (see in more detail Article 132.2 of the Constitution of the Republic of Croatia, Official Gazette no. 85/10 – consolidated text).

characteristics legal rules must have and what requirements they must meet in order to satisfy the criteria of the rule of law, as well as how the rule of law as a value connected with a specific human right or freedom is realised in a functional sense, strengthening legal certainty and predictability, will be addressed later in this paper. However, at this point it must also be said that the Constitutional Court interprets other highest values of the constitutional order of the Republic of Croatia as well. Its positions on the substantive meaning of each of these values, just as in the case of the rule of law, are generally binding and must be respected by every natural and legal person. However, the interpreted content of an individual highest value, as expressed through the positions of the Constitutional Court, is thereby transformed from an ethical into a legal concept and acquires its legal definition and meaning. It is no longer merely definable, but is, in the legal sense, defined. To the extent that such a position affects and/or may affect the exercise and/or protection of an individual human right (or another right prescribed by law, e.g. of a procedural nature), it also becomes a right. In this context, the rule of law should be interpreted broadly, both as one of the highest values of the constitutional order and as a requirement that its content be realised according to the law, as well as one of the fundamental principles of a democratic constitutional state governed by the rule of law. After all, a similar context gave rise to Isensee's view of the constitutional state, which, in his opinion, can be nothing other than a state governed by the rule of law.¹⁴

Before turning to examples of the decisions of the Constitutional Court of the Republic of Croatia concerning the interpretation of the rule of law as one of the highest values of the constitutional order of the Republic of Croatia in its application and protection, I will next provide a concise definition of the rule of law and attempt to distinguish between it and the legal state. I will then briefly address the relationship between the rule of law and legal certainty, with the aim of providing a more comprehensive treatment of the rule of law in this paper (within its subject matter and available scope), both as one of the highest values of the Croatian constitutional order and as a principle requiring that everyone acts in accordance with the law in both the formal and material (functional) sense, as required by the Croatian Constitution.

ON THE CONCEPT OF THE RULE OF LAW

Today's understanding of the rule of law is rooted in the definition developed by English constitutional doctrine of the 19th century, taking into account the insights of medieval concepts "according to which even the ruler must submit not only to God but also to the law (*"Rex non debet esse sub homine sed sub Deo et lege"*)".¹⁵

The rule of law is defined in the Encyclopaedia Britannica as: "the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power".¹⁶

In the Republic of Croatia, the most acceptable definition of the rule of law was provided by B. Smerdel. Starting from the fact that the Constitution of the Republic of

¹⁴ Isensee J., op. cit., p. 78.

¹⁵ Smerdel B. and Sokol S., op. cit. p. 161.

¹⁶ Encyclopaedia Britannica, Rule of law/Definition, Implications, Significance, at: www.britannica.com, accessed 30 June 2025.

Croatia recognises it as one of the highest values of the constitutional order, he defined it in two ways: (a) from a political and (b) from a legal perspective, stating: (a) “In the political sense, the concept of the rule of law unites a set of principles of constitutional governance, according to which all holders of public authority are subject to the limitations established by the legal order of the state, under the political supervision of representative bodies, based on a mandate received from the people, which is ensured by the provision of protection through an independent judiciary in appropriate and legally prescribed proceedings in which respect for human rights is guaranteed”; b) “In the legal sense, the rule of law requires strict adherence to the Constitution and the law by all state authorities, individual officials, as well as by the citizens themselves”. However, from the perspective of the requirement of the rule of law, formal adherence to the law is not sufficient. The Constitution and statutes must have certain content, including the separation of powers and guarantees of human rights and freedoms, as well as a system for the protection of those rights from holders of power and state authorities. The rule of law, therefore, as a complex political and legal concept, represents a set of normative requirements that implement the idea of constitutional governance, as described earlier, that is, of a liberal civil state, from which systems of institutions necessary for maintaining and developing a democratic political order are constitutionally derived.¹⁷

In the European Union, the rule of law is recognised as one of the fundamental values on which the Union is founded.¹⁸ For the contemporary understanding of the concept of rule of law, it is important to know (especially for the EU Member States) how this concept is defined, among others, by the European Union. On its official websites, we find the definition which reads: “Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts”.¹⁹ However, due to the specific nature of the European Union (arising from the diversity of identity among its Member States), the European Union provides a descriptive account of what the rule of law encompasses in terms of its content, stating: “The rule of law is a well-established principle. Despite the differences in national identities and traditions among the Member States, they all share a common understanding of the rule of law, which can be defined on the basis of six principles: legality, which presupposes transparent, accountable, democratic and pluralistic law-making; legal certainty; prohibition of the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts and effective judicial review, including respect for fundamental rights; separation of powers; and equality before the law. These principles are recognised by the Court of Justice of the European Union and the European Court of Human Rights. In addition, the Council of Europe develops standards, and issues opinions and recommendations with clearly defined guidelines for the promotion and respect of the rule of law.”²⁰

By accepting the rule of law as one of the values on which the European Union is founded, and especially in the EU Member States, the use of concepts of the constitutionalisation of society and a state based on the model of the legal state (Rechtsstaat) is increasingly coming to an end in Europe. The doctrinal concept of the

17 Smerdel B. and Sokol S., op. cit. p. 161.

18 See in more detail Article 2 of the Treaty on European Union [2010] OJ C83/1 – consolidated versions, where the rule of law is expressly stated, among other things, as a value on which the European Union is founded.

19 Official website of the European Union: <https://commission.europa.eu>, accessed 30 June 2025.

20 Official website of the European Union, op. cit.

legal state (Rechtsstaat) originated in German legal theory in the 19th century. This theory was less concerned with political elements and placed emphasis on the supra-legal force of constitutional norms and the hierarchy of legal sources derived therefrom. The legal system is thereby understood as a gradationally derived whole, in which legal norms are deduced from higher legal norms, and the entire system is internally harmonised through the obligation to adhere to constitutional principles. The focus is on establishing and maintaining the unity of the legal system through the hierarchy of legislation and a system of oversight that ensures the coherence of the system.²¹

In its essence, the doctrine of the rule of law “mainly retained its meaning in administrative law and evolved into a simple principle of legality. More precisely, the Rechtsstaat principle was understood more narrowly as the need for judicial review of administrative acts, mostly on procedural grounds, rather than as a constitutional review of legislative acts. Its main purpose was to provide protection against unlawful or arbitrary administrative decisions, rather than to enable the exercise of fundamental human rights”.²² However, it was precisely the demand and the need of citizens to ensure, in conformity with the Constitution and the law, the effective protection of human rights and freedoms, on the one hand, and, on the other, to prevent wilfulness and arbitrariness on the part of the authorities, that were the main motives behind the pursuit to establish a state based on the doctrinal foundations of the rule of law. Perhaps this need, and indeed this demand, was best articulated by G. Radbruch in his work *Philosophy of Law*, where he wrote: “We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a Rechtsstaat, a government of law that serves as well as possible the ideas of both justice and legal certainty. Democracy is indeed laudable, but a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such a government”.²³

The definitions of the rule of law and the legal state cited above, as well as the goals to be achieved through the application of each of these models, show both their similarities and their differences. In addressing possible differences, L. Basta points out that the rule of law is, in its essence, “antipositivist in its foundations; therefore, it is very difficult within it to clearly distinguish between positive-legal, moral, and natural-law normativity”.²⁴ In my opinion, however, the most comprehensive distinction between the rule of law and the legal state was presented by F. von Hayek in his book “*The Political Ideal of the Rule of Law*”. In that work, he defines the rule of law by drawing a clear distinction between it and the legal state, claiming that “the rule of law is not the rule of statutes (which is the essential characteristic of the legal state – comment by the author), but the rule according to the law, a meta-legal doctrine or a political ideal”.²⁵ However, over time, with the development of the democratic constitutional state founded on the ideals and values of liberty, human rights and freedoms, the separation of powers, and the limitation of power by law and the obligation that the state itself must exercise all its competences in accordance with the law, these differences have gradually diminished, which has led to such a convergence between the rule of law and the legal state that today it can be said, in a substantial sense, that they are almost identical, or that the differences between them have become almost negligible.

21 Smerdel B. and Sokol S., op. cit. p. 161.

22 Avramović D., “Vladavina prava i pravna država – istost ili različitost”, *Collected Papers of the Faculty of Law of Novi Sad*, no. 3/2010, p. 430.

23 Radbruch G., “*Filozofija prava*”, Belgrade, 1998, p. 186.

24 Basta L., “*Politika u granicama prava*”, Belgrade, 1984, p. 118.

25 Von Hayek F., “*Politički ideal vladavine prava*”, Zagreb, 1994, p. 47.

One of the important reasons for this lies in the fact that, at the turn of the 21st century, the doctrine of the legal state “was supplemented with substantial requirements regarding the guarantee of human rights and freedoms and the assurance of their protection, as a result of which the fundamental difference was almost entirely suppressed”.²⁶ The position presented by B. Smerdel regarding the reasons for the suppressed distinction between the rule of law and the legal state is, from that perspective, largely acceptable to me. However, I find it necessary to emphasise once again that this has not, in substantive terms, led to the abandonment (or abolition) of the concept of state organisation based on the doctrine of the legal state (*Rechtsstaat*). In the approximation and equating of these two doctrines, one must also take into account that a large number of the principles on which the legal state is, by definition, based are identical to (and/or accepted within) the doctrine of the rule of law. In that sense, as I have previously pointed out, the contemporary understanding of the rule of law, in its substantive sense, encompasses all the essential elements on which the legal state is based. Naturally, these elements are adapted and placed at the service of achieving the ideals and objectives of today’s democratic constitutional state, the rule of law, guaranteed and protected human rights and freedoms, democratic elections, the division of powers and power limited by law, an independent and effective judiciary, and constitutional adjudication by a Constitutional Court entrusted with the task of safeguarding and protecting the Constitution.

Precisely because of such functions of the rule of law, it seems to me that Duquit had already taken his well-known position as an expression of his deep conviction when he wrote: “We firmly believe that there exists a rule of law above individuals and the state, above rulers and those who are ruled, a rule that is binding on all, and we consider that what is referred to as state sovereignty is legally limited by the rule of law”.²⁷ His admiration for the rule of law and its significance in the practice of democratic constitutionalism was clearly expressed in the book written by the renowned Croatian constitutional scholar and Member of the Academy, A. Bačić, as follows: “The rule of law, as an amalgam of standards, expectations and aspirations, encompasses both traditional ideas of the requirements of justice and fairness in the relationship between the rulers and the ruled. Thus understood, the rule of law is necessarily linked to certain fundamental institutional arrangements, which are, in turn, central to both the theory and practice of democratic constitutionalism”.²⁸

In writing about the rule of law as an amalgam, Bačić pointed to one of its most important characteristics, namely that it includes within its substance a whole set of constitutional standards, as well as principles, guarantees and freedoms, whose observance and implementation within the constitutional system ensure both the rule of law itself and the constitutional order, in accordance with its requirements as the highest value of the constitutional system and, as such, a particularly important and essential good on which that system is founded and which, at the same time, protects it.

Following this line of thought, this paper will briefly point to the amalgam of the rule of law as both a value and a principle, which, practically understood, constitutes its essential elements, and how the rule of law is realised and protected in the full scope of its meaning through several examples based on the decisions and rulings of the Constitutional Court of the Republic of Croatia.

26 Smerdel B. and Sokol S., op. cit., p. 162.

27 Duquit L., “Theory of Objective Law Anterior to the State”, in *Modern French Legal Philosophy*, p. 237, cited according to Bačić A. and Bačić P., “Ustavna demokracija i sudovi”, Split, 2009, p. 228.

28 Bačić A., “Hrvatska i izazovi konstitucionalizma”, *Književni krug*, Split, 2001, p. 88.

ON THE UNITY AND FUNCTIONAL INTERCONNECTION OF THE RULE OF LAW AND THE PRINCIPLES OF THE CONSTITUTIONAL ORDER

The rule of law is understood both as the highest value of the constitutional order and simultaneously as the highest principle requiring that all persons and everyone individually must submit to and act in accordance with the law. The rule of law is a conceptual category that includes within its substance a whole range of legal principles, the realisation of which gives effect to it both as the highest value of the constitutional order and as the highest requirement of law itself, since it, in and of itself, is inconceivable in a society and a state where the constitutional order does not function in a way that ensures that everyone acts, exercises their powers, and fulfils their duties in accordance with the law. The aforementioned unity and mutual interconnection of the rule of law as one of the highest values of the constitutional order and its principles reflect, on the one hand, its complexity, but at the same time also the coherence necessary for its understanding and implementation as a practical concept.

Considering the rule of law precisely from the perspective of a practical concept, the European Commission for Democracy through Law (hereinafter: the Venice Commission), as the advisory body of the Council of Europe, examined this issue, reached a consensus and identified “the necessary elements of the rule of law... which are not only formal but also substantive or material... for which there appears to be a consensus”,²⁹ as noted by J. Omejec, a long-standing member of the Venice Commission and former President of the Constitutional Court of the Republic of Croatia.

The elements of the rule of law that define it in both its formal and substantive sense are listed by Omejec, as follows:

“(1) Legality, including a transparent, accountable and democratic process for enacting law;

(2) Legal certainty;

(3) Prohibition of arbitrariness;

(4) Access to justice before independent and impartial courts, including judicial review of administrative acts;

(5) Respect for human rights;

(6) Non-discrimination and equality before the law”.³⁰

Starting from Tom Bingham’s short definition of the rule of law that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”,³¹ the rule of law is further expanded by 8 “ingredients”. These include:

29 Venice Commission, Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), cited by Omejec, J., “Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava – Strasbourški *acquis*”, Novi informator, Zagreb, p. 1087.

30 Omejec J., op. cit. p. 1087.

31 Omejec J., op. cit. p. 1087.

- “(1) Accessibility of the law (that it be intelligible, clear and predictable);
- (2) Questions of legal right should be normally decided by law and not discretion;
- (3) Equality before the law;
- (4) Power must be exercised lawfully, fairly and reasonably;
- (5) Human rights must be protected;
- (6) Means must be provided to resolve disputes without undue cost or delay;
- (7) Trials must be fair, and

(8) Compliance by the state with its obligations in international law as well as in national law”.³²

On the mutual functional interconnection between the rule of law as the highest value of the constitutional order and the requirement that every person acts in accordance with the law and the principles of the constitutional order, similar positions to those of the Venice Commission can be found both among legal theorists³³ and constitutional courts.³⁴ In fact, the views of the Venice Commission, as cited by Omejec, are indispensable in interpreting, from a legal perspective, what is considered in the substantive sense to constitute the rule of law, on the one hand, when we talk about it as the highest value of the constitutional order, and on the other as an imperative requirement that every person acts in accordance with the law and in conformity with the law and within the legal framework governing their rights, obligations and responsibilities.

Why are they indispensable both for the interpretation of the rule of law as the highest value of the constitutional order, on the one hand, and for its implementation by all competent authorities with a view to fulfilling its requirement that the constitutional order be established according to the law, but also that it be implemented in accordance with the law on the other hand? The answers to the questions raised are of exceptional importance. They provide an answer both to the extent to which the concrete constitutional order based on the value of the rule of law has been achieved in the actual functional³⁵ order, and the extent to which the given state is founded on the rule of law as one of the highest values of the constitutional order and functionally realises that value by ensuring its implementation in concrete social relations as a requirement that everyone acts, fulfils their duties, and exercises their rights and responsibilities according to the law.

To what extent the Constitutional Court of the Republic of Croatia has interpreted the rule of law in its decisions and ensured its protection both as the highest value and

32 Omejec J., op. cit. p. 1088.

33 Among legal theorists, see, for example, Smerdel B. and Sokol S., *Ustavno pravo*, Faculty of Law, University of Zagreb, 2006, p. 161 et seq., and Bačić A., “Ustav Republike Hrvatske i najviše vrednote ustavnog poretka,” *Collected Papers of the Faculty of Law in Split*, vol. 49, no. 1/2012.

34 For instance, the Constitutional Court of the Republic of Croatia, as evidenced by its constitutional case law, which is illustrated through several examples of its decisions and rulings presented below in this paper.

35 The understanding of the constitution and the constitutional order from a functional perspective has been adopted and is used in that sense as presented by MacCormick, N., “Institutions of Law: An Essay in Legal Theory,” *Naklada Breza*, Zagreb, 2014, p. 75.

as the supreme law, on the basis of its constituent elements as previously set out, will be presented below through several examples from its established case law.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA – INTERPRETATION AND PROTECTION OF THE VALUE OF THE RULE OF LAW (EXAMPLES)

The role and significance of the decisions of the Constitutional Court of the Republic of Croatia in the interpretation and protection of the value of the rule of law (and other values set out in Article 3 of the Constitution) stem from its position, jurisdiction and tasks assigned to it and prescribed by the framer of the Croatian Constitution through acts of constitutional force.³⁶ The Constitutional Court of the Republic of Croatia is, first and foremost, obliged, like any other natural and/or legal person in interpreting the Constitution, to interpret it on the basis of the highest values of the constitutional order, including the rule of law as one of those values.³⁷ However, unlike all others, the decisions of the Constitutional Court of the Republic of Croatia in which the rule of law is interpreted and protected as one of the highest values of the constitutional order have general binding force and “must be respected by every natural and legal person”,³⁸ on the one hand, and, on the other, derive from the Court’s constitutional position³⁹ assigned to it by the framer of the Constitution as the “guardian and protector”⁴⁰ of the Constitution of the Republic of Croatia.

As the framer of the Croatian Constitution has, by norms of constitutional force, prescribed that “the Constitutional Court shall guarantee compliance with and application of the Constitution of the Republic of Croatia”, and further that “the decisions and the rulings of the Constitutional Court are obligatory” and that “every individual or legal person shall obey them”,⁴¹ it follows that, from the aspect of legal force, both the operative part and the statements of reasons carry the force of law.

Such a constitutional position of the decisions and rulings of the Constitutional Court in Croatia is necessary, required, and justified. It is precisely in these acts (case law) that the Constitutional Court has provided official, consistent, and binding interpretations for all as to what is to be understood, in a substantive sense, by the rule of law as the highest

36 The constitutional-law fact that confirms the presented position that the status, jurisdiction, and tasks of the Constitutional Court of the Republic of Croatia are regulated exclusively by legal acts of constitutional force derives from the fact that they are solely legal norms contained in the Articles of the Constitution of the Republic of Croatia (Official Gazette no. 85/10) – consolidated text) and the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette no. 49/02), which, pursuant to Article 132.2 of the Constitution, “shall be enacted under the procedure prescribed for amending the Constitution”, and therefore the Constitution itself conferred upon it the same (constitutional) legal force it possesses.

37 See in more detail Article 3 of the Constitution of the Republic of Croatia (Official Gazette no. 85/10 – consolidated text).

38 Article 31.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette no. 49/02 – consolidated text).

39 See in more detail Article 2.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette no. 49/02 – consolidated text).

40 Häberle P., “The Role and Influence of Constitutional Courts from a Comparative Perspective”, in Bačić A. and Bačić P. (eds.), *Ustavna demokracija i sudovi*, Split, 2009, p. 353.

41 Article 31.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette no. 49/02 – consolidated text).

value of the constitutional order, since this has been determined by the competent body designated by the Constitution.

In addition, in specific cases of abstract review of the constitutionality of laws or the review of the constitutionality and legality of other regulations, or in decisions or rulings of the Constitutional Court adopted in proceedings conducted upon constitutional complaints submitted for the protection of human rights and freedoms guaranteed by the Constitution and the Convention,⁴² the Constitutional Court interprets the rule of law as a right that has been violated and as a right in itself, not merely as one of the highest values of the constitutional order. In this context, it should be borne in mind that, unlike in proceedings of abstract review, in proceedings upon constitutional complaints, the rule of law as one of the highest values of the constitutional order is “considered and interpreted only” if it is “linked, in specific, individual cases, to a violation of a specific human right guaranteed by the Constitution”.⁴³ In other words, the rule of law appears in a specific case also as a right, and not only as one of the highest values of the constitutional order.

In several examples of decisions and rulings of the Constitutional Court of the Republic of Croatia, I will present cases in which, in proceedings of abstract review, the Court applied the interpretative method to determine, in a substantive sense, what constitutes the rule of law as one of the highest values of the Croatian constitutional order. I will then provide an example of proceedings upon a constitutional complaint, in which the Constitutional Court established a connection between the violated human right and the rule of law, both as one of the highest values of the constitutional order and as a right, and therefore upheld the constitutional complaint and quashed the contested decision.

Example I

In its decision and ruling nos. U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, and U-I-589/1999 of 15 March 2000 (Official Gazette no. 31/00), the Constitutional Court of the Republic of Croatia reviewed the conformity with the Constitution of the Republic of Croatia of several provisions contained in the articles of the Act on the State Judicial Council (Official Gazette no. 49/99). Following the conducted proceedings, the Constitutional Court issued the aforementioned decision and ruling by which it repealed several articles of the Act on the State Judicial Council, because they were not in conformity with the Constitution, or, more specifically, with the rule of law as one of the highest values of the constitutional order, as prescribed in Article 3 of the Constitution. This decision and ruling clearly illustrate the case law of the Constitutional Court of the Republic of Croatia in which it both interprets and protects the rule of law as one of the highest values of the Croatian constitutional order. This is particularly evident in point 11 of the statement of reasons of the following decision and ruling, which reads:

“11. Although it presumes full constitutionality and legality, in terms of Article 5 of the Constitution, the rule of law is more than the mere requirement for acting in keeping with the law. It also embraces the requirements that concern the contents

42 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette – International Treaties nos. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 and 13/17 – consolidated text).

43 Such an approach in proceedings upon constitutional complaints in which the applicant also invokes a violation of the rule of law as one of the highest values of the constitutional order under Article 3 of the Constitution of the Republic of Croatia was adopted by the Constitutional Court of the Republic of Croatia in its decision and ruling no. U-III-6559/2010 of 13 November 2014 (Official Gazette no. 142/14).

of the law. Hence, the rule of law in itself may not be the law in the same sense as the laws that are passed by the legislator. The rule of law is not just the rule of laws, but also the rule by rights which – in addition to the requirements regarding the constitutionality and legality, as the most important principles of every regulated legal order – also contains additional requirements, which are relative to the very laws and their contents.

11.1. In that sense, the Court particularly points out that within the legal order founded on the rule of law, laws must be general and equal for all, and legal consequences must be unambiguous for all those to whom the law is applied. The Court also points out that legal consequences must be adequate for the legitimate expectations of the parties in every specific case where the law is applied directly to them”.

Example II

In reviewing the constitutionality of several provisions of the Free Legal Aid Act (Official Gazette no. 62/08), the Constitutional Court rendered decision no. U-I-722/2009 of 6 April 2011 and repealed those provisions, declaring their non-conformity with the Constitution of the Republic of Croatia. The decisive reasons on which the Constitutional Court based its decision were related to the lack of conformity of the contested provisions with the rule of law. In the reasoning of its decision, the Constitutional Court presented its views on what it understands by the rule of law and legal certainty, as well as the requirements of legal certainty. These views were presented by the Constitutional Court in points 5, 5.1, and 5.2 of the statement of reasons of the decision. They read as follows:

“5. ... the requirements of legal certainty and the rule of law in Article 3 of the Constitution demand that the legal norm should be accessible to and predictable for those it applies to, i.e. such that they can know their real and specific rights and obligations so that they can act accordingly (...).

5.1. The Constitutional Court deems that the addressees of a legal norm can certainly not know their rights and obligations really and specifically and foresee the consequences of their conduct if the legal norm is not sufficiently definite and precise. The requirement for a definite and precise legal norm is ‘one of the basic elements of the principle of the rule of law’ ... and is crucial for the creation and preservation of the legitimacy of the legal order. It ensures that the democratically legitimate legislator can independently elaborate the basic rights and freedoms in laws, that the executive and administrative powers can draw on clear statutory and regulatory standards for their decisions and that the judicial powers and courts can control the legality of the legal order (...). When this requirement is not met, indefinite and imprecise laws delegate some of the powers of legislation to subjective administrative and judicial decision-making, which is impermissible in constitutional law.

5.2. The requirement for the definiteness and precision of the legal norm has both a positive and a negative meaning. In the positive meaning, the definiteness and precision of the legal norm means that its wording must allow citizens to know their real and specific rights and obligations so that they can behave accordingly (...).

The negative meaning of the requirement for the definiteness and precision of the legal norm, with reference to a governmental body, means that its wording must

bind the body and not allow it to act outside the purpose its content determines. This is important both for the conduct of governmental and public administration bodies and for the conduct of the judicial authorities (...).

Examples III A and B

This example illustrates how the Constitutional Court of the Republic of Croatia proceeds in cases initiated for the protection of constitutionally guaranteed rights, submitted by applicants who consider that an individual act of a state authority, a body of local or regional self-government, or a legal person vested with public authority had violated the human rights and freedoms guaranteed by the Constitution of the Republic of Croatia. The example presented under A illustrates a case in which the applicants, in their constitutional complaint, claimed that the rule of law as one of the highest values of the constitutional order had been violated, without at the same time placing it in the context of a violation of their specific human rights and freedoms guaranteed by the Constitution, the protection of which they were seeking. Due to this "omission" by the applicant, the Constitutional Court of the Republic of Croatia was not able to assess a violation of the rule of law in the specific case. The reasons for this position were concisely stated by the Constitutional Court of the Republic of Croatia in its decision no. U-III-1125/1999 of 13 March 1999 (Official Gazette no. 38/00). The relevant part of this position was presented by the Constitutional Court of the Republic of Croatia in points 17, 17.1, and 17.3 of the reasoning of the decision. They read as follows:

"17. Finally, the applicants point in the constitutional complaint to a violation of the principles of the constitutional order of the Republic of Croatia enshrined in Article 3 of the Constitution, as well as a violation of Article 5.2 of the Constitution.

17.1. However, Article 3 of the Constitution does not establish the freedoms and rights of individuals and citizens (constitutional rights). Namely, Article 3 sets out the highest values of the constitutional order, which are elaborated and defined in other provisions of the Constitution, in particular those that guarantee the freedoms and rights of individuals and citizens. The provision of Article 3 of the Constitution serves as a basis for the interpretation of the Constitution and as a guideline for the legislator in elaborating the constitutional rights of citizens, and it is addressed to state authorities rather than directly to citizens.

(...)

17.3. Accordingly, the provisions of Article 3 and Article 5.2 of the Constitution contain the highest values, that is, the fundamental principles on which the constitutional order of the Republic of Croatia is founded, and they are general in their content and do not provide constitutional guarantees to the individual (subject)".

Under point B of this example, we present a case in which the Constitutional Court of the Republic of Croatia, acting upon a submitted constitutional complaint, conducted proceedings by assessing the violation of the applicant's human rights and freedoms, also taking into account the violation of the rule of law as one of the highest values of the Croatian constitutional order. The Constitutional Court was able and obliged to proceed in this manner because, in the specific case, the applicant linked the violation of his constitutionally guaranteed human rights and freedoms to the violation of the rule of law as one of the highest values of the constitutional order. Specifically, this refers to decision and ruling no. U-III-6559/2010 of 13 November 2014, Official Gazette no. 142/14. In the

statement of reasons of that decision and ruling, among other things, the Constitutional Court stated the following in points 124 and 124.1:

“124. The applicant invokes in the constitutional complaints the rights guaranteed in the following articles of the Constitution: Article 14 (guarantee of equality before the law), Article 18.1 (guarantee of the right to appeal against individual legal acts adopted in first-instance proceedings by courts or other authorised bodies), and Article 26 (guarantee of equality of aliens with Croatian citizens before courts and governmental agencies and other bodies vested with public authority).

He mentioned Article 3 of the Constitution laying down the fundamental values of the constitutional order of the Republic of Croatia, Article 5.2 of the Constitution stating that ‘All persons shall be obliged to abide by the Constitution and law and respect the legal order of the Republic of Croatia’ and Article 116.1 of the Constitution laying down that the Supreme Court, as the highest court, ensures the unified application of laws and the equality of all in their application.

124.1. The Constitutional Court stresses that the assessment of all alleged violations of the constitutional rights examined in these Constitutional Court proceedings were based on equality, freedom, respect for human rights and the rule of law, as the highest values of the Constitutional order of the Republic of Croatia laid down in Article 3 of the Constitution. These are values present in the entire text of the Constitution and used for its interpretation. Since Article 5, Article 14 and Article 26 of the Constitution are only special normative aspects of these values, the Constitutional Court took them into account in the assessment of the alleged violations of the constitutional rights of the applicant”.

Although the above examples already demonstrate the approach taken by the Constitutional Court of the Republic of Croatia in interpreting and protecting the rule of law as one of the highest values of the constitutional order of Croatia, for the reader's better understanding, I would add that, particularly since 2008, the Constitutional Court has rendered a number of decisions and rulings in which it assessed (primarily in cases of abstract review of the constitutionality of laws and the constitutionality and legality of other regulations) whether the rule of law as one of the highest values of the constitutional order had been violated.

CONCLUSION

The constitutionalisation of states, particularly at the turn of the 21st century, has largely been based on the doctrine of a state governed by the rule of law. In the wake of major social changes at the end of the 20th century, which led to the collapse of socialist and communist systems in Central and South East Europe and the USSR, as well as the dissolution of complex states and their new re-constitutionalisation, the majority of these states adopted new social values as the foundation of their constitutions, with the rule of law being among the most prominent. The Republic of Croatia was among the first to do so. However, the Republic of Croatia has adopted and prescribed the rule of law (alongside other values) as one of the highest values on which its constitutional order is founded and which serve as the basis for the interpretation of the Constitution. By taking this approach, the framer of the Croatian Constitution accepted and established the highest values of its constitutional order as a fundamental element defining the constitutional identity of the

Republic of Croatia. At the same time, by prescribing that these values also serve as the basis for the interpretation of the Constitution, they have become a binding foundation for everyone who interprets the Constitution for the purposes of its implementation, elaboration, application, or protection. In this way, the framer of the Croatian Constitution assigned to the highest values of the constitutional order, along with other functions, the role of binding guidelines that must be taken as a starting point by everyone when interpreting the Croatian Constitution. As much as such a constitutional determination of the position of the highest values has its positive aspects, it also entails certain difficulties. Namely, constitutional values are, first and foremost, ethical values in society. By prescribing them in the Constitution as the foundation of the constitutional order, the framer of the Constitution granted them constitutional status, which, by that very fact, also grants them legal status. However, the Constitution does not prescribe or define the specific content of the highest values of the constitutional order on the basis of which it could be said that each of them, individually, is legally determined or defined in a substantive sense. For that reason, from a constitutional and legal perspective, the highest values of the constitutional order of the Republic of Croatia are not defined but are definable. Anyone interpreting the Constitution of the Republic of Croatia, starting from the highest values (or any one of them), is, *volens nolens*, required to engage in interpreting their content. That very fact entails the inherent possibility of different interpretations of the content of the same value by its individual interpreters, which may lead to inconsistencies, and even complete contradictions in the understanding of its content as regards that issue, resulting in unacceptable consequences for the coherence and consistency of the constitutional and legal order. In order to avoid such situations and to achieve the highest possible level of acceptability, uniformity, and consistency in the understanding of the substantive content of each of the highest values of the constitutional order, the framer of the Constitution designated, through the Constitution, the competent body whose interpretation is generally binding on all and must be respected by all natural and legal persons. That is the Constitutional Court of the Republic of Croatia.

The existence of a body designated by the Constitution whose interpretation of the content of each of the values is generally binding is important for each of those values individually, and particularly so for the rule of law and, ultimately, for the entire concept of a state governed by the rule of law. This importance arises from the very fact that a state governed by the rule of law, founded upon it as one of the highest values of the constitutional order, in fact reflects a constitutional state governed by the rule of law which, in both the formal and substantive (functional) constitutional legal aspect, is implemented across all segments of legal and actual reality, not only as a state founded on the value of the rule of law, but also as a society and a state in which all individuals exercise their rights, duties, and responsibilities according to the law, that is, in conformity with the law. Precisely because of the position of the rule of law as one of the highest values underpinning the constitutional order of the Croatian state, and as a requirement that everyone must act and operate in accordance with the law, it is of particular importance that we all understand what the rule of law entails in terms of its content, namely in the constitutional law sense as interpreted by the Constitutional Court of the Republic of Croatia. This is true simply because the very operative part and the positions arising from the statement of reasons adopted by the Constitutional Court of the Republic of Croatia, when it is interpreting the rule of law as one of the highest values of the Croatian constitutional order, upon the entry into force of its decision and/or ruling in such cases, themselves become law, namely law which has the legal force of law prescribed by statute within the constitutional legal order. This assertion, too, founded on constitutional grounds in the Republic of Croatia, affirms the rule of law not only as one of the highest values of the Croatian constitutional order, but also as an

overarching (imperative) requirement that the rule of law is not merely the rule of statutes, but rule in accordance with the law.

Precisely such a position of the rule of law within the Constitution of the Republic of Croatia and in the overall constitutionalisation of Croatia as a modern state governed by the rule of law requires systematic protection of the rule of law, both as a legal right and as one of the highest values of the constitutional order of the Republic of Croatia, on the basis of the Constitution. The interpretation and protection of the rule of law as one of the highest values of the constitutional order and as a right has been entrusted, by a constitutional norm, to the Constitutional Court of the Republic of Croatia. In this paper, I have presented several examples illustrating how the Constitutional Court interprets the rule of law as one of the highest values of the constitutional order and as a requirement of governing and acting in accordance with the law, thereby providing insight into its established case law in this area.



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USTAVNI SUD REPUBLIKE HRVATSKE U PRIMJENI I ZAŠTITI USTAVNE VREDNOTE VLADAVINE PRAVA

Sažetak:

Hrvatski ustavotvorac je Ustavom Republike Hrvatske utvrdio i propisao najviše vrednote ustavnog poretka Republike Hrvatske koje su, istovremeno, temelj za tumačenje Ustava. Najviše vrednote ustavnog poretka obvezuju sve subjekte koji provode Ustav Republike Hrvatske od zakonodavne, izvršne i sudbene vlasti do Ustavnog suda Republike Hrvatske.

Jedna od najviših vrednota ustavnog poretka Republike Hrvatske je i vladavina prava. Sve najviše vrednote ustavnog poretka Republike Hrvatske po Ustavu su međusobno jednake. No, u konkretnim slučajevima može doći do proturječja između pojedinih vrednota, pa je potrebno pronaći pravu mjeru između njih. Druga osobina najviših vrednota ustavnog poretka Republike Hrvatske proizlazi iz činjenice da ih Ustav u sadržajnom smislu konkretnije ne definira. One su u sadržajnom smislu odredive, ali nisu određeni. Svi subjekti koji provode Ustav Republike Hrvatske dužni su ga tumačiti na temelju najviših ustavnih vrednota. Međutim, samo jedan od njih, a to je Ustavni sud, ima takav ustavni položaj da zauzeta stajališta u njihovom tumačenju izražena u njegovim odlukama imaju općeobvezujuću snagu (erga omnes).

U svojoj dosadašnjoj ustavnosudskoj praksi, Ustavni sud Republike Hrvatske se u više predmeta susreo s potrebom da odluči što on smatra pod vladavinom prava kao jednoj od najviših vrednota ustavnog poretka Republike Hrvatske. Polazeći od svoje ustavne nadležnosti, i ustavnog položaja kao čuvara i zaštitnika Ustava Ustavni sud je u nekoliko

svojih odluka zauzeo stajalište što on smatra pod vladavinom prava kao jednoj od najviših vrednota hrvatskog ustavnopravnog poretka. Zauzeta stajališta izražena u odlukama Ustavnog suda su od velikog značaja za provedbu i zaštitu vladavine prava kao jedne od najviših vrednota ustavnopravnog poretka Republike Hrvatske.

U radu ću s teorijskog aspekta obraditi pojam vladavine prava kao najviše vrednote ustavnopravnog poretka, te ustavnosudsku praksu Ustavnog suda Republike Hrvatske koja će uključivati i njegovu aktivističku ulogu u definiranju sadržaja ove vrednote.

Ključne riječi: *vladavina prava, vrednote ustavnosudskog poretka, Ustavni sud, ustavnosudski aktivizam, interpretacija vrednota ustavnosudskog poretka.*

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THE CONSTITUTIONAL COURT OF SERBIA – POSITION AND CERTAIN COMPETENCIES

Abstract:

Serbia has had a Constitutional Court since 1963, but by changing its state status and adopting the Constitution, which expressed such a state status, Serbia introduced many new legal solutions on the organization and functioning of this body. With the 2006 Constitution, this body underwent the greatest changes. It is a special constitutional body, which is not a court, although it contains that word in its name. This body performs the function of controlling constitutionality and legality and protecting human and minority rights. It does so according to rules and procedures that are similar to the procedures of regular courts of general and special jurisdiction. The paper analyzes the constitutional, legal and procedural provisions that regulate the composition of the Court, the election and legal status of judges, jurisdiction, proceedings before the Court and the effect of the acts it adopts.

Keywords: *Constitutional Court, position, jurisdiction*

INTRODUCTION

The Republic of Serbia Constitutional Court represents an independent and autonomous constitutional body whose competences are regulated by the Republic of Serbia Constitution of 2006. The legal function of the Constitutional Court in Serbia was established in 1963 when, at that time the socialist federation formed the Federal Constitutional Court, while each republic in the federation established its own Constitutional Court. In socialist systems of that time, it was rare to have a specialized body - the court that controls the constitutionality. Nevertheless, this body in the Socialist Federative Republic of Yugoslavia, as well as in the Socialist Republic of Serbia was organized and had a normative structure resembling the European model of constitutional court control. When after 50 years the constitutional system of the Republic of Serbia introduced the principle of the distribution of power, dividing government functions between the power holders, the Constitutional Court still maintained the position of the “guardian of the constitution”. With the introduction of the constitutional appeal, the Constitution of 2006 broadened

the competences of the Constitutional Court. Thus, the country's supreme legal act inaugurated this body in the contemporary framework of constitutional court control. It is our belief that the Constitutional Court contributes to establishing an equilibrium between three branches of power, performing the control of the constitutionality and legality of general legal acts. Also, the Constitutional Court offers the protection of constitutionally guaranteed rights and freedoms. Serbian legal system, as well all those which cherish the tradition of the rule of law and acknowledge the supremacy of the constitution and the protection of constitutionality, manage to secure in practice the compliance of all three branches of power with the decisions of the Constitutional Court.

ELECTION AND COMPOSITION OF THE CONSTITUTIONAL COURT

The Constitutional Court consists of 15 judges elected and appointed by the representatives of all three branches of power. "The increase of the number of judges from 9 to 15 has both positive and negative sides. Positive effects and the justification of this solution reflect the need to have more judges contributing to more efficient work of the Court and its broader competence, while negative sides assume that in case of a greater number of Constitutional Court judges, some may be top quality professionals with high ethical principles, but some of them may be elected without adequate previous professional experience. In other words, fewer Constitutional Court judges force the election bodies to be more observant when selecting them"¹ Thus, one third of judges are elected by the National Assembly among 10 candidates proposed by the President of the Republic, one third are appointed by the President of the Republic among 10 candidates proposed by the National Assembly, while one third are appointed by the general session of the Supreme Court among 10 candidates who are proposed at joint session by the High Judicial Council and the High Prosecutorial Council. To be a judge of the Serbian Constitutional Court a candidate must be at least 40 years old, with at least 15 years of professional legal experience. A special qualification required by the Constitution is that a judge should be selected among "prominent lawyers", while this term has not been legally clarified. This means that the bodies which propose the candidates for Constitutional Court judges, that is, which select or appoint them, should first determine who can be considered to be "a prominent lawyer". "According to one interpretation, "a prominent lawyer is more than a top legal professional given the fact that he must possess exceptional personal characteristics, such as high moral integrity, autonomous thinking, courage, creativity and developed consciousness of responsibility."² The judges of Serbian Constitutional Court are elected or appointed for a nine-year term and can be re-elected a total of two terms.

The President of the Constitutional Court is elected by the judges of the Constitutional Court from among them, by secret ballot and a majority vote of all the judges, to a term of office of three years with the possibility of reelection. The President of the Constitutional Court represents the Constitutional Court, convenes its sessions, proposes the agenda and chairs sessions, looks after the implementation of Constitutional Court acts and harmonizes its work. The President of the Constitutional Court also exercises the duty of a judge. The Constitutional Court has a Deputy President, who stands in for the President of the Constitutional Court

1 Nićiforović, A. (2025), *Election of Constitutional Court judges as a guarantee of constitutional- judicial independence*, Proceedings of the Faculty of Law in Nis 1(104), pp. 347-348.

2 Petrov, V. (2013). "Prominent lawyer" - a special condition for the election of Constitutional Court judges or an empty constitutional norm . *NPB – Journal for criminalistics and law*, 18(3), pp. 44-45

if the President is absent, or otherwise engaged. Deputy President is elected according to the same procedure for the election of the President of the Constitutional Court. Six months before the expiry of the nine-year term of office to which a Constitutional Court judge has been appointed, or elected, the President of the Constitutional Court shall notify thereof the authorized propounder and the National Assembly. The office of the Constitutional Court judge may be terminated upon his request, or in case of his death, or if legal conditions for his dismissal or retirement have been met. Constitutional Court judge shall file a request for termination of office before the expiry of the term to which he/she has been elected or appointed, to the authorized propounder for election or appointment, to the National Assembly and to the President of the Constitutional Court. The National Assembly decides on termination of office of Constitutional Court judge and if it fails to adopt a decision within three months from the day the request was filed, it shall be considered accepted. The Constitutional Court notifies the authorized propounder for election or appointment of a judge, and the National Assembly, that the judge has fulfilled requirements for mandatory retirement, no later than six months before the fulfillment of those requirements. Constitutional Court judge may be dismissed if: 1) he/she becomes a member of a political party, 2) accepts the position which violates the prohibition of conflict of interest, 3) suffers permanent loss of ability to perform the duty of a Constitutional Court judge, or 4) is convicted to a prison sentence or is convicted for a punishable offence rendering him/her unworthy to serve as a Constitutional Court judge. Fulfilment of conditions for dismissal of a Constitutional Court judge of duty is determined by the Constitutional Court. The first two conditions are the consequence of the principle of institutional and personnel autonomy of the Constitutional Court. Constitutional Court judge may not hold any other public or professional office or job, with the sole exception of a professorship at a law faculty in the Republic of Serbia. Constitutional Court judge may not be a member of a political party at the time of his/her election and is also prohibited to be politically active during his/her term of office. The loss of ability to perform the duty of Constitutional Court judge is determined by the professionals from the authorized medical institution, while the final decision that Constitutional Court judge is convicted to a prison sentence or for a punishable offence is issued and delivered *ex officio* by the competent court, or other government bodies.

ABSTRACT CONTROL OF CONSTITUTIONALITY BEFORE SERBIAN CONSTITUTIONAL COURT

The main competence of the Constitutional Court is the abstract control of constitutionality and legality. This competence comprises several groups of authorizations. The first group is related to normative control of constitutionality and legality, the second to the authorizations aimed at securing the balance in the system of separation of powers, while the third group of authorizations guarantee the protection of constitutionally acknowledged citizens' rights and liberties. Within the normative control, the Constitutional Court ensures the supremacy of the highest legal act by passing decisions on: 1) the compliance of laws and other general acts with the Constitution and generally accepted rules of international law and ratified international treaties, 2) the compliance of ratified international treaties with law, 3) the compliance of other general acts with law, 4) the compliance of statutes and general acts of autonomous provinces and local self-government units with the Constitution and law, 5) the compliance of the general acts of organizations vested with public authority, as well as of political parties, trade unions, associations of citizens and collective agreements with the Constitution and law.

Therefore, the main competence of the Constitutional Court is the abstract control of constitutionality and legality of general legal acts, including the constitutionality of ratified international treaties and compliance of other normative acts with generally accepted rules of international law and ratified international treaties. This competence of the Constitutional Court originates from the monistic concept on the relationship between domestic and international law given the fact that the ratified international treaties and generally accepted rules of international law are the part of the legal system of the Republic of Serbia. In the hierarchy of normative acts, ratified international treaties are immediately below the Constitution and may not be in conflict with this supreme legal act. The Constitutional Court may exercise the normative control of constitutionality and legality in the procedures of preliminary and subsequent control. The Constitutional Court, by rule, exercises abstract assessment of constitutionality and legality in the procedure of subsequent control, which is performed after the general legal act has come into force. In exceptional cases, the subject of this control may include the laws and general legal acts which have expired if the procedure for their control was initiated within six months before their expiration. In the procedure of normative control, this body is authorized to suspend the implementation of certain acts, or activities undertaken under the acts, which are the subject of the constitutional normative control, until the final decision has been reached. At the request of one third of the members of the National Assembly, the Constitutional Court may perform the control of the constitutionality of laws before they come into force. In this case the Constitutional Court has the obligation to pass within seven days a decision on the constitutionality of the law which has been adopted by the National Assembly, but still not promulgated. If within the period of seven days the Constitutional Court does not reach a decision whether the law complies with the Constitution and the law is promulgated, there is an alternative solution - the Constitutional Court will continue with the regular procedure for the control of constitutionality and legality. If the Constitutional Court passes a decision that the law does not comply with the Constitution before it is promulgated, that law may no longer be the subject of the constitutional control. The decision of the Court in preliminary proceeding of the assessment of constitutionality comes into force with the day when the law is promulgated.

In theory, the following has been, rightfully, emphasized: “The combination of the model of preliminary and subsequent control of constitutionality in national law may yield positive effects, but it also contains some traps that may lead to the restriction of the functioning of the Constitutional Court. Namely, the law whose compliance with the Constitution is assessed before it comes into force can no longer be the subject of a constitutional control. Therefore, the representatives of the parliamentary groups in the National Assembly can use this form of constitutional control in order to protect “their own” draft of law against possible future control after the law comes into force. However, given the fact that the preliminary proceeding has been established as an emergency action with short period for passing a decision, it is not expected that this form of control will become the subject of abuse. If the law which is the subject of control is promulgated before passing the final decision whether it complies with the Constitution, the Constitutional Court may continue the procedure of *ex post* control, which means that now the procedure is conducted based on *ex officio* rule”³

In the legal system of the Republic of Serbia, in addition to an abstract control, there is also a concrete constitutional-judicial control. In the latter case, regular courts play a significant role. If in a proceeding before the court of a general or special competence an issue is raised whether a normative act is in compliance with the Constitution, generally

3 Pejić, I. (2024). *Constitutional law*, Nis, University of Nis Faculty of Law p. 538.

accepted rules of international law, ratified international treaties or law, the Court may suspend the procedure if it deems there are grounds for it, and initiate the procedure for the assessment of constitutionality and legality of the given act before the Constitutional Court. We are speaking here about the control of constitutionality and legality which is performed for the specific purpose when a regular court assesses whether a general act, which is applied to a concrete case, is in compliance with the Constitution or law. Here the Court deviates from the rule to act *in abstracto*, no matter whether there is a specific reason to resolve a concrete case.

CONTROL OF THE CONSTITUTIONALITY OF INTERNATIONAL TREATIES IN THE REPUBLIC OF SERBIA

The Constitutional Court of the Republic of Serbia cherishes the monistic view of the relationship between domestic and international law. Based on this view” domestic and international law form a single, unified legal system inside which both laws are inferior to each other. According to the proponents of this theory, either the international law is derived from the domestic law, which leads to a unique concept of law – legal monism, where domestic law is superior, or the domestic law derives from the international law, which also leads to legal monism where the international law is superior. Here the theory starts from the presumption of the unity of law which is achieved by confirming the derivative character of one legal system in relation to another. Two legal systems form a unity and a complete circle including both international and domestic law, that is international and domestic law constitute two inseparable parts of one unique legal system”⁴ Thus, the provisions of the Constitution state that “generally accepted rules of international law and ratified international treaties are the integral part of the legal system of the Republic of Serbia and are applied directly.” The monistic concept of the relationship between domestic and international law is more precisely defined in Serbian Constitution in the provision on the compliance of these sources with the country’s supreme general legal act: “Ratified international treaties must be in compliance with the Constitution”. This rule can be found in the section of the Constitution which regulates the hierarchy of general legal acts in the national legal system. In the second case, a phrase “Ratified international treaties must not be in non-compliance with the Constitution”, is applied instead of the expression “must be in compliance with the Constitution”. Also, we have a more precise positioning of laws in the hierarchy of general legal acts given the fact that they are inferior to the Constitution, ratified international treaties and generally accepted rules of international law. This constitutional concept, we have no objections to, generally follows the monistic theory on the relationship between domestic and national law. However, the above stated provisions of the Constitution should be systematically interpreted and linked with the provision which regulates the procedure of the constitutional control of general legal acts in domestic legal system. In the procedure of subsequent and abstract control, the Constitutional Court, among other things, passes a decision on the compliance of the ratified international treaties with the Constitution.

The rule which has been established to be general assumes that the Constitutional Court decisions have *erga omnes* effect, which means that they nullify the normative act which is in non-compliance with the Constitution. This further means that ratified international treaties may be cassated that is annulled, in any time following their ratification and coming

4 Đorđević, S. (1997), *The relationship between domestic and international law*. Annals of Law Faculty in Belgrade, 45(4-6), pp. 360.

into force if there is a proposal of the authorized propounder, or an initiative of the Court itself to decide on this matter. However, the Constitution does not regulate the legal effects and consequences of the Constitutional Court decision when the ratified international treaty is found to be in non-compliance with the Constitution. In this case there are two possible legal solutions: the first assumes that the international treaty is proclaimed void based on the Article 53 of Vienna Convention on the Law of Treaties⁵, if this solution is foreseen in the given treaty, while the second solution is to initiate the revision of the Constitution in order to harmonize constitutional provisions with those from the international law.

The Law on Constitutional Court⁶ regulates the effects of Constitutional Court decisions related to the non-compliance of international treaties with the Constitution by mitigating the consequences of its cassatory effect. Namely, the unconstitutional provisions of the international treaty cease to be valid, as it is foreseen by that treaty itself and generally accepted rules of international law. “This legal provision in a way softened the effect of hastily drafted constitutional provision on the subsequent constitutional control of ratified international treaties in domestic legal system. The subsequent control of the constitutionality of ratified international treaties raises the question: can a state resort to national legislation should it fail to fulfill its obligations from international agreements?”⁷ In that context, the rules of international law related to the procedure of signing international agreements are binding for states according to Vienna Convention and, therefore, the states may not resort to the rules of national legislation to justify their breach of international agreements and obligations. Thus Article 27 of Vienna Convention on the Law of Treaties states: “A state cannot use its own domestic laws as a justification for failing to comply with its obligations under an international treaty”. This rule is drafted to the detriment of Article 46 which balances a state’s sovereignty over its domestic legal processes with the need for security and stability in international treaty law.

There is a number of instruments used for expressing a state’s consent for signing an international agreement and assuming international obligations, all in accordance with international law. The Vienna Convention foresees a number of these instruments related to giving consent, such as ratification, exchange of letters of credits during the signing procedure, signing, acceptance, approval and accession to the agreement. States use these instruments to verify the conditions for signing an international agreement and implementation of its content that are foreseen in their domestic laws which increases security and certainty in international treaty law. The consent of the state body which is authorized by the Constitution to ratify the international treaty is the expression of the state’s will to fully accept all rights and obligations foreseen by that international treaty. When a state has expressed its free will to accept the contractual obligations, then these obligations shall be fulfilled according to the international law principle of imperative character – *pacta sunt servanda*.

“Systematic interpretation and linking of constitutional provisions pertaining to the relationship between international and domestic law, to the hierarchy of general legal acts, to the competences of the Constitutional Court and to the procedure of constitutional control lead us to the following conclusion: on one side we have a widely accepted “internationalistic” approach in structuring the legal system of the Republic of Serbia which proclaims the sources of international law to be integral elements of the national legal

5 *Decree on the ratification of Vienna Convention on the law of treaties*, Official Journal of FRY – International treaties and other agreements no. 30/72.

6 *Law on Constitutional Court*, Official Journal of RS no. 109/2007, 99/2011, 18/2013 – decision of the Constitutional Court, 103/2015, 40/2015 – other law, 10/2023 and 92/2023.

7 Pejić, I. *op. cit.*, p. 538

system, while, on the other side we have a decrease in certainty, legal security and stability in the application of international treaty law. By allowing the Constitutional Court to assess the compliance of an international treaty with the Constitution in a subsequent control procedure, this legal uncertainty is even doubled: a) for the subjects of law in domestic legal system and b) for the subjects of law in international legal system.”⁸ Majority of European states maintain the supremacy of the constitutional act in their legal systems. However, national systems of constitutional control address basic requirements related to the contractual capacity of the state to enter international agreements. This is the reason why the sources of international law may be only the subject of preliminary constitutional control which is performed before the international treaty comes into force.

The Constitutional Court may decide if an international treaty is in compliance with the Constitution in the procedure foreseen for assessing the constitutionality of laws before they come into effect. In the constitutional and legal system of the Republic of Serbia, the preliminary control of the constitutionality (of international treaties) is a novelty and it can be used in an efficient and comprehensive way - all aimed at avoiding the conflict between the supreme general legal act and an international act, that is between the national legal system and the state's obligations under international law, both in a formal and material sense. Formal assessment of constitutionality is related to the formal elements of law governing the ratification of international treaties which is passed by the National Assembly and this assessment should correspond to the requirements foreseen by Article 46 of Vienna Convention.⁹ The international treaty is considered to be formally in non-compliance with the Constitution in relation to the body authorized to enter the international agreement, or in relation to the breach of the provisions of domestic law of essential importance. The assessment of constitutionality in a material sense is related to the mere content of the international agreement, that is to the rights and obligations which the state assumes by signing it. If the Constitutional Court decides that some elements of an international treaty are unconstitutional in a formal or material sense, then parliamentary ratification of the international treaty should be suspended. If the National Assembly wishes to complete the ratification of the international treaty, it should initiate the constitutional revision and thus indirectly ensure that the international treaty is in compliance with domestic constitutional law.

THE CONSTITUTIONAL COURT PROCEDURE FOR A CONSTITUTIONAL APPEAL

The Constitution of 2006 introduced the constitutional appeal as an instrument of constitutional and judicial protection of constitutionally guaranteed rights. The constitutional appeal was known in times of socialist constitutions, while the Constitution of the Federal Republic of Yugoslavia of 1992 and the Constitutional Charter of the State Union of Serbia and Montenegro of 2003 introduced it into the legal system of the common state of Serbia and Montenegro. However, the Constitution of 1990 did not foresee the constitutional appeal as a separate legal instrument for the protection of citizens' rights

8 Pejić, I. *op. cit.*, p. 540.

9 This Article of Vienna Convention states: “1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

before the Constitutional Court. Based on its legal nature, constitutional appeal represents an exceptional legal remedy which the citizens may use against individual acts of judicial and administrative (executive) authorities. This legal remedy constitutes the entire national mechanism of protection of human and minority rights which precedes the system of rights protection before the European Court of Human Rights.

The Constitution of the Republic of Serbia sets a wide scope of the application of the constitutional appeal either related to the individuals who have legitimacy to resort to this instrument of legal protection, or related to the objects of protection and the individual acts that may be the subject of the Constitutional Court control. It can be filed against individual acts or actions of government bodies or organizations vested with public authority. The subjects of review under constitutional appeal are judicial, administrative or other acts of state bodies or organizations which execute public authorities. The subjects of review under constitutional appeal may also include actions, doings or non-doings of authorized state bodies or organizations. Constitutional appeal may be filed only when other legal remedies have been exhausted, or are not prescribed, or where the right to their judicial protection has been excluded by law (the principle of subsidiarity in the work of the Constitutional Court). "The rule is, although some exceptions have been found in comparative law, that constitutional appeal is allowed only if all other available mechanism of legal, administrative and judicial protection of human rights have been exhausted. In this way the constitutional appeal really becomes an exceptional and supplementary legal instrument of direct constitutional and judicial protection of human rights given the fact that it can be used only when all other available and allowed legal instruments for the protection of violated constitutional rights have been exhausted."¹⁰

The sphere of constitutional-judicial protection is rather extensive. Namely, the object of protection is the entire corpus of human and minority right guaranteed by the Constitution. Bearing this in mind, then it is not surprising that the constitutional appeal represents a powerful instrument of protection, not only of individual rights, but also of the rights of the autonomous province and local self-government units. The protection of the rights of individuals at the same time guarantees the protection of the legal order. Thus, the provisions on the human and minority rights should be interpreted in the context of enhancing the values of democratic society. "The examples in comparative law reveal that the interests of the individual citizens should be viewed from two sides: firstly, in the context of their relationship with public authorities whose power and arbitrariness should be restrained and secondly, in the context of securing individual rights in order to protect the objective legal order and the functioning of the legal state and the rule of law."¹¹

The constitutional appeal has been inaugurated as an instrument providing institutional guarantees of human rights and freedoms. However, it does not exclude a specific legal protection of ethical, religious and other groups in relation to their rights. Thus, the specific collectives which enjoy, so called, minority rights, also can use the constitutional appeal to exercise these rights. The Constitution also guarantees the equal rights to autonomous provinces and local self-governments if an individual act or action of a state body or a local self-government unit hinders the autonomy in their work.

The right of the Constitutional Court to adjudicate on a constitutional appeal should not be viewed in the context of its supreme position in the hierarchy of regular courts. This means

10 Simović, D. (2012). *Constitutional appeal – theoretical and legal framework*, Annals of the Faculty of Law in Belgrade, 60(1), p. 215.

11 Pejić, I. *op. cit.*, p. 542.

that the constitutional appeal is not filed for the purpose of reviewing a factual state or the legality of an individual act. The Constitutional Court can only decide whether a court decision violates a constitutionally guaranteed right, or whether the same right has been violated in a procedure that was conducted before an authorized body. This means that the individual act contains the wrong interpretation of constitutional law, or that in a procedure that was conducted before an authorized body a constitutionally guaranteed right has been violated.

The purpose of constitutional protection is not just to determine whether a concrete case contains unconstitutional elements. Namely, pointing out to unconstitutionality can entail the consequences in general sense, if we consider that the main function of the Constitutional Court is the function of “the guardian of the Constitution” and the guarantee of the legal system. This statement is not of particular significance from the point of view of an individual whose rights are violated or denied. Therefore, it is crucial that the Constitutional Court has a direct influence on restoring the violated or endangered basic rights. Based on the Law on Constitutional Court of the Republic of Serbia, an individual act against which the appeal has been filed, may be annulled by the decision of the Constitutional Court, that is an action may be annulled, or an execution of another action ordered. The legal phrase “annulment of an individual act” is not precise and can raise doubts in relation to the effects of the Constitutional Court decision. A decision of this Court which has annulling effects (in a constitutional appeal procedure) can have positive effects from the point of view of the subjects whose rights have been addressed. However, it is our opinion that this Law does not reflect the consistency in relation to the legal effect of the Court’s decision. Thus, Article 89 of this Law regulates the annulment of a legal act, but further states that the legal effects of the decision come into force “from the date when it is served to the parties in the procedure”. This means that the Constitutional Court decision will have legal effects in the future – *pro futuro*. The revision of the Law on Constitutional Court has given the Court an authority to include the claim for compensation for material or immaterial damages in the same decision adjudicating the constitutional appeal. “In theory, there are some stands that the constitutional appeal should not be used against individual acts and actions of courts (I. Krbek), although they are also public bodies. These stands should not be accepted since the Constitutional Court does not decide on an appeal as a court of higher instance (a reviewing court). It does not assess the merit of the given dispute (determining the factual state or the application of law for resolving the dispute) and does not decide on the legal relations adjudicated by the given court, but it only assesses the court decision in relation to the violation or restriction of human or minority rights and freedoms which are guaranteed by the Constitution.”¹²

CONCLUSION

Constitutional judiciary, as a state function, is of recent date. Setting up the Constitutional Court as a state body represents a logical legal consequence of having a written, strong constitution as an act of supreme legal force. The internal control of constitutionality in a material sense is conducted taking into account the content of the Constitution, while the external, formal control is related to constitutionally foreseen procedure of passing laws (legislative procedure). The same situation is in the Republic of Serbia. Serbian legislators, like the legislators worldwide, particularly in democratic countries, have envisaged the Constitutional Court as a body which ensures the rule of the Constitution and law and offers the highest legal protection of basic human rights

12 Marković, R. (2014). *Constitutional law*, Belgrade, University of Belgrade Faculty of Law, p. 556.

in national legal system. The Republic of Serbia has changed a number of legal solutions related to the organization and work of the Constitutional Court. Thus, the Constitution of 1990 did not have the competence to decide on the constitutional appeal since this institute was not present in the legal system of that time. When the legislator introduced the constitutional appeal in the Constitution of 2006, the Constitutional Court acquired this new competence that has been discussed in details in this paper, in addition to the control of the constitutionality of international treaties.

As for the constitutional appeal, several conclusions can be drawn: 1) that it represents a subsidiary instrument of the legal protection of constitutionally guaranteed rights; 2) in the procedure of constitutional appeal, the Constitutional Court will only look into the constitutional matter, that is the Court will only decide whether the contested act of the state body or organization vested with public authority violates human or minority rights or freedoms, 3) the subject of a constitutional appeal is, before all, an individual act of public authority, 4) in order to file a constitutional appeal, a person must possess legitimacy to appeal, that is. that his/her rights have been violated or denied by the contested act; 5) when deciding on a constitutional appeal, the Constitutional Court assesses whether it is justified and may only suspend the implementation of the contested act (it may not reverse the decision).

In this paper the authors underline that most of constitutional countries foresee some forms of control whether international treaties are in compliance with the Constitution. However, majority of European countries, including the Republic of Serbia, maintain the rule of the superiority of the constitutional act in domestic legal system. However, national systems of constitutional control address basic requirements related to the contractual capacity of the state to enter international agreements. This is the reason why the sources of international law may be only the subject of preliminary constitutional control which is performed before the international treaty comes into force.

Due to the restriction of the length of the text, this paper focuses only on addressing the main issues related to the Constitutional Court – its composition, the election and appointment of judges and their legal status, while only three competences have been discussed: the abstract control of constitutionality, the control of the constitutionality of international treaties and the control based on a constitutional appeal. The other competences are left to be analyzed in some future papers: the characteristics of the procedures before the Constitutional Court, that is the procedure of deciding on the suspension of the enforcement of the decision passed by an autonomous province body, the procedure of resolving the conflict of jurisdictions, the procedure of deciding on election disputes, the procedure of deciding on the prohibition of the work of a political party, trade union, citizens' association or religious community, the procedure of deciding on the breach of Constitution by the President of the Republic and the procedure based on the appeal filed to the Constitutional Court by a judge, the Court President or a public defender which excludes the right to submit a constitutional appeal against the decision on the termination of their term in office.

Finally, the image of the Constitutional Court depends on the social awareness on the importance of this institution. Currently, constitutionality and legality are not among top values in the hierarchy of social values. The activities and conduct of Serbian politicians have contributed to this situation, particularly of those at the executive levels. Also, the Constitutional Court does not seem ready to be more active in its role of the guardian of the Constitution which has adverse effects on its authority. The Constitutional Court should not only exist in the text of the Constitution, it should be present in its life as well. It seems

this is exactly the present situation in Serbia, since even the best normative solutions related to the Constitutional Court will not give results in practice if the judges are not ready to defend the Constitution.



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УСТАВНИ СУД СРБИЈЕ – ПОЛОЖАЈ И ПОЈЕДИНЕ НАДЛЕЖНОСТИ

Апстракт:

Србија има Уставни суд почев од 1963. године, али је променом свог државног статуса и доношењем Устава, којим је такав државни статус изражен, Србија увела многа нова правна решења о организацији и функционисању овог органа. Уставом из 2006. године, овај орган је доживео највеће промене. Ради се о посебном уставном органу, који није суд, иако у свом имену садржи ту реч. Овај орган врши функцију контроле уставности и законитости и заштитника људских и мањинских права. То чини по правилима и поступцима који су налик поступању редовних судова опште и посебне надлежности. У раду се анализирају уставне, законске и пословничке одредбе, које регулишу састав Суда, избор и правни статус судија, надлежност, поступак пред Судом и дејство аката које доноси.

Кључне речи: Уставни суд, положај, надлежности

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LEGAL CONSEQUENCES OF OPENING THE BANKRUPTCY PROCEEDINGS ON FINANCIAL LEASING

Abstract:

The paper analyzes legal provisions, the standpoints of court practice, as well as opinions of jurisprudence regarding the legal consequences of opening bankruptcy proceedings on financial leasing. Special attention is devoted to the right of separation of the leased asset – an exclusion right (*right to separate recovery, right of exemption*) belonging to the lessor if bankruptcy proceedings are opened against the lessee. The significance of the prohibition of enforcement and settlement, as a legal consequence of opening bankruptcy proceedings, is highlighted. This prohibition also appropriately applies to the enforcement of the lessor's right to reclaim the leased asset from the bankruptcy estate until the decision on the debtor's bankruptcy (or until the approval of the reorganization plan). The study also examines the problems that arise if the bankrupt debtor or the bankruptcy trustee fails to adequately safeguard the leased asset, exposing it to risk. In such cases, the lessor may request the lifting of security measures imposed in prior bankruptcy proceedings or the termination of the stay of execution and settlement prohibition as a legal consequence of opening bankruptcy proceedings. The paper further explains the lessor's right to reclaim the leased asset in the event of a bankruptcy declaration, noting an exception where the bankruptcy judge may – upon the trustee's proposal and with creditors' committee approval – reject the reclamation (*separation*) request and order the full contractual lease payment as an obligation of the bankruptcy estate. The consequences of non-payment, which grant the lessor the right to demand repossession and enforcement on the leased asset in accordance with the contract or law, are also addressed. Lastly, the study analyzes theoretical and practical issues concerning the obligation of the bankrupt debtor or trustee to return the leased asset to the lessor after the approved reorganization plan is confirmed – if the plan does not provide for the continued use of the leased asset and payment of lease fees under the leasing agreement.

Keywords: *opening of bankruptcy proceedings; legal consequences; financial leasing; right to separate recovery; payment of leasing fees.*

INTRODUCTION

The consequences of opening bankruptcy proceedings on the legal transaction of financial leasing are defined in Article 95 of the *Law on Bankruptcy* (LB), The Official Gazette of RS, no. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018, 95/2018, 44/2025, within the chapter 'Consequences of opening bankruptcy proceedings on legal transactions. Therefore, this is one of the legal consequences of opening bankruptcy proceedings on legal transactions. The bankruptcy proceedings represent a specific type of civil court procedure,¹ and thus, in addition to the bankruptcy law, the relevant rules of litigation are applied subsidiarily and accordingly to issues that are not specifically regulated by it, in accordance with the principle of imperativeness and preclusiveness from Article 7, Par. 1 of the LB.²

If bankruptcy proceedings are initiated against the lessee, the lessor submits a request to have the leased asset exempted from the bankruptcy estate.³ This is an exclusive right and a third-party claim, where the lessor, based on their real or personal right, seeks to separate a specific asset from the bankruptcy estate.⁴ "Separation rights prevent assets belonging to the lessor from being included in the bankruptcy estate."⁵ The LB uses the term "financial leasing" solely in the heading of Article 95, while the provisions of said article – governing the effects of bankruptcy proceedings on leasing transactions – utilize the terms "lessor," "lessee," and "leased asset." These terms apply to both financial leasing and direct (true or quasi) leasing, wherein the lessor and the supplier of the leased asset are identical. "If the lessor and the supplier of the leased asset are the same person, the legal transaction concluded between them shall not be considered a financial leasing transaction... The lessor and the supplier in a financial lease must be separate entities, as otherwise, the rules of a lease agreement or some other legal transaction (such as an installment sale agreement, etc.) will apply."⁶

Therefore, the conclusion is that the provisions regarding the consequences of opening bankruptcy proceedings on the legal transaction of leasing – primarily concerning the lessor's right of separation – should also apply to direct leasing, meaning when the lessor and the supplier of the leased asset are the same entity. This is because both types of leasing share the common feature that the lessor is the owner of the leased asset, which constitutes an essential prerequisite for the existence and exercise of the right of separation. "The lessor (leasing provider) remains the owner of the leased asset until the expiration of the leasing term and full repayment of the leasing installments, and therefore holds the position of an excluding creditor in case of the lessee's (leasing recipient's) bankruptcy."⁷ Regarding other matters, different interpretations and deviations could be accepted because the financial lessor, as a business entity operating

1 Vasiljević, M. (1997). *Poslovno pravo*. Beograd: Savremena administracija, p. 328.

2 Šarkić, N., Radulović, D., and Počuca, M. (2019). *Posebni građanski postupci*. Beograd: Pravni fakultet Univerziteta Union i JP Službeni glasnik, pp. 319–320.

3 LB, Article 95, Par. 1.

4 LB, Article 50.

5 Milenović, D. (1990). Pravne posledice otvaranja stečajnog postupka. *Zbornik radova Pravnog fakulteta u Nišu*, (30), p. 180.

6 Ljubojev, N. (2009). Opšta koncepcija zakona o finansijskom lizingu i utvrđivanje subjekata finansijskog lizinga. *Glasnik Advokatske komore Vojvodine*, 81(4), p. 114.

7 *Ruling of the Higher Commercial Court, Ref. No. Iž 1568/2009 dated July 2, 2009* (Retrieved on June 24, 2025) from: <http://www.propisionline.com>

under a special regime, must obtain authorization from the National Bank of Serbia to conduct financial leasing operations as a form of financial intermediation. Furthermore, it must fulfill legally prescribed requirements concerning the minimum monetary portion of founding capital and other similar conditions.⁸

“One of the biggest challenges for lessors is that neither in the past nor today do they have legal means to urgently regain possession of the leased asset upon the lessee’s default. This can only be done through court intervention, but often only after years of litigation, during which time the lessee not only continues using the leased asset, but it also partially depreciates. Moreover, the lessee may hide, dismantle, and sell the leased asset, thereby preventing the lessor from recovering it.”⁹ “This could lead to the collapse of the lessor, especially considering that ‘Austria’s fifth largest bank, Hypo Alpe-Adria-Bank, among others, went bankrupt due to problematic leasing operations in the Western Balkans,¹⁰... recording a net loss of €1.58 billion in 2009, primarily due to its troubled leasing portfolio and cross-border placements.”¹¹

When it comes to the enforcement of exclusion rights, our bankruptcy law provides exceptionally strong protection for creditors entitled to separate recovery. This primarily refers to cases where the bankruptcy administrator is obligated to prioritize payment of the monetary equivalent to the excluding creditor for the asset on which they held the right to separate recovery,¹² for instance, if said asset was wrongfully alienated after the declaring of bankruptcy proceedings.¹³ In the event of alienation of the exclusion asset by the excluding debtor, the excluding creditor assumes the seller’s position by operation of statutory subrogation, thereby acquiring the right to either collect the sale price (if not yet realized) or claim damages equivalent to its value from the bankruptcy estate¹⁴ – which shall consequently be settled as a liability of the bankruptcy estate.

1. ANALOGOUS APPLICATION OF THE STAY OF ENFORCEMENT AND DEBT SETTLEMENT RULES TO THE LESSOR’S EXCLUSION RIGHT

The provisions of Article 93 of the LB regarding the stay of enforcement and settlement, as a statutory procedural consequence of the commencement of bankruptcy proceedings, shall apply accordingly to the exercise of the lessor’s right to exempt the leased asset from the bankruptcy estate until: (i) a decision on the bankruptcy of the debtor is rendered, or (ii) the adopted reorganization plan is confirmed.¹⁵ Following

8 *Law on Financial Leasing*, (LFL), The Official Gazette of RS, no. 55/2003, 61/2005, 31/2011, 99/2011, Articles 10 and 10a.

9 Thaythy, T. (2017). Leasing in the western Balkans and the fall of the Austrian Hypo Alpe Adria bank. *Pravni zapisi*, 8(2), p. 220.

10 *Ibid.*, p. 219.

11 *Ibid.*, p. 155.

12 Dukić Mijatović, M. and Kozar, V. (2019). *Postulati korporativnog stečaja u Republici Srbiji*. Novi Sad: Pravni fakultet za privredu i pravosuđe, p. 426.

13 LB, Article 102, Par. 3.

14 Salma, M. (2010). Izlučna prava u stečaju. *Zbornik radova Pravnog fakulteta u Novom Sadu*, (3), pp. 235–236.

15 LB, Article 95, Par. 2.

the commencement of bankruptcy proceedings and until either: (i) a decision on the bankruptcy of the debtor is rendered, or (ii) the adopted reorganization plan is confirmed, a statutory prohibition on the separation of the leased asset in favor of the lessor takes effect pursuant to Article 95 par. 2 in conjunction with Article 93 par. 1 of the LB. Consequently, there is no need for the bankruptcy administrator to issue a formal decision rejecting the lessor's request for asset separation during this period."¹⁶ The purpose of the moratorium is to temporarily allow the bankruptcy debtor to retain possession of the leased asset until either: (i) a bankruptcy ruling is issued that excludes the possibility of reorganization, or (ii) the adopted reorganization plan is confirmed. At that point, based on the content of the plan's implementation measures, it will be definitively determined whether the approved reorganization plan provides for the continued use of the leased asset and payment of lease installments in accordance with the leasing agreement or not. According to established case law, if a judicial settlement was concluded prior to the initiation of bankruptcy proceedings, the enforcement procedure is suspended, and the lessor exercises its rights in accordance with Article 95 of the LB. However, if a judicial settlement was concluded with the bankruptcy debtor during ongoing bankruptcy proceedings, and if it was executed by the bankruptcy administrator on behalf of the bankruptcy estate, then such settlement constitutes an enforceable instrument between the parties and may be enforced through the delivery of the leased asset. "¹⁷

In judicial practice, a stance has been taken regarding the bankruptcy judge's conclusion on the lessor's objection (as a legal remedy) to the bankruptcy administrator's notice on retaining the leased asset: "In a situation where the lessor submitted a repossession request immediately upon the opening of bankruptcy proceedings, if the bankruptcy administrator issued a notice that the leased asset should not be returned, the lessor may file an objection to such notice of the bankruptcy administrator before the bankruptcy judge. The right to repossession under the provision of Article 112, Par. 5 of the LB will be decided by the bankruptcy judge through a ruling on the objection to the bankruptcy administrator's actions, which is issued in the form of a conclusion, in accordance with Article 45, Par. 3 of the LB."¹⁸

However, the obligations of the bankruptcy debtor towards the lessor that fall due after the opening of bankruptcy proceedings are considered obligations of the bankruptcy estate¹⁹, i.e., claims that are paid with priority and in full, ahead of the claims of bankruptcy creditors.²⁰ In essence, lease payments falling due after the opening of bankruptcy proceedings constitute obligations arising from a synallagmatic (bilateral) contract, the performance of which continues through the use of the leased asset even after the commencement of bankruptcy proceedings.²¹

16 Opinion of the Department for Commercial Disputes of the Commercial Appellate Court dated November 12, 2013, and November 14, 2013. (2013). *Case Law of Commercial Courts*, (3).

17 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 26 and 27, 2014. (2014). *Bulletin of Commercial Courts' Jurisprudence*, (4), pp. 115–116.

18 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Case law of commercial courts*, (3).

19 LB, Article 95, Par. 2.

20 From the bankruptcy estate, the costs of the bankruptcy proceedings are settled first, and after their full satisfaction, the obligations of the bankruptcy estate are paid (LB, Article 54, Par. 1).

21 The obligations of the bankruptcy estate include liabilities arising from a synallagmatic (bilateral) contract if its performance is claimed for the bankruptcy estate or must occur after the opening of bankruptcy proceedings (LB, Article 104, Par. 1).

“Claims arising from a leasing agreement become time-barred under the general statute of limitations of ten years... The Supreme Court of Serbia accepts the conclusion ... that in this case, the general limitation period under Article 371 of the Law on Contracts and Torts (LCT) could apply... because a leasing agreement represents a specific type of contract that incorporates elements of several contracts – a loan agreement, lease agreement, contract for work, and provision of services, and even elements of a sales agreement. However, not all of these elements are equally present in every leasing agreement, as there is no uniform type of such a contract. Precisely for this reason, to ensure consistent treatment of the agreement in all cases, regardless of the modalities of this legal transaction, a single limitation period should apply – namely, the period under Article 371 of the LCT.”²² Consequently, judicial practice has adopted the position that “claims for unpaid lease payments arising after the opening of bankruptcy proceedings constitute a debt of the bankruptcy estate, to which the general statute of limitations applies, as well as the conditions for suspension and continuation of the limitation period prescribed by the LCT.”²³

If the bankruptcy debtor or the bankruptcy administrator fails to adequately protect the leased asset, thereby exposing it to security risks, the lessor may request the lifting of the security measure under Article 62, Par. 2, Item 4 of the LB, imposed in the preliminary bankruptcy proceedings.²⁴ This measure allows the bankruptcy judge to prohibit or temporarily postpone enforcement actions against the bankruptcy debtor. Alternatively, the lessor may seek the lifting of the stay of execution and payment under Article 93 of the LB, which is an automatic legal consequence of the bankruptcy proceedings’ initiation.²⁵ The moratorium constitutes a prohibition on individual enforcement actions against the bankruptcy debtor’s assets for the purpose of satisfying individual creditors’ claims. It takes effect mandatorily as a procedural consequence upon the opening of bankruptcy proceedings, or optionally – if the court orders a security measure containing such prohibition in the preliminary bankruptcy proceedings.²⁶

The security measure under Article 62, Par. 2, item 4 and the moratorium under Article 93, Par. 1 of the LB may be lifted under the same conditions prescribed by Articles 93a and 93b of the LB.²⁷ When deciding on the lessor’s request to lift security measures or the stay of execution and payment, the rules concerning the protection of separate and pledge creditors introduced by the 2017²⁸ legislative amendments shall apply. These rules stipulate the conditions for lifting the stay of execution and payment, the requirement to issue a decision on adequate protection of the leased asset instead of lifting the moratorium, etc. (Article 93a), as well as regulate the procedure for decision-making on proposals, the

22 *Judgment of the Supreme Court of Serbia*, Prev 305/2000 dated September 20, 2000 (Retrieved on June 24, 2025) from: <http://www.propisionline.com/Practice/Decision/5222>

23 *Judgment of the Supreme Court of Cassation*, Prev 339/2019 dated June 18, 2020. (2021). *Bulletin of the Supreme Court of Cassation*, (1). (Retrieved on June 24, 2025) from: <http://www.propisionline.com/Practice/Decision/58905>

24 Kozar, V., and Aleksić, N. (2018). Mere obezbeđenja i „moratorijum“ u prethodnom stečajnom postupku. *Pravo i privreda*, 56(4–6), pp. 515–529

25 LB, Article 95, Par. 5.

26 Kozar, V., and Aleksić, N. (2018). Zabrana izvršenja i namirenja kao procesnopravna posledica otvaranja stečajnog postupka. In: Miodrag Mićović (Ed.), *Savremeni pravni promet i usluge – Conference Proceedings from a Symposium* (pp. 920). Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.

27 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 8-9, 2018. (2019). *Bulletin of Commercial Courts’ Case Law*, (2), pp. 108–109. (Retrieved on December 26, 2020) from: <https://pa.sud.rs/tekst/394/bilteni-sudske-prakse.php>

28 *Law on Amendments to the Law on Bankruptcy*, The Official Gazette of the RS, no. 113/2017

right to appeal, etc. (Article 93v).²⁹ In this manner, the rights of financial lessors regarding adequate asset protection have been aligned with the amendments made to Article 93 and the new Articles 93a–93g (concerning similar rights of secured and pledge creditors), thereby harmonizing the provisions of Article 95 with the new legislative provisions.

1.1. Surrender of the leased asset that is not crucial for the reorganization prior to the bankruptcy ruling and confirmation of the adopted reorganization plan

The bankruptcy judge may, upon the proposal of the bankruptcy administrator, and even before the bankruptcy ruling or the adoption of the reorganization plan, order the surrender of the leased asset to the lessor if the asset is not crucial for the debtor's reorganization.³⁰ „If the bankruptcy administrator determines that retaining the leased asset until the bankruptcy ruling or the confirmation and adoption of the reorganization plan is not expedient – particularly since lease payments due after the opening of bankruptcy proceedings constitute a liability of the bankruptcy estate – and assesses that this would impose an unnecessary burden on the estate, he may propose to the bankruptcy judge that an order be issued for the surrender of the leased asset to the lessor, provided the asset is not essential to the debtor's reorganization.”³¹

2. RIGHT TO SEPARATION OF THE LEASED ASSET IN CASE OF BANKRUPTCY DECLARATION AND COMPULSORY ENFORCEMENT

In the event of a bankruptcy decision, the lessor has the right to request the separation of the leased asset³², and the bankruptcy judge shall rule on such request without delay.³³ “If the court of first instance has already ruled on the lessor's separation request (prior to the bankruptcy decision or prior to the approval of the reorganization plan) by rejecting the lessor's request for separation, this does not prevent the lessor from resubmitting the separation request after the bankruptcy decision or the approval of the reorganization plan. The new request shall then be adjudicated in accordance with the cited legal provisions.”³⁴ If the separation request is granted, the bankruptcy trustee is obligated to surrender the leased asset to the lessor without delay, and no later than within 30 days from the bankruptcy decision. Exceptionally, the bankruptcy judge may, upon the bankruptcy trustee's proposal and with the consent of the creditors' committee, reject the separation request and instead order the payment of the full contractual leasing fee, which shall then constitute a liability of the bankruptcy estate. If such payment is not made within 30 days

29 LB, Article 95, Par. 4.

30 LB, Article 95, Par. 5.

31 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 12 and 14, 2013. (2013). *Case Law of Commercial Courts*, (3).

32 The right of separation reflects the provisions of Article 50 of the Serbian *Law on Bankruptcy* and financial leasing regulations (LFL, Article 15), ensuring the lessor's priority over other creditors. Aligns with EU Directive 2019/1023 on restructuring and insolvency, which recognizes similar separation rights for leased assets.

33 Salma, M. *op. cit.*, p. 238.

34 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Commercial Courts Case Law*, (3).

of the bankruptcy decision, the lessor shall have the right to demand repossession and enforcement over the leased asset in accordance with the contract or applicable law.³⁵

Excerpt from the Financial Leasing Registry constitutes an enforceable instrument³⁶ based on which the court may order compulsory enforcement for the repossession of the leased asset, that is, for the delivery of individually specified movable items³⁷ or for the vacating and handing over of real estate³⁸, depending on whether the subject of financial leasing is a movable non-consumable item or real estate, which can be the subject of property rights in accordance with *Law on the Elements of Property Law Relations*, The Official Gazette of SFRY, no. 6/80, 36/90, Official Gazette of FRJ, no. 29/96, Official Gazette of RS, no. 115/2005, such as equipment, facilities, vehicles, etc.³⁹ According to the interpretation adopted in court practice, “the stay of enforcement on the bankruptcy debtor’s assets does not apply to the lessor’s claim for repossession of the leased asset or enforcement against the leased asset in the event of the lessee’s bankruptcy.”⁴⁰

The cited provisions regarding the obligation to approve the separation request are of mandatory nature. According to established case law, “when a bankruptcy decision has been rendered against the bankruptcy debtor (the lessee), the bankruptcy judge is obliged to approve the lessor’s separation request, provided that the bankruptcy trustee has not previously contested the ownership rights of the excluding creditor over the leased asset, nor proposed to the court – with the consent of the creditors’ committee – that the separation request be rejected while ordering payment of the full agreed lease amount.”⁴¹

In essence, in the event of a bankruptcy declaration, the lessor holds a conditional right of separation, which may be suspended upon the bankruptcy trustee’s proposal – provided the creditors’ committee consents – through payment of the full contractual lease amount. This payment constitutes a liability of the bankruptcy estate and is therefore settled with priority and in full, before satisfying claims of bankruptcy creditors but after complete coverage of the bankruptcy proceeding costs. This legal solution bears similarities to the concept of real subrogation, as it involves the substitution of the obligation’s object. Instead of reclaiming the leased asset (either movable “durable goods” or immovable property), the lessor acquires a monetary claim for payment of the full contractual lease amount from the bankruptcy estate, effectively accelerating the payment schedule beyond originally agreed maturity dates. In this arrangement, the bankruptcy trustee exercises a “purchase option for the leased asset” established under Article 95, Par. 6 of the LB. This mechanism prevents the asset’s separation from the bankruptcy estate, as the leased asset thereby becomes part of the lessee’s property and consequently part of the bankruptcy estate.⁴² Notably, the lessee may also hold a contractual purchase option for the asset upon full payment of the total lease amount, as stipulated in Article 2, Item 3 of the LFL.

35 LB, Article 95, Par. 6.

36 *Law on Enforcement and Security* (LES), The Official Gazette of RS, no. 106/2015, 106/2016, 113/2017, 54/2019, 9/2020, 10/2023, Article 41, Item 3.

37 LES, Articles 344–347

38 LES, Articles 353–358.

39 LFL, Article 4.

40 *Ruling of the Higher Commercial Court, Iž 1568/2009 dated July 2, 2009* (Retrieved on June 24, 2025) from: <http://www.propisionline.com>

41 Judgment of the Commercial Appellate Court, Pvrž 17/13 dated January 30, 2013. (2013). *Commercial Courts Case Law*, (4). (Retrieved on June 24, 2025) from: <http://www.propisionline.com>

42 Ekart, T. (2017). *Odstop od pogodbe o finančnem leasingu, magistrsko delo*. Maribor: Univerza v Mariboru Pravna fakulteta, p. 51.

Had the rejection of the separation (exclusion) request not been ordered, all lease payments due prior to the opening of bankruptcy proceedings could have been claimed by the lessor as an “ordinary” bankruptcy creditor from the third payment class⁴³– i.e., proportionally to the amount of its claim and available funds. However, since the rejection of the separation request implies a “purchase option,” for the bankruptcy debtor to become the owner of the leased asset, he must simultaneously pay the full contractual lease amount. This amount, by its legal nature, becomes an obligation of the bankruptcy estate, encompassing both lease payments that fell due prior to the opening of bankruptcy proceedings (without any reduction), and all lease payments maturing after the commencement of bankruptcy proceedings until the expiration of the contractual period. This position has also been adopted in court practice: “This further means that in the event of bankruptcy, if the bankruptcy debtor (as lessee) wishes to retain the leased asset, he is obligated to pay the lessor all outstanding lease installments due up to the opening of bankruptcy proceedings, and continue making regular lease payments during the bankruptcy proceedings... If the lessee intends to retain ownership of the leased asset, in addition to paying ongoing lease installments during bankruptcy, he must also settle all pre-bankruptcy arrears with the lessor to effect the transfer of title.”⁴⁴

However, if the bankruptcy debtor defaults on payment for more than 30 days from the bankruptcy ruling date, the right of separation is reinstated. In such case, an alternative claim exists, with the lessor having the election right to either demand full payment, or claim repossession of the leased asset. The lessor may initiate compulsory enforcement proceedings against the bankruptcy debtor to enforce either remedy.

3. LESSOR’S RIGHTS IN REORGANIZATION PROCEEDINGS

In the event of reorganization, the bankruptcy debtor or the bankruptcy trustee shall be obligated to surrender the leased asset to the lessor within eight days from the date of confirmation of the approved reorganization plan, unless the approved reorganization plan, as an implementation measure⁴⁵, provides for both continued use of the leased asset, and payment of lease installments in accordance with the leasing agreement.⁴⁶ Article 157, Par. 1 of the LB, which defines types of reorganization plan implementation measures, enumerates 16 specific measures in distinct paragraphs. However, this list is not exhaustive, as Item 19 additionally provides for “*other measures significant for plan implementation.*” Consequently, such measures may include: continued use of the leased asset, and payment of lease installments in accordance with the leasing agreement. This interpretation is supported by the referenced provision of Article 95 Par. 7 of the LB.

If the bankruptcy debtor or the bankruptcy trustee fails to surrender the leased asset in accordance with the specified rules, or breaches the leasing agreement obligations after confirmation of the approved reorganization plan, the lessor shall have the right to demand repossession of the leased asset, and enforcement regarding the leased asset in accordance with the contract and applicable law.⁴⁷ In such case, the court may order

43 LB, Article 54, Par. 4, Item 3.

44 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Commercial Courts Case Law*, (3).

45 LB, Article 157, Par. 1, Item 19.

46 LB, Article 95, Par. 7.

47 LB, Article 95, Par. 8.

compulsory enforcement for recovery of possession of the leased asset, based on the extract from the Financial Leasing Register, which constitutes an enforceable instrument.⁴⁸

4. COMPARATIVE ANALYSIS OF THE LESSOR'S LEGAL POSITION VIS-À-VIS EXCLUDING CREDITORS AND SEPARATE CREDITORS

Thus, a legal position analogous to the regime governing excluding creditors is also prescribed for the lessor in financial leasing when bankruptcy proceedings are initiated against the lessee.⁴⁹ The lessor's ownership ensures protection against the lessee's creditors in both bankruptcy and enforcement proceedings, "but, as evidenced by comparative experience, only if the leasing contract or the right itself is properly publicized"⁵⁰, which, under our legal system, is achieved through registration in the Financial Leasing Register.⁵¹ „A leasing agreement may result in the conversion of a leasehold into a sale relationship only upon fulfillment of a deferred condition stipulated therein. If such condition remains unfulfilled, the lessor retains exclusion rights over the leased asset in the lessee's bankruptcy.”⁵²

Moreover, parallels exist with the position of separate creditors⁵³, as the stay of enforcement and payment (moratorium) also restricts the lessor's right to separate the leased asset from the bankruptcy estate until either a bankruptcy ruling is issued, or the approved reorganization plan is confirmed.⁵⁴

In legal scholarship, the significance of the lessor's right to immediately recover possession of the leased asset upon the opening of bankruptcy proceedings against the lessee has been emphasized. In other words, it is widely accepted that for a secured creditor (including the lessor), the immediate right to repossession in the event of bankruptcy is crucial, as it alters the strategic position of the contracting parties: The lessee is prevented from damaging, concealing, or disposing of the leased asset and can no longer use it to generate revenue. The lessor can immediately sell the asset to cover its losses. Furthermore, once possession is recovered, it is not the secured creditor (lessor) who must file a lawsuit and bear the risks and costs of litigation to prove that the lessee breached the contract and that the lessor is entitled to recover the asset. Rather, it is the lessee who must initiate legal action and assume all associated costs and risks in attempting to prove that the lessor had no right to repossession or that the repossession violated applicable rules. In the United States, out-of-court disposition of repossessed collateral (including leased assets) is permitted—though this may not be the case in other jurisdictions.⁵⁵

48 LES, Article 41, Item 3.

49 Kozar, V. (2010). *Komentar stečajnih zakona*. Beograd: Poslovni biro, p. 75.

50 Đurđević, M. (2002). Svojina na predmetu lizinga kao obezbeđenje lizingodavca u ugovoru o lizingu. *Pravo i privreda*, 39(9–12), p. 53.

51 Third parties are deemed to be aware of the existence of a leasing agreement based on its registration in the public registry. No party may invoke ignorance of the registered financial leasing data, in accordance with this Law (LFL, Article 48, Par. 1 and 2)

52 *Judgment of the Supreme Court of Serbia, Prev 110/03 of 2 April 2003*. (Retrieved on 24 June 2025) from: <http://www.propisiononline.com/Practice/Decision>

53 Bilbija, V. (2011). Zakonsko pravo zaloge i retencije u srpskom pravu. *Pravo – teorija i praksa*, (4–6), pp. 79–98.

54 Kozar, V. i Aleksić, N. (2018). *Komentar Zakona o stečaju sa novelama iz 2017. godine i sudskom praksom*. Beograd: Poslovni biro, p. 239.

55 Thaythy, T., *op. cit.*, p. 200.

CONCLUSION

The opening of bankruptcy proceedings against the lessee in financial leasing agreements triggers significant legal consequences, particularly regarding the lessor's right to separate and reclaim the leased asset from the bankruptcy estate. This right of exclusion is temporarily suspended due to the automatic stay on enforcement and settlement upon the opening of bankruptcy proceedings, with asset recovery only becoming possible after either a bankruptcy decision or confirmation of a reorganization plan. The bankruptcy court may, upon the trustee's proposal and with the creditors' committee's approval, reject the separation request (exclusion claim) and instead order payment of the full lease amount as bankruptcy estate debt, with a 30-day deadline - if payment is not made, the lessor regains his right to reclaim the asset. In reorganization proceedings, the leased asset must be returned to the lessor unless the confirmed plan explicitly provides for continued lease payments. A critical issue arises when the bankruptcy trustee fails to adequately protect the leased asset, jeopardizing its value and justifying a request to lift the enforcement stay under Articles 93a-93b of the LB. It is important to note that under the Serbian LB, the term "bankruptcy proceedings" encompasses both bankruptcy (leading to asset liquidation and termination of the debtor's existence) and reorganization (business continuation under an approved plan). This distinction is crucial for understanding the lessor's rights - in bankruptcy he has separation (exclusion) rights, while in reorganization outcomes depend on plan provisions. Comparative analysis shows that while Serbian law follows EU standards through mandatory registration in the Financial Leasing Register, procedural delays in asset recovery persist, highlighting the need for reforms to balance creditor protection with reorganization objectives. The lessor's position resembles that of excluding creditors, but strategic weaknesses remain, particularly regarding urgent asset recovery - a challenge accentuated in cross-border insolvencies. Ultimately, the outcome depends on the duration of the enforcement stay, reorganization plan terms and the trustee's actions, with non-payment of lease installments reinstating enforcement rights for asset recovery under contract and law, regardless of whether bankruptcy or reorganization proceedings are involved.



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ПРАВНЕ ПОСЛЕДИЦЕ ОТВАРАЊА СТЕЧАЈНОГ ПОСТУПКА НА ФИНАНСИЈСКИ ЛИЗИНГ

Апстракт:

У раду су анализиране законске одредбе, ставови судске праксе, као и мишљења правне науке о правним последицама отварања стечајног поступка на финансијски лизинг. Посебна пажња посвећена је праву на издвајање предмета лизинга – излучно право, које припада даваоцу лизинга ако се стечајни поступак отвори над примаоцем лизинга. Указано је на значај забране извршења и намирења, као законској последици отварања стечајног поступка, која се сходно примењује и на остваривање права даваоца лизинга на излучење из стечаја предмета лизинга до одлуке о банкротству стечајног дужника, односно до потврђивања усвојеног плана реорганизације. Анализирани су и проблеми који настају ако стечајни дужник или стечајни управник нису на адекватан начин заштитили предмет лизинга тако да је његова безбедност изложена ризику, када давалац лизинга може захтевати укидање мере обезбеђења изречене у претходном стечајном поступку, односно укидање забране извршења и намирења као законске последице отварања стечајног поступка. Објашњена су питања везана за право даваоца лизинга на излучење предмета лизинга у случају одлуке о банкротству, и указано је на изузетак када стечајни судија може, на предлог стечајног управника и уз сагласност одбора поверилаца, одбити излучни захтев и одредити исплату пуног уговореног износа лизинг накнаде, као обавезе стечајне масе, као и на последице неисплате које дају право даваоцу лизинга да захтева повраћај државине и извршење на предмету лизинга у складу са уговором односно законом. На крају анализирана су теоријска и практична питања која се односе на дужност стечајног дужника, односно стечајног управника да предмет лизинга преда даваоцу лизинга након потврђивања усвојеног плана реорганизације, уколико њиме није предвиђен наставак коришћења предмета лизинга и плаћање лизинг накнада у складу са уговором о лизингу.

Кључне речи: отварање стечајног поступка; правне последице; финансијски лизинг; излучно право; плаћање лизинг накнада

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CIVIL LIABILITY IN THE LAW OF THE REPUBLIC OF SERBIA: THE INJURED PARTY'S CONTRIBUTION TO THE OCCURRENCE OF DAMAGE

Abstract:

The injured party's contribution to the occurrence of damage is a highly complex institution. Contributory liability may be defined as the situation in which damage is not attributable solely to the tortfeasor but also to the injured party. In legal doctrine, one frequently encounters divergent opinions concerning both the scope and the extent of the injured party's contribution to the damage. A particularly contentious issue is whether the injured party's liability requires the element of fault or whether it may rest solely on the causal contribution to the damage. The aim of this paper-given the importance and complexity of the institute under analysis-is to dispel uncertainties, or at least to reduce them, through logically derived conclusions on the subject matter. A special emphasis is placed on presenting generalized solutions more concisely by clarifying which circumstances the court assesses when determining the amount, scope, and proportion of the injured party's contribution to the occurrence of damage.

Keywords: *contributory fault, shared liability, case law, tortfeasor's fault.*

INTRODUCTION

Damage is a very broad concept with which we encounter daily. According to professor Jakov Radišić, "damage is not a concept used solely by lawyers and having exclusively a legal meaning; rather, its significance extends beyond the legal sphere. Thus, damage may occur when someone misses an event or an action (the damage of not having read a certain book, of not having gone on an excursion), etc."¹ Nevertheless, in legal and normative terms, the concept of damage has a narrower meaning.²

1 See in the book: Radišić, J. (2021). *Obligaciono pravo – opšti deo, četrnaesto izdanje*. Pravni fakultet: Univerziteta u Nišu, p. 217.

2 *Ibidem*.

Damage constitutes an injury to the psycho-physical integrity of a person, as well as a certain loss in material terms. Everyone is obliged to refrain from actions by which damage may be caused to another person.³ The principle prohibiting the infliction of damage is a crucial tenet of civil law.⁴ The Law on Obligations of 1978 (hereinafter: LOO) itself provides that anyone who causes damage to another is obliged to compensate it, unless he proves that the damage occurred without his fault.⁵

The basic classification of damage is into material and non-material damage. Material damage represents a reduction of someone's property and/or the prevention of an increase in property. Non-material damage was for a long time a contentious issue and was defined conceptually for the first time with the entry into force of the LOO. Therefore, non-material damage constitutes the infliction of physical or psychological pain or fear on another. The elimination of the consequences of a damaging event on the property of the injured party constitutes compensation for material damage. Although material damage is exact, visible, and relatively straightforward to determine, the problem arises when one must determine the injured party's contribution to the occurrence of damage. In other words, when the extent and scope of the injured party's contribution to the damage must be assessed and determined, a simple task becomes highly complex and challenging, both for court experts and for the courts themselves.

Accordingly, the aim of this paper is to, through a detailed analysis of statutory solutions as well as case-law decisions, attempt to answer the contentious questions relating to the subject matter, with an emphasis on defining methods that would assist courts in rendering correct and equitable judgments in the context of determining the amount and scope of the injured party's contribution to the damage sustained.

2. THE CONCEPT AND TYPES OF DAMAGE

The Law on Obligations ("LOO") defines damage as the diminution of a person's property ("ordinary damage") and the prevention of its increase ("loss of profit"), as well as the infliction of physical or psychological pain or fear on another ("non-material damage"). An injured party who has contributed to the occurrence or aggravation of the damage is entitled only to proportionally reduced compensation. If it is impossible to ascertain which portion of the damage resulted from the injured party's own conduct, the court will award compensation in light of all the circumstances of the case. "They should receive compensation corresponding only to the adequate consequence of the tortfeasor's conduct, that is, compensation for the damage that occurred up to the disruption of the causal link."⁶

Civil codes generally do not define the concept of damage.⁷ The Austrian General Civil Code and the LOO are exceptions in this regard: they do not provide an exhaustive definition, but they do enumerate the various matters and types of damage.⁸

One of the general prerequisites for obligation-law liability is the existence of

3 Article 16 of the Law on Obligations („Sl. list SFRJ”, br. 29/78, 39/85, 45/89 - odluka USJ i 57/89, “Sl. list SRJ”, br. 31/93, “Sl. list SCG”, br. 1/2003 - Ustavna povelja i “Sl. glasnik RS”, br. 18/2020).

4 Article 154 LOO.

5 *Ibidem*

6 Loza, B. (1981). *Obligaciono pravo – opšti deo, drugo izmenjeno i dopunjeno izdanje*. Zenica: Dom Štampe, p. 235.

7 Radišić, J. (2021). *op.cit*, p. 218.

8 *Ibidem*.

damage.⁹ Liability cannot arise unless harm has been inflicted on a person or on material assets.¹⁰ Damage may arise on two bases: by breach of a contractual provision, or by a tortious act.¹¹ The occurrence of a harmful consequence due to the tortfeasor's wrongful act creates an obligation-law relationship between the tortfeasor and the injured party, giving rise to non-contractual liability.¹² For compensation claims based on breach of contract-whether for delay or non-performance-the rules governing non-contractual liability apply by analogy.¹³

Legal doctrine distinguishes several types of damage depending on whether it is contractual or non-contractual. This paper will analyze the fundamental classifications of damage in the context of non-contractual liability. The elementary division is between material and non-material damage, based respectively on impairment of property rights or of personal rights. Material damage has been defined as the diminution of a person's assets or the prevention of their increase. Thus, it concerns injury to a person's material goods. Material damage also arises from bodily injury in the form of treatment costs, impairment of health, permanent or temporary incapacity to work, loss of personal income, and the like.¹⁴ It is relatively precise, visible, and measurable, and its amount can be determined using objective criteria.

By contrast, non-material damage constitutes an impairment of the psycho-physical integrity of the person. It is assessed according to the circumstances of each case-namely, the findings and opinions of forensic medical experts and the court's own evaluation. Prior to the enactment of the LOO, compensation for non-material damage was long a contentious issue and was rarely awarded, because legal theory and practice lacked a unified approach to how to quantify such harm. The LOO now provides that, when deciding a claim for non-material damage and determining its amount, the court must consider the importance of the right infringed and the purpose served by the compensation, while ensuring that the award does not gratify tendencies incompatible with its nature and social function. In this way, the legislator has recognized the right to compensation for non-material damage and provided guidelines for determining its amount.

In addition to the basic division, it is important to distinguish material damage into actual (ordinary) damage and loss of profit. Ordinary, simple, or actual damage is defined by the LOO as the diminution of a person's assets.

In relation to this type of damage, loss of profit signifies the prevention of an increase in a person's assets. It is a form of material damage suffered because an unlawful act by another has prevented the injured party from realizing a specific economic benefit.¹⁵ "Loss of profit consists of the expected increase in assets."¹⁶ It is not enough that the injured party merely anticipated the gain; the objective circumstances of the case must substantiate the right to compensation on that basis.

9 Milošević, Lj. (1982). *Obligaciono pravo – šesto izmenjeno i dopunjeno izdanje*. Beograd: Savremena administracija, p. 154.

10 *Ibidem*.

11 Radovanov, A. (2008). *Obligaciono pravo – opšti deo*. Novi Sad: Pravni fakultet za privredu i pravosuđe Univerziteta Privredna akademija u Novom Sadu, p. 264.

12 *Ibidem*.

13 *Ibidem*.

14 Milošević, Lj. (1982). *op.cit.* p. 156.

15 Radišić, J. (2021). *op.cit.* p. 220.

16 *Ibidem*.

Moreover, damage is distinguished as concrete or abstract. Concrete damage can be evidenced and its amount determined precisely, whereas abstract damage is presumed. Typically, the amount of abstract damage is established in advance, i.e., before it has actually materialized.

Material and non-material damage may also be categorized as existing or non-existent damage. Existing damage manifests immediately upon commission of the harmful act, while with future damage it remains uncertain whether it will ever occur.¹⁷

The distinction between direct and indirect damage partially overlaps with that between actual damage and loss of profit-loss of profit is always indirect, whereas actual damage need not always be direct.¹⁸ Direct damage, in principle, arises immediately upon execution of the harmful act, while indirect damage ensues from the impairment of an object or a legally protected interest and thus represents harm beyond and above the value of the destroyed or injured asset.¹⁹

3. FOUNDATIONS OF CIVIL LIABILITY

In order for a person to be held liable for damage in civil law, there must exist the basis of their liability. The basis of tortious civil liability is that on which the obligation to compensate damage rests.²⁰ "The basis of liability is that upon which liability is founded."²¹

Legal doctrine distinguishes two theories with respect to liability for damage: the subjective theory and the objective theory. The subjective theory of liability rests on the notion that fault is the basis of liability, whereas proponents of objective liability hold that it suffices that the damage was caused, irrespective of fault.

The subjective theory of liability dates back to the enactment of the *lex Aquilia*, i.e. classical Roman law.²² At that time, damages generally arose from the tortfeasor's deliberate act, and there was no need to consider any other basis of liability beyond fault.²³ Only later, with the advent of technical revolution, did harms occur whose attribution of fault became difficult to prove. The burden then fell on the injured party to prove that the tortfeasor committed the wrongful act. Subsequently, a presumption of fault was introduced, easing the injured party's position. Today, pursuant to Article 7(1) of the Law on Civil Procedure (hereinafter: LCP), parties are required to present all facts on which they base their claims and to propose evidence supporting those facts. A party asserting a right bears the burden of proving those facts material to the existence or exercise of that right, unless otherwise prescribed by law.²⁴ In our legal system, the presumption of fault is applied, which may be rebutted by proving that the person was not at fault for the ensuing damage.²⁵ The injured

17 Radovanov, A. (2008). *op.cit.*, p. 264.

18 Milošević, Lj. (1982). *op.cit.*, p. 156.

19 Radovanov, A. (2008). *op.cit.*, p. 265.

20 Loza, B. (1981). *Obligaciono pravo – opšti deo – drugo dopunjeno i izmenjeno izdanje*. Zenica: Dom štampe, p. 200.

21 *Ibidem*.

22 *Ibidem*.

23 *Ibidem*.

24 Article 231(2) of the Law on Civil Procedure

25 A common example in legal doctrine and case law is that parents are held strictly liable for their child's

party's position is thus facilitated, since the person who denies fault for the harmful event-or for the damage incurred-must also prove that denial.

In contrast to the subjective theory, the objective theory of liability began to be applied only in the mid-19th century: "It increasingly occurred that, under the influence of advanced means of production and improvements in transportation, harms began to appear as normal consequences of certain activities or uses of specific means (things)."²⁶

Under Article 154(2) of the LOO, it is provided that for damage arising from a thing or activity which poses an increased risk of harm to the environment, liability is strict-that is, without regard to fault. Today, objective liability as the basis of liability is applied in almost all legal systems.²⁷

In our legal system there exists yet another basis of liability: liability on grounds of equity, a more recent development also regulated by the LOO. In the case of damage caused by a person who is not liable for it-and where compensation cannot be obtained from the person who was obligated to supervise that person-the court may, when equity so requires and particularly in light of the tortfeasor's and the injured party's respective financial circumstances, order the tortfeasor to compensate the damage, in whole or in part.²⁸

The basis and the elements of liability are not synonymous. The basis of liability is the reason for the obligation to compensate, whereas an element is that which must necessarily be fulfilled for liability to arise.²⁹

The elements of liability for asserting the right to compensation are: (1) the existence of damage; (2) the wrongfulness of the tortfeasor's act; (3) the causal link between the tortfeasor's act and the harmful consequence; and (4) the tortfeasor's fault.³⁰ Under the subjective theory of liability, all of these elements must be met; under objective liability, only the existence of damage and the causal link between the tortfeasor's act and the harmful consequence are required.

According to professor Jakov Radišić, the facts that may exclude liability for a wrongful act are: the performance of a public duty, the injured party's consent, necessary defense, a state of necessity, lawful self-help, and the exercise of one's own right. When rendering a final decision on the basis and elements of liability for wrongful acts and on the right to compensation, the court considers all the circumstances of the case. For this reason, professor Radišić used the term "may" rather than "shall" when enumerating the grounds for excluding liability-indicating that the list is not exhaustive but merely illustrative.

4. SHARED LIABILITY / CONTRIBUTORY FAULT

Fault is one of the elements of liability entitling a party to compensation. Whether the wrongful act consisted of a positive deed or an omission that could have prevented

acts until the child reaches seven years of age under an absolute liability standard, and from the age of seven onward under a relative standard. Thus, once the child has reached seven years of age, parental liability is founded on a presumption of fault, subject to the possibility of exculpation.

26 Loza, B. (1981). *op. cit.* 194.

27 *Ibidem*

28 Article 169(1) of the LOO

29 Loza, B. (1981). *op. cit.* p. 192.

30 Radovanov, A. (2008). *op.cit.* p. 265.

the damage, the person at fault will be liable provided that the fault can be attributed to them.

For there to be fault, the person must possess the capacity for judgment—one who is not aware of their actions cannot be held liable for the resulting harm.³¹

Civil-law doctrine recognizes two theories of fault: the subjective theory and the objective theory. The subjective theory grounds liability in the tortfeasor's state of mind toward the resulting damage. It examines whether the tortfeasor intended the harm or was reckless. In contrast to the objective theory, the subjective theory defines fault as conduct deviating from what is reasonably expected or from statutory norms.

Professor Ljubiša Milošević³² notes that some theorists—such as the French jurist Planiol—proposed that fault consists in violation of certain prior duties: the duty to refrain from all violence, from all deceit, from any act requiring special strength or skill, to supervise dangerous things in one's possession, and to oversee those entrusted to one's care.³³ Breach of these supposed duties would give rise to fault and thus to civil liability. However, this view was not adopted, since these duties are not explicitly codified and cannot rightly be called statutory obligations.³⁴

What has been accepted by both doctrine and case law is that fault may manifest in greater or lesser degrees. Under Article 158 of the LOO, fault exists when the tortfeasor causes harm intentionally or through negligence. The more serious forms of fault are *dolus* (direct intent) and *dolus eventualis* (conditional intent), while the lesser degrees are ordinary negligence and gross negligence.

The subsequent articles of the LOO set out the grounds for excluding liability. Article 159 provides that a person who, by reason of mental illness, retardation, or other incapacity for judgment, is not responsible for the harm they cause, and that one who causes damage while in a temporary incapacity for judgment is nevertheless liable—unless they prove they did not reach that state through their own fault, in which case the person responsible for placing them in that state is liable. Article 160 addresses minors: a child under seven years of age is not liable for harm they cause; a child aged seven to fourteen is not liable unless it is shown they had capacity for judgment when causing the damage; a minor aged fourteen and above is liable under the general rules of liability.

Article 161(1) of the LOO excludes liability for harm caused in necessary self-defense, except where defense is exceeded. The next article similarly exempts from liability one who, in lawful self-help, causes harm to the person who necessitated that self-help. Finally, Article 163 provides that a person who permits another to act at their own risk cannot later claim compensation for harm caused by that act. Any declaration by the injured party consenting to a wrongful act forbidden by law is void.

Damage may be caused by multiple parties, and one way this occurs is when the injured party's own conduct contributes to the tortfeasor's wrongful act. In such cases, liability is apportioned between the tortfeasor and the injured party.³⁵ An injured

31 Milošević, Lj. (1966). *Obligaciono pravo*. Beograd: Naučna knjiga, p. 119.

32 *Ibidem*.

33 *Ibidem*.

34 *Ibidem*.

35 Salma, J. (2007). *Obligacono pravo – šesto izdanje*. Pravni fakultet Univerziteta u Novom Sadu, p. 466.

party who has contributed to the occurrence of damage, or to its being greater than it otherwise would have been, is entitled only to proportionally reduced compensation.³⁶ When it is impossible to determine which portion of the damage stems from the injured party's conduct, the court will award compensation in light of all the circumstances of the case.³⁷

Accordingly, the Judgment of the Belgrade Court of Appeal, Gž 6329/2011 of October 10, 2012, is instructive:

From the reasoning:

"...In determining the parties' respective contributions to the occurrence of the harmful event, the first-instance court, despite having correctly and fully established the facts, drew an incorrect conclusion regarding the extent of the plaintiff's contribution to the harmful event, and thus misapplied substantive law in assessing the amount of the monetary obligation the defendant owes the plaintiff. The second-instance court, on its own motion, has ensured the proper application of substantive law, as also properly noted in the lodged appeal.

"Pursuant to Article 192(1) of the LOO, an injured party who has contributed to the occurrence or aggravation of damage is entitled only to proportionally reduced compensation. In the present case, the plaintiff's contribution was reflected in a series of failures made during the defendant's hiring and during his employment: the plaintiff hired the defendant without verifying passage of the requisite firearm-handling examination, issued him a rifle without confirming his proficiency, provided no training or instructions on proper use of a hunting rifle, and required him to work up to twenty hours per day-including permitting untrained guards to work overtime-all of which the first-instance court correctly found. However, by these omissions, the court of appeal determined that the plaintiff contributed 50% to the occurrence of the damage, since his conduct contributed equally to the harm as did the defendant's own contribution-namely, that despite lacking training and knowledge in proper firearm handling, the defendant used the weapon outside a safe range, failed to exercise due care by firing into asphalt in the direction of individuals who had already passed by, and thereby injured two persons, conduct for which he was convicted in a final criminal judgment. For these reasons, the defendant's claim that the plaintiff's contribution was 90% (and his own only 10%) is unfounded. Since the plaintiff paid the injured party RSD 850,000 for non-material damage and RSD 172,870 for procedural costs (totaling RSD 1,022,870), the defendant must reimburse him 50% of that amount-i.e. RSD 511,435. Because the first-instance court awarded RSD 716,009, the plaintiff is not entitled to the excess RSD 204,574 awarded in the first paragraph of the operative part."

In every concrete case, the court must ascertain the injured party's contribution to the damage-even in cases of bodily injury. This duty is confirmed by the Decision of the Niš Court of Appeal, Gž 1806/2020 of July 29, 2020:

"...If the injured party sustained some bodily injuries due to the tortfeasor's unlawful conduct and others through his own self-injurious actions, the court must determine which injuries were inflicted by the tortfeasor's conduct and which were self-inflicted by the plaintiff, thereby contributing to the occurrence of damage."

36 Article 192(1) LOO

37 *Ibidem*, Article 192(2) LOO

The court is always obliged to rigorously examine the causal chain of events, in which the findings and opinions of experts-both forensic medical and of other specialties-are of great importance.³⁸ In the case at hand, the court decided to determine the injured party's contribution to the occurrence of damage because the forensic medical expert noted in their report and opinion that it is possible certain injuries were self-inflicted by the injured party (e.g., striking one's head against a wall). "If fault, or the proportion thereof, cannot be determined, the parties share the compensation amount proportionally among themselves."³⁹

The injured party's contribution to the damage also exists where, by their own actions, they could have prevented or mitigated the harm, or where such a duty is stipulated by contract.⁴⁰

A common example in case law of the injured party's contributory fault is consenting to ride with a driver known to be intoxicated, as illustrated by the Judgment of the Belgrade Court of Appeal, Gž. 5085/2012 of December 6, 2012:

Excerpt from the reasoning:

"The injured party who consented to the ride, knowing the driver was intoxicated, contributed to the harmful consequences of the traffic accident caused by the intoxicated driver."

Further from the reasoning:

"According to the facts established at first instance, and in line with the criminal case file, the traffic accident was preceded by the plaintiff's socializing with S. S., during which, immediately before the criminal event, both consumed alcohol. Given that it was undoubtedly known to the plaintiff that S. S. had consumed alcohol and did not possess a driver's license (as the plaintiff stated when questioned in the proceedings before the Basic Court in V. against the accused S. S.), by agreeing to ride with him in that condition, he consciously assumed the risk of possible harmful consequences. Therefore, the plaintiff's degree of contribution to the occurrence of harmful consequences is assessed at 40%."

5. CRITERIA INFLUENCING THE DETERMINATION OF THE AMOUNT AND EXTENT OF THE INJURED PARTY'S CONTRIBUTION TO THE OCCURRENCE OF DAMAGE

The liable party is obliged to compensate the entirety of the damage.⁴¹ The obligation to indemnify is considered due from the moment the damage occurs.⁴² In order for the court to establish the extent of the debtor's liability, it must first determine the amount of damage for which compensation is sought.⁴³ However, where the amount of

38 Antić, O. (2008). *Obligaciono pravo – drugo izmenjeno i dopunjeno izdanje*. Beograd: Pravni fakultet Univerziteta u Beogradu, str. 471.

39 Salma, J. (2007). *op.cit.* p.467.

40 Rešenje Vrhovnog suda Srbije, Prev. 105/2005 od 24.3.2005. godine

41 Đurovi, R., Dragašević, M. (1980). *Obligaciono pravo sa poslovima prometa*. Beograd: Savremena administracija, p.180.

42 Article 186 LOO.

43 Radišić, J. (2021). *op.cit.* p. 310.

damage cannot be quantified numerically-as in the case of loss of profit-the court fixes the compensation based on the ordinary course of events and on measures undertaken by the injured party.⁴⁴ Taking into account also the circumstances arising after the harmful act, the court will award such compensation as is necessary to restore the injured party's material situation to what it would have been had the damaging act or omission not occurred.⁴⁵ Bearing in mind the injured party's financial situation, the court may order the liable party to pay less than the full amount of damage if the harm was caused neither intentionally nor through gross negligence, and if the liable party's modest means would render payment of the full indemnity unduly burdensome.⁴⁶ If the tortfeasor caused damage while acting for the benefit of the injured party, the court may likewise award a reduced compensation, taking into account the care the tortfeasor exercised in his own affairs.⁴⁷ The moment at which the damage is determined is the moment of the judgment.

Compensation is assessed according to objective criteria (e.g., the market value of the item) and subjective criteria (e.g., special circumstances, the injured party's affection for the damaged or destroyed item).

The injured party's contributory fault also influences the amount of compensation. In most cases it is impossible to determine precisely; thus, courts must exercise their discretion in evaluation and assessment. They generally rely on the findings and opinions of judicial experts of various specializations.

Commonly, a traffic-technical expert will calculate, in their report and opinion, the injured party's contribution to the occurrence of damage. The court values the expert's findings-especially in traffic accidents-but also considers all circumstances of the specific case. Judicial practice has developed certain benchmarks: for failure to wear a seat belt, a contribution of 20-30%; for falls on damaged pavement (potholes), 10-20%-with consideration given to whether it was daytime and whether the injured party was familiar with the route. In traffic accidents involving two passenger vehicles, contributions of 30%, 40%, or even 50% have been applied.

However, it must be emphasized that failure to wear a seat belt does not always constitute contributory fault. In this regard, the District Court of Novi Sad held (Gž. no. 1130/2000 of April 25, 2000):

"There is no shared liability where the injured motorist did not buckle the seat belt, and the injury occurred due to movement of deformed parts of the vehicle toward the body-not due to movement of the body toward the windshield."

Excerpt from the reasoning:

"The defendant's contention that the court misidentified the facts concerning the objection of shared liability-namely, the failure to wear a seat belt at the time of the harmful event-does not stand. It was correctly found that the plaintiff's injury occurred regardless of belt use, as it was caused by movement of the vehicle's deformed parts toward the co-driver's body, not by the plaintiff's body moving toward the windshield. Nor does the defendant's argument that the court based its merit decision on evidence the defendant disputed carry any weight."⁴⁸

44 *Ibidem*

45 Article 190 LOO.

46 Article 191(1) LOO.

47 Article 191(2) LOO.

48 Vujanić, M., Obradović, D. (2022). *Naknada štete u saobraćaju – podeljena odgovornost*. Zbornik

Thus, every traffic accident is unique, and the effect of not wearing a seat belt on the injured party's liability must be assessed on a case-by-case basis.⁴⁹

6. CONCLUSION

In assessing the injured party's contribution to the occurrence of damage, certain case-specific circumstances assume decisive importance. Today, courts have developed criteria for determining both the extent and the degree of the injured party's contributory fault. These criteria draw on established case law, the experience of the presiding judge, and the similarity of antecedent cases.

The court fixes the degree and amount of the injured party's contribution by exercising its equitable discretion and on the basis of expert findings and opinions from various disciplines. Expert reports carry legally relevant weight, especially in cases of traffic accidents, which, regrettably, we encounter almost daily.⁵⁰

Before issuing a final decision, the court must thoroughly analyze each case on its own merits, taking into account the most important principles and the positions of the highest judicial and scholarly authorities.⁵¹ Where it is impossible to ascertain which portion of the damage is attributable to the injured party's conduct, the court will award compensation in light of the specific circumstances of the case.⁵²

From the foregoing, it follows that the court determines the injured party's contribution through equitable assessment tailored to the facts of each case—a practice that has proven just, given the unique nature of every matter. Any attempt to constrain the court—whether by prescribing fixed ranges for monetary awards or otherwise—would lead to unjust outcomes, unacceptable under both legal doctrine and judicial practice.

radova XXV Međunarodna nučna konferencija – Prouzrokovanje štete, nakanda štete i osiguranje, Beograd - Valjevo, p. 177.

49 *Ibidem*.

50 Rešenje Apelacionog suda u Nišu, Gž 1806/2020 od 29.7.2020. godine

51 See for a detailed treatment the research paper by Vujanić, M. & Obradović, D. (2022), Compensation for Damage in Traffic - Contributory Liability, in the Proceedings of the XXV International Scientific Conference - Causation of Damage, Compensation for Damage and Insurance, Belgrade-Valjevo, where the authors propose a method-based on quantitative calculations-for accurately assessing the injured party's contribution in traffic accidents that have resulted in prior material damage.

52 Article 192(2) LOO



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ГРАЂАНСКОПРАВНА ОДГОВОРНОСТ У ПРАВУ Р. СРБИЈЕ: ДОПРИНОС ОШТЕЋЕНОГ ЛИЦА НАСТАНКУ ШТЕТЕ

Апстракт:

Допринос оштећеног лица настанку штете је врло комплексан институт. Подељена одговорност се може дефинисати као настанак штете за коју није одговоран само штетник, већ и оштећено лице. У правној теорији, неретко се сусрећемо са неуједначеним ставовима у вези обима и висине доприноса оштећеног лица настанку штете. Као спорно питање намеће се одговорност оштећеног лица у контексту да ли је за исту потребна кривица или се одговорност темељи само на доприносу штете. Циљ рада, а имајући у виду значај и сложеност института анализе, јесте да се отклоне недоумице, или бар умање логичним изведеним закључцима у вези предметне проблематике. Посебан акценат рада је да се уопштена решења прикажу концизније на тај начин што ће се разјаснити које околности суд цени при доношењу одлуке о висини, обиму и доприносу оштећеног лица настанку штете.

Кључне речи: допринос штети, подељене одговорност, судска пракса, кривица штетника.

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LAW AND JUSTICE IN THE CONTEXT OF THE ZAPATISTA WESTERN

Abstract:

In this paper I analyze the concepts of law and justice, frequently used together, starting with their use in the names of political parties in Poland, Croatia and Serbia, and with Emiliano Zapata's famous words, "*If there is no justice for the people, let there be no peace for the government.*" By "*Zapatista Western*" I refer to different, mostly superficial, appeals to justice. I examine the phenomenon of appeal to justice from two theoretical perspectives: Kelsen's critique of justice as an elusive pursuit of happiness that needs to be excluded from the domain of law, and Althusser's concept, which draws on Kelsen. Although I refrain from a definite conclusion, I favor Althusser's position. Althusser perceives law not as a neutral instrument of justice, but as a key element in an ideological reproduction of a society. Therefore, appeal to justice has to be related to class politics, rooted in and thought out in relation to structural layers and elements of society, and not taken moralistically, as a perception of a current aberration from the civilizational norm. Althusser contributed to the elevation of legal theory from formalism and positivism to a critical approach, so that law is no longer seen as abstract justice, but as an active element in the dynamics of social power relations.

Keywords: *Law, justice, structure, infrastructure, Zapatista Western.*

I will attempt to explore the theme of the call for justice, beginning with the Zapatista (Zapata) Westerns from the late 1960s, and ending with more recent developments. The Zapatista Western, also known as the Zapata Western, refers to a subgenre of Spaghetti Westerns that emerged in Western European cinema during the late 1960s and early 1970s.¹ The main protagonists are typically an ignorant and brutal villager and a decadent European revolutionary who form an alliance initially driven by selfish motives or greed. Over time, their accidental partnership evolves into an uncompromising struggle against injustice. The creators of Zapatista Westerns often promoted Marxist or other radical political ideas. The most renowned work within the genre is Sergio Leone's *A Fistful of Dynamite* (1971), which, paradoxically, was also interpreted as a critique of the genre itself.

The plot is well known: the previously described duo confronts a bloodthirsty dictator who collaborates with a multinational corporation. The representatives of such corporations and imperialist forces on the ground are typically portrayed as psychopaths or ruthless mercenaries. I treat the Zapatista Western as a paradigm of spontaneous philosophy – that is, the emergence of a philosophical idea in an informal, non-academic

1 Zapata Western. 2025 (Internet)

context. Spaghetti Westerns criticism and its related narrative forms focus on subjective and moralistic elements, which also mark their limits. While the issue of informal philosophical thought is significant, a more detailed analysis lies beyond the scope of this text.

I examine the phenomenon of the appeal to justice through the theoretical lens of Kelsen's critique of justice as an elusive pursuit of happiness, as well as Althusser's conception developed under Kelsen's influence. According to both Kelsen and Althusser, the foundation of law lies in private law, in line with the thesis on the significance of social reproduction. The question of justice is therefore addressed from the perspective of private law as the basis of social reproduction, rather than in moralistic terms, as is the case in the Zapatista Western, where a local psychopathic dictator and American imperialism are juxtaposed, while the underlying social structures remain obscured. Kelsen and Althusser do not situate the problem of justice within the sphere of morality, but rather in the codification and functioning of private law. While refraining from offering a definitive judgment, I am more inclined toward Althusser's solution, which builds upon Kelsen's rigorous exclusion of justice from legal theory, yet allows for the inclusion of a non-moralistic concept of justice.

POLITICAL PARTIES, ZAPATISTA WESTERN AND CURRENT NARRATIVES

The term *justice* is frequently used in political discourse. Notably, *Law and Justice* (*Pravo i pravda*) is a sovereignist political party in Croatia, founded on February 3, 2024. Its president is Mislav Kolakušić, with Ivan Vilibor Sinčić and Ivan Lovrinović as vice-presidents. The party positions itself as populist, Eurosceptic, and anti-establishment, and even shares a name and branding similarities with Poland's *Law and Justice* party.² Law and Justice (*Polish: Prawo i Sprawiedliwość*, abbreviated as PiS) is a right-wing, national-conservative political party in Poland, officially registered on June 13, 2001.³ The ideological framework of both parties reflects a shared emphasis on sovereignty and traditional values. The *Freedom and Justice Party* (*Stranka slobode i pravde*) active in Serbia, is a pro-European, social democratic party founded in 2019 through the merger of the *Green Ecological Party* and the *Left of Serbia*.⁴ In most variations, justice is positioned alongside law as its corrective. When justice takes precedence, it signals a certain insufficiency within the law and highlights the need to move beyond formal legal frameworks. The pairing of law and justice emphasizes adherence to values that, while encompassed by legal norms, extend beyond them and carry a broader, more binding significance.

It is interesting that the words of the Mexican revolutionary Emiliano Zapata are often invoked by intellectuals and politicians across the political spectrum in Serbia: "If there is no justice for the people, let there be no peace for the government." Emiliano Zapata (1879–1919) mobilized a peasant army from villages and haciendas and, under the banner of land and freedom, joined the Mexican revolutionary Francisco Madero in 1910 during the uprising against the dictator Porfirio Díaz. Zapata formulated his plan for agrarian reform in the *Plan Ayala*, which called for the redistribution of land to the local population. Disappointed by Madero's failure to implement the promised agrarian reforms and by his demands to disband guerrilla units and disarm the peasants, Zapata refused to submit to the new government. He demanded the immediate implementation of agrarian reform and the confiscation of land belonging to the enemies of the revolution. In the territory under his control, he redistributed

² Pravo i pravda. 2025 (Internet).

³ Prawo i Sprawiedliwość. 2025 (Internet)

⁴ Party of Freedom and Justice. 2025 (Internet).

land to peasants according to the *Plan Ayala*, renewing the revolution under the slogan of “land and freedom.” This was a revolutionary and anti-feudal act that resonated strongly in Mexico and other Latin American countries. However, Zapata remained in opposition, continuing to fight against repression. Lured into a meeting with government troops, he was killed on April 10, 1919, in an ambush in the town of Chinameca.⁵

In 1994, an uprising erupted in the Mexican region of Chiapas, led by the rural population of Indigenous descent (descendants of the Mayan peoples). The insurgents called themselves Zapatistas and saw themselves as continuing Emiliano Zapata’s struggle. In our society, however, references to Emiliano Zapata’s words are often made without regard to their historical background.

KELSEN’S CRITIQUE OF JUSTICE

Hans Kelsen is renowned for his efforts to separate law from ideology and politics, aiming to establish law as an autonomous system. He sought to minimize the influence of the state in the creation of law and to unify domestic and international law into a single, coherent legal framework. His theory, known as the “Pure Theory of Law,” emphasizes a strict distinction between law and other social or political factors.⁶ These tendencies in thinking stand in contrast to the prevailing moralistic current of the time, which called for justice and fairness. Kelsen’s critique of justice is particularly significant – and productive – in the way it redirects the problem back to the social structure. He excludes moral, psychological, and social elements from the concept of law, as they tend to create confusion, and instead bases his approach on Kant’s ideas.⁷ More precisely, while Kant excluded legitimacy from morality, Kelsen excluded morality from legitimacy. Regardless of whether his ideas are currently in vogue, Kelsen’s insights remain a “true touchstone” for theoretical – and especially legal – thought, whether legal positions are being developed, defended, or critiqued.⁸ In his uncompromising critique, Kelsen exposed the entire Western tradition of thinking about justice, questioning the very concept itself and advocating for its exclusion from the domain of legality. He replaced the notion of justice with that of social peace. Yet, the question remains: is social peace truly possible without the realization of justice? Kelsen not only seeks to cleanse jurisprudence of legal politics, but also fundamentally challenges the very idea of justice.⁹

Kant – followed later by Kelsen – pays particular attention to the relationship between morality (what our conscience dictates as “moral self-awareness”) and legality (what the law prescribes and permits). For instance, we may be law-abiding citizens who follow the principle of legality out of selfish or even immoral motives: fear of punishment, desire for a good reputation, or pursuit of personal gain. If we perform an objectively good act, but are motivated by self-interest or calculation, we are acting legally – but not morally.¹⁰ Kant deliberately avoids grounding moral action in the pursuit of happiness, as is characteristic of so-called substantive, hedonistic, eudaimonistic, or utilitarian ethical

5 Rolls, A. 2011. *Emiliano Zapata. A biography*. Denver. Oxford: Greenwood.

6 Avramov, S. 1974. Hans Kelsen – life and work. *Annals*, vol. 22, vol.1-2, 22.

7 Ibid., 22.

8 Basta, D. 1998. Kelsen’s Destruction of Justice. In: Hans Kelsen. *What is justice?* Belgrade: Filip Višnjić, 167.

9 Kelsen, H. 1998. *What is Justice*. Belgrade: Filip Višnjić

10 Pavićević, V. 1979. Kant’s ethics of the categorical imperative. In: Immanuel Kant, *Critique of the Practical Reason*, Belgrade: Bigz, 8.

theories – a position that Kelsen, in this respect, closely follows.¹¹ Kant draws a fundamental distinction between morality and legality. If a person acts in accordance with the moral law, but does so because of some feeling (such as sympathy, fear, personal gain, or emotional inclination), then the action lacks moral value. In such a case, the action may be legally right or outwardly correct, but it is not morally good, because the will was not determined purely by respect for the moral law.¹² This idea deeply influenced Hans Kelsen. Like Kant, Kelsen insists on separating morality from legality. For Kelsen, law must be analyzed in formal, normative, and value-neutral terms, independent of emotional, psychological, or moral content. Both thinkers oppose grounding legal or moral systems in subjective feelings or utilitarian calculations.

Kelsen's approach is quite the opposite. As I mentioned, Kant seeks to free morality from legality, whereas Kelsen aims to free legality from the burden of morality. For the internal structuring of the legal order, the key concepts are gradation and subordination – not justice, happiness, or fairness. Kelsen schematically presents the hierarchy of the legal order of an individual state as follows: assuming the existence of a basic norm, the highest level of positive law is the constitution – understood in the material sense of the term – whose essential function is to determine the content of future laws. Positive constitutions often perform this function by prescribing or excluding certain content.¹³

The level closest to the constitution consists of general norms created in the legislative procedure, the function of which is to determine not only the authorities and procedure but, above all, the content of individual norms. While the focus of the constitution consists in regulating the procedure in which laws are created, the content of which is determined only to a very small extent, and the task of legislation is to equally determine the creation and content of judicial and administrative acts. The law that appears in the form of law is both substantive and formal law.¹⁴

THE HIERARCHY OF RIGHTS AND THE “BASE” OF PRIVATE LAW

The relationship between higher and lower levels within the legal order – such as between a constitution and a law, or a law and a court ruling – is one of determination or obligation. A norm at a higher level governs the act through which a norm at a lower level is created (or the act of enforcement, when relevant), thereby determining not only the procedure for creating the lower norm but often also the content that the norm must have. However, this determination is never absolute. A higher-level norm cannot fully prescribe every aspect of the act by which it is executed. There must always remain some degree of discretion, whether large or small, so that a higher-level norm, in relation to the creation or enforcement of a lower norm, serves only as a framework to be filled in by that act.¹⁵ Even a command that goes down to details must leave a multitude of determinations to its executor. If authority A orders that authority B should arrest subject C, then authority B must decide at its own discretion when, where, and how to execute that arrest order – decisions that depend on external circumstances that the commanding authority did not foresee or could have foreseen. It follows from this that

11 Ibid., 8.

12 Kant, I. 1979. *The Critique of Practical Reason*. Belgrade: Bigz, 91.

13 Kelsen, Hans. 2007. *A Pure Theory of Law*. Belgrade: Center for Publications of the Faculty of Law, University of Belgrade, 54.

14 Ibid., 55.

15 Ibid., 64.

every legal act, whether it is an act of creating a right or an act of mere execution in which a norm is implemented, is determined by that norm only in one part, and in the other part – undetermined. Indeterminacy can refer both to the conditioning factual conditions and to the conditioned consequence. Vagueness can be intentional, ie. contained in the intention of the authority that assigns a higher norm: “Thus, the prescription of a general norm – in accordance with its essence – always occurs under the assumption that the individual norm that applies in some implementation continues the determination process, which, of course, makes sense of the gradualness of the sequence of legal norms.”¹⁶ For example, sanitary law may stipulate that, in the event of an epidemic outbreak, the inhabitants of a city are required – under threat of punishment – to take certain measures to prevent the spread of the disease. The administrative authority is empowered to determine these measures in different ways depending on the nature of the disease. Similarly, criminal law may prescribe, for a particular offense, either a fine or imprisonment, leaving it to the judge to decide which sanction to apply in each specific case and to determine its severity, provided that both an upper and lower limit for the sanction are established by the law itself.¹⁷

The distinction between public and private law is crucial for the systematic study of modern jurisprudence. Private law governs relationships between coordinated entities that are legally equal, while public law governs relationships between a superior and a subordinate entity – that is, between two parties where one holds greater legal authority than the other. A typical public law relationship is that between the state and its subjects. Private legal relations are often referred to simply as legal relations in the true, narrower sense of the term, in order to contrast them with public law relations, which are characterized as relations of “authority” or “government.” The greater legal authority vested in the state and its organs vis-à-vis subjects stems from the legal order’s recognition of the sovereign power to bind subjects through unilateral declarations of will – commands.

A classic example of a public law relationship is an administrative command: an individual norm issued by a state authority that legally obliges the addressee to act in accordance with the command. Conversely, a typical private law relationship is a legal transaction, such as a contract – an individual norm created by mutual agreement that legally binds the contracting parties to certain reciprocal conduct. In private law, the parties participate in the creation of the binding norm, which is the essence of contractual lawmaking. The private law contract thus represents a distinctly democratic method of creating rights.¹⁸ Although private law is formed through voluntary legal contracts between equal parties, it is no less an arena of political power than public law, which is created through legislation and administrative acts. Both spheres reflect and exercise power, albeit in different forms – public law through hierarchical authority and unilateral commands, and private law through negotiated agreements and mutual consent.¹⁹

According to Kelsen, private rights form the foundation not only of government but also, and more importantly, of society itself.

16 Ibid., 64.

17 Ibid., 64.

18 Ibid., 75.

19 Ibid., 76.

ALTHUSSER: PRIVATE LAW AND SOCIAL REPRODUCTION

Louis Althusser was greatly influenced by Hans Kelsen, whose work *The Pure Theory of Law* appeared in a French translation in 1962. Of course, Althusser transforms and rewrites Kelsen's views, he by no means simply adopts them. Kelsen's theses appear in a different context, outside the horizon of his ideas. Kelsen, as Althusser understood him, emphasized the issue of sovereignty, less by limiting it within the formalism of law, but more by re-inscribing it in the contradictory field of the subject of the law (*Rechtssubjekt*). In the cases of the exteriority of the law, what is not in the law becomes the basis of its existence. Truth lies outside itself in the sovereign's decision or the subject's free choice.²⁰ What is not explicitly written into the law itself often forms its foundation or constitutes its most important element.

Althusser's fundamental thesis is that the relationships between law, the state, and ideology can only be understood and analyzed from the perspective of social reproduction.²¹ It is not only about the reproduction of the production process but also about the reproduction of social relations. Law forms the infrastructure of society, which is why Althusser places law before the state. In capitalist formations, private law becomes the norm of law in general, and its characteristics are considered essential to the nature of law itself. Althusser focuses particularly on private law as contained in the Civil Code. Moreover, private law serves as the legal foundation from which other branches of law develop their concepts and harmonize their rules.²² Law is a system of codified rules that are applied and/or circumvented in everyday practice, yet what is often completely omitted from legal texts is its most important element – the function of production relations. Private law serves as the foundation from which other branches of law derive their rules.²³ Private law systematically sets out the rights that govern commodity exchange, purchase, and sale, ultimately resting on the right of ownership. These rights are derived from general legal principles, including legal personality (which defines individuals as legal persons endowed with certain capacities), legal freedom to use property in one's possession, and equality before the law.²⁴ More specifically, private law, which governs agreements between individuals, functions as the foundation or infrastructure that enables and shapes the nature of the public law that depends upon it.²⁵ In our era, law should be understood as an unevenly organized whole dominated by private law, which tends to preserve three fundamental characteristics: systematicity, formalism, and repressiveness.²⁶

Although the state apparatus dominates the whole, it does not simply transcend the class struggle. Force is the energy transformed into power, law, legislation, and state norms. Law not only fails to oppose domination but is itself merely one element of domination, a point that Althusser particularly emphasizes. Althusser refers to the well-known proposition of historical materialism, according to which Marx envisions the structure of every society as composed of distinct but interrelated levels or instances: the infrastructure or economic base (the unity of productive forces and production relations) and the superstructure, which itself consists of two parts – the political-legal level (law and state) and the ideological level

20 Montag, W. 2013. The threat of the outside Althusser's reflections on law. In: Althusser and Law. (ed. Laurent de Sutter). London: Routledge, 20.

21 Althusser, L. 2014. *On the Reproduction of Capitalism*. London: Verso, 56.

22 Ibid., 57.

23 Ibid., 56.

24 Ibid., 57.

25 Montag, W. op. cit., 19.

26 Ibid., 20.

(including religious, legal, moral, and political ideologies).²⁷ The metaphor of society as a building with a lower and upper floor is not entirely reliable and is often misunderstood, but it ultimately points to the dominance of the economic base. What occurs on the lower floor ultimately determines what happens on the upper floor. In the Marxist tradition, this notion of determination is usually expressed in two ways: 1) the superstructure is relatively autonomous from the base; and 2) the superstructure reacts with a form of “feedback” to the base. However, the advantages of this division are not unquestionable. When examining social reproduction, the spatial metaphor falls short of providing a satisfactory explanation. To approach this complex problem, Althusser first poses three fundamental questions: What is law? What is the state? What is ideology? His hypothesis is that the problem must be analyzed from the only viable perspective – that which begins with the distinction between production and reproduction. Accordingly, Marx understood the structure of every society as composed of distinct “levels” or “instances,” articulated by the “base” (the unity of productive forces and production relations) and the superstructure, which contains two instances: 1) the political-legal (law and state) and 2) the ideological (religious, moral, legal, and political).²⁸

According to that topographical metaphor, the upper floors would float in the air, if they did not rely on their base. Althusser now poses the question from the point of view of reproduction,²⁹ respecting a crucial assumption: without the reproduction of the conditions of production, a social formation would not survive a single day.³⁰ In this sense, the superstructure is the base, and it is precisely the layer containing law that is decisive. From this, we can begin to see that: 1) Law exists solely as a function of existing production relations; 2) Law takes the form of law – that is, formal systematicity – only on the condition that the relations of production, on which it is based, are entirely absent from the law itself. This unique condition of law, which exists only as a connection to content from which it is completely abstracted (the relations of production), explains the classic Marxist formula: law “expresses” the relations of production without explicitly mentioning them within its system of rules. On the contrary, it effectively makes these relations disappear.

One of the most important ideas in Althusser’s philosophy of law is that production relations constitute the absent content of law. Law, existing solely as a function of class relations, recognizes only individuals – meaning that bourgeois law is fundamentally based on commodity relations.³¹ Marx and Engels follow Kant, and to a lesser extent Hegel, in emphasizing three key characteristics of law: systematicity and inclusiveness, formalism, and its repressive nature. Regarding formalism, it does not matter to the law whether it is accepted or rejected; law exists and functions solely in a formal sense. A clear consequence of this formalism is that the law brackets out, or excludes, the various contents to which it applies. However, this exclusion does not make those contents simply disappear “by magic.” On the contrary, the formalism of law only makes sense when applied to a specific content that is necessarily absent from the law itself: “These contents are the relations of production and their effects.”³²

We begin to see that, for Althusser, law exists only as a function of existing relations of production. Law functions as law only under the condition that the relations of production

27 Althusser, L. *op. cit.*, 56.

28 Altiser, L. 2009. Ideology and state ideological apparatuses. Loznica: Karpos , 16.

29 Ibid., 19.

30 Ibid., 7.

31 Althusser, L. 2014. *op. cit.* 60.

32 Ibid., 59.

on which it is based are completely absent from the law itself. What does this mean? The law recognizes that all individuals are equal before it and have the right to own property, yet no legal provision acknowledges the fact that certain subjects – capitalists – control the means of production, while others – the proletariat – own none at all. This element, the relations of production, is absent from the law but simultaneously guaranteed by it.³³ Law is necessarily repressive (following Kant), and regarding the function of violence, Althusser aligns more closely with Kant than with Hegel. Law is repressive because it cannot function without a system of sanctions. In other words, there can be no civil code without a criminal code. This is easy to understand: a legal contract can only exist if it is enforceable. Therefore, law exists based on its enforcement – that is, on the observance or violation of contracts.³⁴ Law cannot exist without legal personality, let alone without repressive enforcement. Law primarily sanctions economic practices, and under the framework of various codes, it regulates other practices such as the exchange, purchase, and sale of goods. All these practices presuppose and depend on key legal categories like legal personality, legal freedom, legal equality, and legal obligation.

Law can function concretely only if there is an actual repressive apparatus that enforces the sanctions prescribed by the law and imposes them as punishments. In the vast majority of cases, however, law is respected through the combined influence of legal and moral ideology, often without any direct intervention from the repressive state apparatus.³⁵

The law formally regulates the interplay of capitalist production relations, as it defines the owners, their property, their 'right to use'. Capitalist relations of production form the concrete object of law to the extent that it is expressly abstracted from them. Also, the law cannot be viewed in isolation, but as an integral part of a system that includes law, specialized repressive apparatus and legal-moral ideology. The specialized repressive state apparatus (to put it simply, gendarmerie plus police plus courts plus prisons and so on) accordingly appears to us in a function that we need to determine more precisely. Legal-moral ideology intervenes not only in the reproduction of production relations, but also immediately in the functioning of production relations – incessantly, daily, actually every second.³⁶ Althusser expands his thesis on the importance of the school's ideological apparatus. The school's ideological apparatus plays a dominant role in the reproduction of production relations, but in the domain of practical ideologies, as Althusser now formulates it, legal-moral ideology plays a dominant role.

Finally, let us list the more significant influences. Althusser's legal theory is primarily associated with Marx and Engels, as well as Kant, while Hans Kelsen, Montesquieu, and Hobbes are mentioned less frequently. Althusser's strict and non-moralistic interpretation of law derives from Montesquieu and his embrace of scientific rationality. For Montesquieu, law is no longer an ideal order but an immanent relationship with social phenomena.³⁷ In this context, the primary subject of research is civil and political law. Various historical topics have been explored, such as inheritance among the Romans and justice in the feudal era, with their complexities and variations forming the focus, while the underlying causes that drive actions often remain unconscious.

For Hobbes, the state achieves true pacification of society – the pacification of violence understood as a war of all against all. According to Althusser, however, the state

33 Ibid., 59.

34 Ibid., 65.

35 Ibid., 166.

36 Ibid., 168.

37 Althusser, L. 2023. Montesquieu. Politics and history. Zagreb: Disput, 24.

perpetuates social violence, but this violence is now understood as one class exerting force over another. Thus, there is a war for the subjugation of one class by another, carried out through the mobilization of production relations. State apparatuses are merely instruments of class struggle, and state policy is ultimately subordinated to the interests of the dominant classes in that struggle.³⁸ The class struggle never ends, even when theory attempts to deny or ignore it.

CONCLUDING REMARKS: THE SOURCES AND SCOPE OF ALTHUSSER'S VIEW

Louis Althusser viewed law within the broader framework of his theory of ideology and the state. Regarding law and justice, Althusser argues that law functions as part of the ideological state apparatus by shaping citizens' subjectivity through normative patterns of behavior and by reinforcing existing relations of production. Law does not operate merely as a neutral set of rules but serves as a tool for the reproduction of the social order. In short, Althusser sees law and justice not as impartial instruments of fairness, but as key components in the ideological reproduction of society. Within the Critical Legal Studies (CLS) movement, the formalism of law was critically challenged, supporting the claim that legal norms uphold class and other social hierarchies. Critical Legal Studies posits that law is inherently intertwined with social issues, asserting that it contains built-in social biases.³⁹ Althusser helped shift legal theory from formalism and positivism to a critical, ideological, and discursive approach, where law is no longer seen as abstract justice but as an active agent of social relations. In the 1970s, the positivist and formalist understanding of law dominated, leading students to interpret law as a neutral system of rules without critically examining its social context. References to justice are often abstract if the social context is omitted. Appeals to justice become meaningful only when examined in relation to the legal foundations of property relations, connected to class politics and grounded in the structural elements of society. Today, as in the Zapatista movement in the West, appeals to justice remain dominant, emphasizing possible deviations from contemporary, often ideological, norms.

Althusser encourages us to adopt a more comprehensive approach – seeing justice within the context of law. As I have stated, law exists only as a function of existing relations of production; it performs the function of law only on the condition that the relations of production on which it is based are completely absent from the law itself. The law recognizes that people are equal before it and have the right to own property, yet no legal provision acknowledges the fact that certain subjects rule over the means of production while others do not own any at all.

In this sense, justice understood as a demand for legal equality is only partial and cannot guarantee equal opportunities or equal rights. This fundamental deficiency is then compensated for by laws that prohibit various forms of discrimination based on race, gender, sexual orientation, and other identifying factors. Similarly, the legal system does not ensure equal access to basic rights such as education, healthcare, the right to work, or even legal protection itself. This deficiency is addressed by laws aimed at alleviating social inequality while simultaneously insisting on judicial transparency so that society can maintain confidence in judicial institutions.

38 Althusser, L. 2014. op. cit., 223.

39 Cornell Law School. https://www.law.cornell.edu/wex/critical_legal_theory.



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ПРАВО И ПРАВДА У КОНТЕКСТУ ЗАПАТИСТИЧКОГ ВЕСТЕРНА

Апстракт:

Анализирам јављање фреквентног пара право и правда, почевши од назива политичких партија Пољске, Хрватске и Србије, као и од експлоатисаног наратива Емилијане Запате: „Ако нема правде за народ, нека не буде мира за власт.“ *Запатистичким вестерном* називам различита, углавном површна позивања на правду. Феномен позивања на правду пропуштам кроз два теоријска филтера: Келзенову критику праведности као неухватљиве тежње за срећом коју треба искључити из домена права и Алтисерову концепцију формулисану под Келзеновим утицајем. Уздржавајући се од дефинитивног суда, преферирам Алтисерово решење. Алтисер посматра право не као неутрални инструмент правде, већ као кључни елемент у идеолошкој репродукцији друштва. Дакле, позивање на правду мора бити повезано са класним политикама, утемељено и промишљено на структуралним слојевима и елементима друштва, а не узето моралистички, као сагледавање тренутне аберације од цивилизацијске нормe. Алтисер је помогао да се правна теорија помери од формализма и позитивизма ка критичком приступу, где се право више не види као апстрактна правда, већ као активан чинилац друштвених односа моћи.

Кључне речи: *Право, правда, структура, инфраструктура, запатистички вестерн*

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RELATIONSHIP OF GENERAL AND SPECIAL ADMINISTRATIVE PROCEDURE - SOME CURRENT ISSUES

Abstract:

The Law on General Administrative Procedure regulates the matter of administrative law in a general way. However, other laws that regulate the same matter in a special way are also valid at the same time. In this case, the rules of the special law are applied, that is, the application of the general law is excluded. The Law on General Administrative Procedure is applied in situations where no deviations are prescribed for cases from a special law. Bearing in mind the above, it seems that any action under a special law “automatically” turns into a special administrative procedure. That is why there is also the Register of Administrative Procedures (RAP), established by a special law - the Law on the Register of Administrative Procedures, which “regulates the establishment, management and management, content, manner of use and other matters of importance for the management of the Register of Administrative Procedures. The Republic Secretariat for Public Policies (RSJP) is responsible for the part of the public administration reform that relates to the modernization and transformation of public administration services. The role of the Registry is to ensure, together with the public administration bodies, that all information about the procedures through which citizens and the economy address the public administration are displayed in one place, in a simple and transparent manner.

Key words: *Law on General Administrative Procedure. Special procedures. Register of administrative procedures. Republic Secretariat for Public Policies.*

1. INTRODUCTION

Administrative procedure, as a form of exercising the rights and legal interests of citizens and legal entities before public administration bodies, is one of the key instruments of the effective functioning of the rule of law. In the modern administrative law of the Republic of Serbia, the relationship between general and special administrative procedure is gaining more and more importance, especially in the context of improving legal security, transparency and efficiency in the work of the administration.¹

1 Lilić, S. (2022). *Commentary and critical analysis of the law on general administrative procedure*,

The basic normative framework for the regulation of administrative proceedings is the Law on General Administrative Procedure² (hereinafter: LGAP), which is applied if no deviations are prescribed by special laws. At the same time, numerous substantive regulations governing various areas of public administration also contain procedural provisions that define “special administrative procedures”. This raises a number of questions regarding the legal nature of those procedures, the relationship between the general and the particular, as well as the application of procedural guarantees and standards.

A particularly topical issue in the domestic legal order is the establishment and function of the Register of Administrative Procedures (RAP), whose goal is to contribute to the transparency, accessibility and uniformity of administrative proceedings. The practice of public administration increasingly points to the need for standardization, rationalization and digitization of procedures, which inevitably leads to the re-examination of the classic concepts of general and special procedure.

This paper aims to, starting from the normative and theoretical framework, analyze the relationship between general and special administrative procedure, point out the current problems and challenges in implementation, as well as the importance of modernization instruments, such as RAP and the roles of the Republic Secretariat for Public Policies (RSPP). The intention of the authors is to contribute to the understanding and improvement of administrative procedural practice, in accordance with the principles of good administration and the rule of law.

2. LEGAL FRAMEWORK OF THE GENERAL ADMINISTRATIVE PROCEDURE

The Law on General Administrative Procedure is the basic procedural regulation that governs the actions of public administration bodies in exercising the rights or obligations of citizens and legal entities. Adopted with the intention of enabling equality, legal certainty and efficiency in the work of administrative bodies, the LGAP foresees general rules of conduct procedures that are applied in all administrative matters, except when otherwise prescribed by a special law.³

LGAP is based on a number of principles, among which the following stand out: the principle of legality, the principle of legal certainty, the principle efficiency and economy of the procedure, the principle of material truth, as well as the principle of proportionality. These principles serve as a landmark not only in the application of this law, but also in the interpretation of procedural provisions contained in other regulations.

The application of the LGAP ensures uniformity in the actions of various administrative bodies, which is particularly important in legal systems with a complex regulatory structure. However, due to the specificity of certain administrative areas (e.g. tax administration, inspection supervision, health or educational regulations), the legislator envisaged the possibility of applying deviating rules for certain administrative matters - through the so-called special administrative procedures. Although it is a matter of subsidiary application, the LGAP is still valid as a starting

Belgrade, Official Gazette, p. 38.

2 Law on General Administrative Procedure, Official Gazette of RS, no. 18/2016 and 95/2018 – authentic interpretation

3 Lilić, S., Cerović, D. (2025). *Administrative law*, Podgorica, Faculty of Law, University of Montenegro, p. 54.

point and basis for the interpretation of special norms, especially in situations where special laws are unclear or incomplete. This indicates the importance of understanding the relationship between the general and the particular, not only from the point of view of formal hierarchy, but also in terms of systemic coordination and compliance of procedural law regulations.

3. SPECIAL ADMINISTRATIVE PROCEDURES - CONCEPT AND CHARACTERISTICS

Special administrative procedures represent a derogation from the general administrative procedure, that is, a set of rules that are applied instead of the provisions of the Law on General Administrative Procedure, if this is expressly prescribed by a special law.⁴ This kind of normative relationship between general and special law represents the concretization of the principle of *lex specialis derogat legi generali*, in accordance with the legal system that allows normative divergence, with the condition of systemic coordination. Special procedures arise due to the need to regulate certain administrative matters with specific, often complex and professionally oriented rules, which cannot be adequately covered by the general procedural framework. In this sense, they occur in areas such as tax administration, health insurance, pension system, energy, telecommunications, ecology, public safety...

What characterizes special administrative procedures are material specificity, procedural adaptation, exceptionality in relation to the general regime, combination with general rules - in cases where special regulations are not complete, the rules of LGAP are applied as a subsidiary norm. However, in practice, the appearance of "parageneral" procedures in which the general rules are essentially applied, but with minimal modifications, is increasingly common - which raises the question of the justification of separating a particular procedure as "special". This is precisely where the space for normative and institutional reflection arises, that is, the question of the boundary between the need for special regulation and the danger of excessive legal fragmentation arises.

In this sense, the question arises: when does a procedure deserve the status of "special" and does every law that foresees procedural norms necessarily establish a special (administrative) procedure? If the answer to this question is not uniform, there is legal uncertainty, selective application of rules and a reduction in legal predictability, which is contrary to the principles of good administration. Precisely for this reason, the understanding of the concept and characteristics of a special administrative procedure must be precise, theoretically grounded and practically oriented. Only if the logic of subsidiarity of the LGAP is preserved and the criterion of normative explicitness is consistently applied, it is possible to preserve the coherence of the administrative procedural system and contribute to legal certainty. This is especially because in some administrative procedures, such as the provision of public services (Articles 31-32 of the LGAP), it happens that there is even no administrative jurisdiction, as for example in the case of a request for disconnection from the district heating system, which, by its legal nature, represents a request for the termination of the contract on the purchase and sale of thermal energy, so in the event of a dispute, the court of general jurisdiction is competent.⁵

4 Lilić, S. (2025). *The lex specialis clause in administrative proceedings*, Collection of Papers "Consultation on Current and Disputed Issues of Contemporary Law", Belgrade, Association of Lawyers, p. 425.

5 Lilić, S. (2022). *Administrative Court Practice - Selected decisions of the Administrative Court, the Supreme Court of Cassation and the Constitutional Court made since 2010*, Belgrade, Official Gazette, p. 10.

4. RELATIONSHIP BETWEEN GENERAL AND SPECIAL ADMINISTRATIVE PROCEDURE - THEORETICAL AND PRACTICAL ASPECTS

The relationship between general and special administrative procedure is one of the most delicate issues of administrative procedural law. From a theoretical point of view, this relationship is based on the classic legal principle *lex specialis derogat legi generali*, which implies that in the event of a collision between general and special law applies special.⁶ However, in practice, this relationship is not always clear or unequivocally solvable. The Law on General Administrative Procedure expressly provides for its subsidiary application. LGAP stipulates that this law is applied in all administrative matters, unless a special law prescribes otherwise. With this, the legislator recognized the primacy of a special law in certain situations, but at the same time limited that dominance to clearly prescribed exceptions.

The essential theoretical dilemma arises from the question: what constitutes a special administrative procedure and when does a certain regulation really exclude the application of the LGAP?⁷ If the law contains several procedural provisions- such as the prescribed deadline for decision-making, the composition of the competent body or the method of delivery - did this automatically make the whole procedure special?⁸ Or can only fully regulated procedures, with their own logic and structure, be considered a separate administrative regime?

The practical implication of this issue is reflected in the work of administrative bodies. In many cases, the authorities, referring to the “special” nature of the procedure, decide to completely ignore the provisions of the LGAP - although in the specific regulation there is no comprehensive regulation of the process, nor an explicit exclusion of the application of the LGAP. In this way, a situation of “normative gap” arises, in which the parties lose the protection they would have had if the general law had been applied. An even greater challenge arises in proceedings that combine the provisions of several laws - for example, inspection procedures in which both the LGAP and the Law on Inspection Supervision are applied, or procedures for issuing licenses, where both the special regulation on the activity and the general rules of the LGAP apply. Administrative practice often does not have a clear methodological framework for assessing which part of the procedure is subject to which law, which leads to fragmentation, arbitrariness and legal uncertainty.

Judicial practice plays a particularly important role in improving this relationship. The Administrative Court of the Republic of Serbia sometimes indicates the unjustified exclusion of LGAP, especially in situations where a special regulation does not provide adequate procedural guarantees. In this sense, the court acts as a corrective to the unclear legal wording and arbitrary behavior of the administration, but also as an incentive to the legislator to more precisely regulate the relationship between the general and the special.⁹

6 Lilić, S., Cerović, D. op. cit., p. 54.

7 Lilić S. (2020). Special administrative law, Belgrade, Official Gazette

8 Milošević, D. *On power of attorney and proxies in certain special administrative procedures in the positive law of the Republic of Serbia*, in the magazine Law and Economy 1/2025, p. 116.

9 Urošević, R. (2017). *Commentary on the Law on General Administrative Procedure*, Novi Sad, Paragraph Lex, p. 62.

5. REGISTER OF ADMINISTRATIVE PROCEDURES (RAP) AS AN INSTRUMENT OF ADMINISTRATION MODERNIZATION

Contemporary trends in administrative law are increasingly moving in the direction of digitization, transparency and simplification of administrative procedures. In this context, the establishment of the Register of Administrative Procedures (RAP) represents one of the most significant steps towards the modernization of public administration in the Republic of Serbia. RAP was established by the Law on the Register of Administrative Procedures¹⁰ as a unique electronic database that contains information on all administrative procedures carried out by public administration bodies. The basic idea of this instrument is to provide citizens and the economy with an easy, fast and transparent access to data on how they can exercise their rights before the administration, what documents they need, what the deadlines and costs of the procedure are, as well as which competent authorities are. RAP¹¹ has a dual function: informational - citizens and business entities can get information in one place about the way the procedure is conducted, which reduces legal uncertainty and administrative costs; both reform and normative- the state gains insight into all the procedures that exist in the public administration system, which enables the abolition of redundant procedures, harmonization of practice and better control of the application of law.

One of the key reasons for the introduction of RAP was precisely the existing fragmentation between general and special administrative procedures. A large number of special laws that provide for different procedures, often without consistent application of the LGAP, it led to confusion both among the parties and within the administrative bodies themselves. RAP tries to “translate” this complexity into a clear, accessible and standardized description of each procedure.

In this sense, RAP is not only a register in the formal sense, but becomes a tool for systemic improvement of administrative process practice. It also acts as a mechanism for identifying inconsistencies between general and special law- if, for example, it is determined that a certain procedure deviates from the rules of the LGAP, the RAP makes it visible and enables the justification of those deviations to be assessed. Also, the Registry supports the process of ex post assessment of regulations (regulatory impact assessment)¹², because it represents the basis for the analysis of the so-called regulatory burden, number and complexity of procedures, number of required documents, average duration and other indicators.

By systematizing all administrative procedures, RAP encourages the standardization of terminology and practice, which further reduces the risks of arbitrariness and discretionary actions of public administration bodies. In this sense, it serves as a “bridge” between the general principles of administrative procedure and the concrete practice of their application in various administrative matters.

According to the reports of the Republic Secretariat for Public Policy (RSPP), the RAP contains thousands of recorded procedures, many of which are systematically described and published in a transparent manner for the first time. According to available data, the total number of administrative procedures for citizens is 716, and they are carried

10 Law on the Register of Administrative Procedures, (“Official Gazette of RS”, No. 44/2021)

11 Register of administrative procedures, <https://rap.euprava.gov.rs/privreda/home>, June 30, 2025.

12 Milovanović, D., Nenadić, N. and Todorić, V. (2012). *Study on the improvement of the legislative process in the Republic of Serbia*, Belgrade, GIZ, p. 78.

out by 135 public administration bodies, while the number of administrative procedures for the economy is 4,878, before 120 public administration bodies.¹³ This represents significant progress in the direction of realizing the right to good administration and legal certainty in the actions of public authorities.

6. THE ROLE OF RSPP AND IMPROVEMENT OF LEGAL SECURITY

The Republic Secretariat for Public Policy (RSPP) is a key institution in the process of public administration reform in the Republic of Serbia. His role in the establishment and management of the Register of Administrative Procedures (RAP) is only one of the segments of his wider competence that this body has in the domain of rationalization of administrative functions, improvement of the regulatory framework and strengthening of legal certainty.

RSPP was established as an expert body of the Government with the task of coordinating the development of public policies, analyzing the impact of regulations and monitoring the effects of law enforcement. In the context of administrative proceedings, RSPP has a special role in: standardization and classification of administrative procedures; elimination of unnecessary procedures and administrative burden; providing normative support to ministries and other bodies - RSPP provides guidelines regarding the harmonization of special laws with the general rules of administrative procedure, which directly affects the harmonization of the legal system; and encouraging digitization and e-government - as an important aspect of modern administrative procedures, which improves the accessibility, speed and transparency of administrative processes.

One of the most important influences of RSPP on the system of administrative law is reflected in the creation of conditions for strengthening legal certainty. In legal theory, legal certainty implies the ability of an individual to predict in advance the consequences of his actions and the actions of public authorities.¹⁴ This principle is an essential condition for the rule of law and good governance.¹⁵ It is precisely this role that RSPP fulfills through the RAP, but also through constant control of the normative framework. It is precisely this role that RSPP fulfills through the RAP, but also through constant control of the normative framework. By ensuring that each procedure is regulated in a transparent, accessible and predictable manner, the Secretariat indirectly ensures the consistent application of the LGAP and prevents the arbitrary exclusion of its provisions. Furthermore, through its role in drafting guidelines for the drafting of regulations, the RSPP insists on respecting procedural standards arising from the LGAP, which reduces the space for arbitrarily constructing "special procedures" in new laws. This is particularly significant in light of the frequent practice of legislators to prescribe procedural rules without sufficient compliance with the existing administrative procedural framework.

7. CURRENT ISSUES AND CHALLENGES IN IMPLEMENTATION

13 Register of administrative procedures, <https://rap.euprava.gov.rs/privreda/home>, June 30, 2025.

14 Milovanović, D. (2014). *The role of public administration in the improvement of the legislative process*, Proceedings "Legal security in conditions of transition", p. 212.

15 Lilić, S. (2024). *Administrative law of Serbia: theory and legislation*, Belgrade, Faculty of Law, University of Belgrade, p. 112.

Although the normative framework governing the relationship between general and special administrative procedures is relatively clear in a formal sense, in practice numerous problems still arise that hinder its consistent application. Current issues arising from this can be classified into several groups, which refer to: normative inconsistency, institutional inconsistency, insufficient transparency and limited application of the principles of good governance.

7.1. Normative non-compliance of special laws with LGAP

One of the most common challenges is the existence of special laws that contain only fragmentary procedural rules, without a clear exclusion of LGAP. In such cases, administrative authorities often make an arbitrary assessment of whether to apply the provisions of the general law or not, which leads to legal uncertainty. An example of this is the Environmental Protection Act¹⁶, which in some parts prescribes deadlines, but not all other procedural rules, while not referring to the LGAP as a subsidiary source.

7.2. Institutional inconsistency and different practices of administrative bodies

It is not uncommon for different administrative bodies, and even different organizational departments within the same institution, to have different approaches to the application of LGAP. Thus, it happens that in one case the same procedure is conducted according to the general rule, and in another as a “special procedure”, which violates the principle of equal treatment. For example, procedures in the field of construction and issuance of construction permits, which are under the normative influence of special laws, are often conducted without a clear application of general principles such as hearing the party and explaining the decision.

7.3. Limited application of procedural principles of good governance

Although the LGAP is based on a number of principles that reflect the concept of good administration, such as proportionality, economy, conduct of proceedings within a reasonable time, hearing the party and legal certainty- many of these principles are neglected in practice, especially in the so-called mass administrative procedures (social benefits, tax returns, cadastral procedures). Formalism, rigidity and lack of individual approach often dominate here. Therefore, pointing out all the mentioned principles, united, is of extreme importance. As the above represents the basic role of RAP, its importance is clear.

16 Law on Environmental Protection, Sl. Gazette of the RS, no. 135/2004, 36/2009, 36/2009 - dr. law, 72/2009 - Ph.D. law, 43/2011 - US decision, 14/2016, 76/2018, 95/2018 - dr. law, 95/2018 - Ph.D. law and 94/2024 - dr. the law

8. CONCLUSION

The relationship between general and special administrative procedure is a fundamental issue of administrative procedural law, but also more broadly - the issue of organization and functioning of public administration in the modern legal order. While the Law on General Administrative Procedure (LGAP) formally represents a pillar of administrative law and a guarantor of procedural fairness, numerous special laws, which regulate different administrative areas, often deviate from the general regime, often without clearly defined boundaries, explanations and compliance. The consequence of this is legal and institutional fragmentation, which manifests itself through unequal treatment, legal uncertainty and difficult access to justice.

The theoretical basis of the relationship between *lex generalis* and *lex specialis* in the administrative procedure must be more precisely conceptualized, and their application in practice more consistent. Not every deviation from individual provisions of the LGAP can be considered a separate "special procedure", nor is every regulation that contains elements of procedural regulation automatically a *lex specialis*. Administrative proceedings must be structured so that the general principles of administrative law are always applied when this is not explicitly and justifiably excluded, and that administrative authorities do not act arbitrarily when assessing the applicability of certain provisions.

In this sense, it is necessary to: normatively define more clearly the criteria for classifying the procedure as special; introduce the obligation of explicit explanation in each separate law about which provisions of the LGAP are excluded and for what reason; specify the obligation to apply the LGAP as a subsidiary source in all procedures that are not fully regulated by a separate law; ensure mandatory control of compliance of the draft law with the LGAP during the legislative process.

Of particular importance is the institutional role of the Republic Secretariat for Public Policies (RSPP), which represents the central institution of public administration reform in the direction of greater transparency, rationality and legal certainty. Register of Administrative Procedures (RAP), as a technical-normative instrument, it has the capacity to act as a cohesive mechanism that overcomes conflicts between the general and the particular. Its full functionality, however, requires institutional support, up-to-date data entry, obligation of use by authorities and recognition of the legal relevance of the data it contains.

Numerous challenges continue to arise in the practice of Serbian administration: from the incomplete application of the LGAP, through different interpretations of procedural rules within the same authorities, to insufficient understanding of the basic procedural principles. The problems of legal certainty, selective application of law, discretionary treatment and lack of transparency are not solely the result of a bad normative framework, but also institutional inertness, lack of professional staff and insufficient control in law enforcement. Precisely for this reason, the relationship between general and special administrative procedure should no longer be viewed exclusively as a matter of technical-legal interpretation, but as a key component of good administration, which also includes: respect for the procedural rights of the parties, access to justice, publicity and transparency of proceedings, predictability of actions of authorities, as well as equal treatment of all persons before the administration. The procedure is not a mere form; it is the essence of the rule of law in administrative action.

Finally, it is important to emphasize that legal certainty, as one of the key values of a democratic society, cannot be ensured without a clear, transparent and fairly regulated administrative procedure. That procedure must be consistently applied - either in general or in a special form. And if the authors could leave the zone of law, they would say that not only individual legal fate depends on the quality of that decision, but also trust in institutions as a whole



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ОДНОС ОПШТЕГ И ПОСЕБНОГ УПРАВНОГ ПОСТУПКА- НЕКА АКТУЕЛНА ПИТАЊА

Апстракт:

Законом о општем управном поступку на општи начин регулисана је материја управног права. Међутим, истовремено важе и други закони који на посебан начин регулишу исту материју. У овом случају, примењују се правила посебног закона, односно искључена је примена општег закона. Закон о општем управном поступку примењује се у ситуацијама када за случајеве из посебног закона нису прописана одступања. Имајући у виду наведено, чини се да се свако поступање по посебном закону “аутоматски” претвара у посебан управни поступак. Због тога постоји и Регистар административних поступака (РАП), који је установљен посебном законом- Законом о Регистру административних поступака којим се „уређује успостављање, управљање и вођење, садржина, начин коришћења и друга питања од значаја за управљање Регистром административних поступака”. Републички секретаријат за јавне политике (РСЈП) одговоран је за део реформе јавне управе који се односи на модернизацију и трансформацију услуга јавне управе. Улога Регистра је да се органима јавне управе обезбеди да све информације о поступцима кроз које се грађани и привреда обраћају јавној управи, буду приказане на једном месту, на једноставан и транспарентан начин.

Кључне речи: Закон о општем управном поступку. Посебни поступци. Регистар административних поступака. РСЈП.

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DISMISSAL OF THE CLAIM IN CIVIL LITIGATION: THEORY AND PRACTICE

Abstract:

The initiation of civil litigation requires a party's intention to seek judicial protection of infringed or threatened subjective rights. This intention is expressed by filing a statement of claim before the competent court. A statement of claim constitutes a procedural act that triggers the commencement of litigation. In the absence of a properly submitted claim, no proceedings can be conducted. The required content of a claim is regulated by several provisions of the Civil Procedure Act. Filing a claim entails certain procedural consequences, obligating the court, during the preliminary review stage, to examine whether procedural prerequisites for conducting the proceedings are met. Should such impediments exist, the court is obliged to instruct the parties to rectify the deficiencies within a prescribed time limit; failing that, the court shall dismiss the claim. This paper examines both the normative framework governing the dismissal of claims and the common misconceptions in legal practice where certain situations are erroneously equated with or confused for the institution of claim dismissal. Selected examples from judicial practice are also analysed.

Keywords: *dismissal of claim, statement of claim, defective pleading, procedural prerequisites, Civil Procedure Act*

INTRODUCTORY REMARKS

Civil litigation is inconceivable without the existence of a statement of claim. A claim represents the legally recognised means by which a party seeks judicial protection of violated or threatened subjective civil rights. The legal framework governing the statement of claim, including its required content, is set out in the Civil Procedure Act. In practice, it is not uncommon for a court to dismiss a claim during the preliminary examination stage. Article 101 of the Civil Procedure Act provides that if a submission is unintelligible or incomplete, and the party is not represented by an attorney, the court shall return the submission for correction, unless otherwise prescribed by law. In such cases, the court shall

specify a deadline of eight days within which the corrected or supplemented submission must be resubmitted. If the submission is corrected or supplemented and submitted within the prescribed time limit, it shall be deemed to have been submitted on the date it was originally filed. If the party fails to resubmit the corrected version within the specified period, the submission shall be considered withdrawn. If the submission is returned without the necessary corrections or additions, it shall be dismissed. However, if the submission was filed by an attorney, public legal representative, or public prosecutor and is unintelligible or incomplete, the court shall dismiss it without first returning it for correction.

THE STATEMENT OF CLAIM AS A PROCEDURAL ACT: CONCEPT AND CONTENT

The statement of claim is regulated under Article 192 of the Civil Procedure Act. It is stipulated that the claim must contain a specific request regarding the main subject matter and any ancillary claims, the facts upon which the claimant bases the request, the evidence supporting those facts, the value of the subject matter in dispute, as well as other elements required of all written submissions, in accordance with Article 98 of the Civil Procedure Act, which governs procedural submissions.

Furthermore, the same provision requires that a claimant who resides or has a registered office abroad must appoint a proxy for service of process within the claim. Failure to do so shall result in dismissal of the claim by the court. If jurisdiction or the right to file an extraordinary legal remedy (such as a revision) depends on the value of the subject matter, and the claim does not involve a monetary sum, the claimant must declare the value of the claim in the submission. The court shall proceed with the claim even if the claimant does not specify the legal basis of the claim; however, if the legal basis is indicated, the court is not bound by it.

Article 98 of the Civil Procedure Act defines what constitutes a procedural submission. A statement of claim, counterclaim, response to the claim, and legal remedies must all be submitted in writing. Written form also includes submissions sent by telegram or email, in accordance with special legislation.

A provision particularly relevant to the dismissal of a claim is paragraph 3 of Article 98, which stipulates that all submissions must be intelligible and must contain all elements necessary for the court to act upon them. Specifically, a submission must include: the designation of the court, the full name of the parties, or the business name in the case of legal entities, their residence or registered office, the names of legal representatives and attorneys if applicable, the subject matter of the dispute, the substance of the statement, and the signature of the submitting party.

If the statement contains a request, the party is obliged to specify the facts on which the request is based, and, where necessary, the evidence supporting those facts. Written submissions must be filed exclusively outside of court hearings and no later than 15 days prior to the scheduled hearing date.¹

¹ **Civil Procedure Act** (*Official Gazette of the Republic of Serbia*, Nos. 72/2011, 49/2013 – Constitutional Court Decision, 74/2013 – Constitutional Court Decision, 55/2014, 87/2018, 18/2020, and 10/2023 – other law; hereinafter: CPA)*, Article 98, paragraphs 4 and 5

GROUND S FOR DISMISSAL OF A STATEMENT OF CLAIM

The initial phase of civil litigation consists precisely of examining the admissibility of judicial protection. Since judicial protection must not be granted in the absence of certain procedural requirements—and as compliance with such requirements ensures the legality of the proceedings, which is ultimately justified by considerations of public interest—the court is obliged to assess the existence of these conditions *ex officio*.

Nevertheless, there are situations in which the absence of one or more such conditions can only be established based on an objection raised by the opposing party (e.g., *res judicata*, *lis pendens*, or a court settlement).² As to the existence of *lis pendens*, *res judicata*, a court-approved settlement, waiver of the claim, or lack of legal interest in filing the claim, the court is not authorised to rule at this stage of the proceedings, even if such procedural defects become apparent during the preliminary examination.

These procedural impediments may lead to dismissal of the claim only at the preparatory hearing or, if such a hearing has not been held, at the first main hearing.³

The preliminary examination of the statement of claim is regulated by Article 292 of the Civil Procedure Act (CPA). Following such examination, the court is authorised to issue decisions unless the matter concerns issues that, by their nature or under the provisions of this Act, can only be decided later in the proceedings.

A decision on the dismissal of the claim is issued by the court in the form of a ruling, on the grounds that general or specific procedural prerequisites have not been met. By doing so, the court prevents the possibility of ruling on the merits of the dispute. Should the procedural prerequisites be subsequently fulfilled, the claimant may renew the request for judicial protection.⁴

In this context, the court considers the submitted claim to be procedurally defective to such an extent that it prevents the normal conduct of proceedings by holding the main hearing, establishing facts, and adducing evidence, all with the aim of reaching a conclusion on the substantive validity of the claim.⁵

If the court finds that the claim is unintelligible or incomplete, or that there are defects concerning the capacity of the claimant or defendant to be parties to the proceedings, deficiencies regarding legal representation of a party, or shortcomings related to the authority of a representative to initiate proceedings when such authority is required, the court shall take necessary measures prescribed by this Act (Articles 80 and 101) to remedy such defects.⁶

Upon preliminary examination, the court shall issue a ruling dismissing the claim if it establishes that⁷: the court lacks jurisdiction over the claim; the claim was filed out of

2 Palačković, D. (2004). *Civil Procedural Law*. Faculty of Law, University of Kragujevac / Svetlost, Kragujevac, p. 52.

3 Triva, S., & Dika, M. (2004). *Civil Litigation Law*. Narodne novine, Zagreb, p. 540.

4 Stanković, G. (2018). *Lexicon of Civil Procedural Law*. Službeni glasnik, Belgrade, p. 223.

5 Bodiroga, N. (2008). Dismissal of an unintelligible statement of claim. *Annals of the Faculty of Law in Belgrade*, 56(2), 354.

6 Civil Procedure Act, Article 293.

7 Borovac, J., et al. (2012). *Commentary on the Civil Procedure Act*. Paragraf DOO, Belgrade, p. 198.

time where a deadline is prescribed by law; there is pending litigation concerning the same claim (*lis pendens*); the matter has been finally adjudicated (*res judicata*); a court-approved settlement has been concluded in the same matter; the claimant lacks legal interest to file the claim pursuant to Article 194 CPA; or the claim is unintelligible or incomplete.

Before rendering a ruling on the dismissal of a claim for the reasons stated, the court is obliged to hold a hearing at which the claimant is given the opportunity to respond to the proposed dismissal. In a case decided by the Higher Court in Novi Sad, case no. GŽ-361/15 dated 9 March 2015, which annulled the ruling of the Basic Court in Novi Sad, case no. P-7866714 dated 17 November 2014, it was held that the court must, in every case, regardless of the grounds for dismissal, first hold a hearing at which the claimant may express their position regarding the dismissal of the claim.

The reasoning in the judgment indicated that the first-instance court dismissed the claimant's statement of claim filed on 24 October 2014, which included a motion for interim measures, and decided not to hold the hearing scheduled for 22 December 2014. Pursuant to Article 294 of the Civil Procedure Act, the court is obligated, in every concrete case, regardless of the grounds for dismissal, to hold a hearing that provides the claimant the opportunity to be heard on the dismissal.

The legislator did not foresee any exceptions to this general rule, irrespective of the grounds for dismissal, nor did it prescribe differentiated court procedure in respect of holding the hearing depending on whether the claim is dismissed due to being unintelligible or incomplete, or on any other ground. Although the first-instance court dismissed the claim on the basis that the subject matter did not fall within its jurisdiction, the appellate court held that dismissal without scheduling a hearing, contrary to the cited statutory provision, deprived claimants of the opportunity to be heard in court. This amounted to a substantial violation of procedural rules under Article 374, paragraph 2, item 7 of the Civil Procedure Act.

1) Adjudication of Claims Outside the Jurisdiction of the Court

Throughout the proceedings, the court is obliged to monitor *ex officio* whether it has jurisdiction to adjudicate the dispute. The court shall declare itself incompetent, annul procedural acts already performed, and dismiss the claim if it determines at any stage that it lacks jurisdiction and that another authority is competent to resolve the dispute.

Furthermore, the court shall *ex officio* declare its lack of jurisdiction, annul procedural acts, and dismiss the claim if it establishes that it is not competent as a court of the Republic of Serbia, unless the jurisdiction of the domestic court depends on the defendant's consent and such consent has been given.⁸

2) Untimely Filed Statement of Claim When a Statutory Deadline for Filing Exists

In certain cases, to protect the interests of the parties, specific laws prescribe deadlines for seeking judicial protection. Pursuant to the Law on the Fundamentals of Property Relations,⁹ Article 77 provides that protection against disturbance or deprivation of possession may be sought within 30 days from the date the disturbance and the perpetrator become known, but no later than one year from the occurrence of the disturbance (dispute relating to possession disturbance).

8 Civil Procedure Act, Article 16

9 Law on the Fundamentals of Property Relations (*Official Gazette of the SFRY*, Nos. 6/80 and 36/90; *Official Gazette of the FRY*, No. 29/96; *Official Gazette of the Republic of Serbia*, No. 115/2005 – other law), Article 77

3) Pending Litigation Regarding the Same Claim

There can only be one active litigation between the same parties concerning the same claim. Parallel proceedings addressing the identical claim between the same parties are not permitted. While litigation on a particular claim is ongoing, no new proceedings may be initiated on the same claim between the same parties. Should such proceedings be initiated, the court shall dismiss the subsequently filed claim.

If a final judgment is rendered in later-initiated proceedings, the court shall dismiss the claim in the earlier proceedings. Throughout the entire process, the court is obliged to monitor whether another litigation concerning the same claim between the same parties is pending.¹⁰

For example, in the decision of the Higher Court in Novi Sad, case no. GŽ1-184/2013 dated 15 November 2013, which annulled the decision of the Basic Court in Novi Sad, case no. P1-1839/2013 dated 17 October 2013, the court, during the preliminary examination of the claim, issued a ruling dismissing the claim if it established that litigation concerning the same claim was already pending.

However, the court noted that, based solely on data from the electronic case management system, it could not conclusively determine whether such litigation was pending between the same parties. The reasoning explained that the first-instance court had reviewed the electronic database of cases at the Basic Court in Novi Sad instead of examining the case file under reference no. P1-552/2013. Consequently, the first-instance court's conclusion that litigation concerning the same claim was already pending was premature, since electronic records alone do not suffice to establish such a fact.

Moreover, data from case file P1-552/2013 showed that the claims were not identical: in that case, the annulment of Articles 3 and 5 of the Agreement was sought, whereas in the present case only Article 5 of the Agreement was contested.

4) Res Judicata

Throughout the proceedings, the court is obliged to monitor *ex officio* whether the matter has been finally adjudicated. If it establishes that the litigation concerns a claim already subject to a final and binding decision, the court shall dismiss the claim.¹¹

5) Court-Approved Settlement in the Same Matter

The court must also monitor *ex officio* whether litigation is pending on a claim for which a court-approved settlement has already been concluded. If such a settlement exists, the court shall dismiss the claim.¹²

6) Lack of Legal Interest of the Claimant to File the Claim

The legislator has provided that the court may dismiss a claim if the claimant lacks legal interest to initiate proceedings, pursuant to Article 194 of the Civil Procedure Act. It is stipulated that a claimant may seek a declaratory judgment establishing the existence or non-existence of a right or legal relationship, infringement of personal rights, or the truthfulness or falsity of a document.

10 Civil Procedure Act, Article 203

11 Civil Procedure Act, Article 359

12 Civil Procedure Act, Article 338

A declaratory claim may be filed if the claimant has a legal interest in establishing the existence or non-existence of a disputed right or legal relationship prior to the maturity of a claim for performance arising from the same relationship, or the truthfulness or falsity of a document, or if the claimant has some other legal interest.

A declaratory claim may also be filed to establish the existence or non-existence of a fact if so provided by law or other regulation. A claim for the protection of personal rights may be filed regardless of whether a claim for damages or other relief has been made, in accordance with a special law.¹³

7) The Statement of Claim is Unintelligible or Incomplete

The requirements for a statement of claim to be complete and intelligible are prescribed in Articles 293 and 98 of the Civil Procedure Act. Article 98 stipulates that pleadings must be comprehensible and contain all necessary information to allow the court to proceed with the case, particularly: the designation of the court, the full names or business names of the parties or other entities, their domicile or residence, or registered office, as well as the details of their legal representatives and attorneys if any; the subject matter of the dispute; the content of the statement; and the signature of the submitter.

If the statement contains a claim, the party must specify the facts on which the claim is based, as well as evidence, if necessary.¹⁴ The statement of claim must include a specific request concerning the main matter and any ancillary claims, the facts supporting the plaintiff's claim, evidence substantiating those facts, the value of the disputed matter, and other data required for every pleading.¹⁵

If the statement of claim is defective, the court shall return it to the claimant for correction and resubmission within a prescribed deadline.¹⁶

In practice, according to the ruling of the Higher Court in Novi Sad, case no. GŽ-332/19 dated 12 March 2019, which annulled the decision of the Basic Court in Novi Sad, case no. P-10161/2017 dated 1 November 2018, it was held that a claim may only be dismissed for procedural deficiencies during the preliminary examination stage, and not after the claim has been served on the defendant, after hearings of the main trial, or after the main trial has been concluded.

The decision annulled the first-instance court's ruling that dismissed the claim as defective after the claim was served on the defendant and after three hearings and the conclusion of the trial. The court emphasized that a claim may be dismissed due to procedural deficiencies only in the preliminary examination stage, not after the procedural steps were already conducted.

Instead of deciding on the merits of the claim at that point, the first-instance court dismissed the claim, relying on procedural defects which had already been remedied during the proceedings.

13 Civil Procedure Act, Article 194

14 Civil Procedure Act, Article 98

15 Civil Procedure Act, Article 192

16 Jakšić, A. (2019). *Civil Procedure Law*. Faculty of Law, University of Belgrade, Belgrade, p. 383.

To properly adjudicate on these procedural prerequisites, whose absence or invalidity leads to dismissal of the claim, the court is required to hold a hearing—a special hearing to examine procedural prerequisites.¹⁷

At the hearing to obtain the claimant's position on the dismissal of the claim, the defendant is not summoned, since the litigation has not yet formally commenced—the litigation process begins upon service of the claim on the defendant.¹⁸

OTHER CONTENTIOUS ISSUES REGARDING THE INTERPRETATION OF SIMILAR INSTITUTES IN PRACTICE

In practice, it is often heard that certain legal institutes are mistakenly used as synonyms. The most common error is found in the distinction between *dismissal* and *rejection*. Additionally, the institutes of *withdrawal of the claim* and *renunciation of the claim* are often misunderstood.

Dismissal of the Claim vs. Rejection of the Claim

These seemingly similar institutes have significant differences. A *claim is dismissed* for reasons expressly prescribed by law, typically relating to procedural defects or non-compliance with statutory prerequisites. Conversely, a *claim is rejected* on the merits, meaning the court has substantively ruled on the claim during the proceedings. Once a claim has been rejected by a final judgment, it cannot be litigated again.

Dismissal of the Claim vs. Withdrawal of the Claim

Dismissal of the claim is a procedural act by the court whereby a submitted claim is dismissed due to failure to meet legal conditions (procedural prerequisites). *Withdrawal of the claim* is a procedural act initiated by the claimant who decides to retract the submitted claim. Withdrawal is a dispositive procedural act by which the claimant abandons their initial claim.¹⁹

It is important to distinguish the point in the proceedings until which the claimant can unilaterally withdraw the claim, and when the defendant's consent is required. The claimant may withdraw the claim without the defendant's consent before the defendant has engaged in the merits of the case. The claim may also be withdrawn later, up until the final resolution of the case, provided the defendant consents. If the defendant fails to respond within eight days from notification of the withdrawal, consent shall be presumed.²⁰

17 Poznić, B., & Rakić-Vodinelić, V. (2015). *Civil Procedure Law* (17th revised and supplemented ed.). Faculty of Law, Union University and Official Gazette, Belgrade, p. 352.

18 Stanković, G. (2024). *Commentary on the Civil Procedure Act*. Official Gazette, Belgrade, p. 1038.

19 Stanković, G., & Boranijašević, V. (2023). *Civil Procedure Law*. Official Gazette, Belgrade, p. 356.

20 **Civil Procedure Act**, Article 202

Withdrawal of the Claim vs. Renunciation of the Claim

Renunciation of the claim is an act by the claimant which, unlike withdrawal, does not require the defendant's consent. Renunciation results in the issuance of a judgment based on the renunciation, which substantively decides on the claim. This means the claimant cannot initiate proceedings on the same claim again, whereas in the case of withdrawal, the claimant may file the same claim anew, as if it had never been filed.

A judgment based on renunciation is issued upon the claimant's declaration that they renounce the claim — a statement informing the court that the claimant considers the claim unfounded.²¹

Specific Examples from Case Law Regarding Dismissal of Lawsuits

Case law represents one of the most reliable mechanisms for monitoring the practical application of legal norms and clarifying potential ambiguities in interpretation. Several noteworthy examples illustrate this in the context of dismissal of lawsuits.

In a decision of the Higher Court in Novi Sad, case no. Gž 4190/2013 dated 12 December 2013, which annulled the ruling of the Basic Court in Novi Sad, case no. P. 8079/2013 dated 1 November 2013, it was established that the death of the defendant does not constitute an irremediable defect warranting dismissal of the lawsuit. The first-instance court's view that the defendant's death represented such a defect was incorrect. Pursuant to Article 222(1) of the Civil Procedure Act (CPA), the court must suspend proceedings upon a party's death, while Article 225(1) CPA prescribes that proceedings shall continue once the heir or estate administrator takes over or is summoned by the court to do so. The death of the defendant is therefore a remediable procedural defect under Article 80(1) CPA, which requires the court to invite the plaintiff to remedy this defect. In the case at hand, the first-instance court failed to notify the plaintiff of the defendant's death and thus unjustly dismissed the lawsuit, effectively depriving the plaintiff of their procedural right to substitute the defendant with their heirs.

Another illustrative case, confirmed by the Higher Court in Novi Sad in case no. Gž-3975/2014 dated 8 October 2014, upheld the Basic Court's ruling no. P-8773/2013 dated 7 October 2013, whereby a lawsuit seeking damages against a judge for unlawful or improper judicial conduct was dismissed as inadmissible. The plaintiff had filed a suit against Judge M.T.Č. of the Appellate Court in Novi Sad, alleging that the court's decision signed by the judge contained inaccurate information and was rendered unlawfully. The court returned the lawsuit for correction and supplementation in accordance with Article 192(1) CPA, which the plaintiff failed to properly fulfill. Importantly, under the Judges Act, judges enjoy immunity for opinions expressed or votes cast in judicial duties (Article 5). Liability for damage caused by unlawful or improper judicial acts lies with the Republic of Serbia, as prescribed by Articles 35 and 151 of the Constitution. Consequently, claims for damages against judges themselves are inadmissible, and such claims must be directed against the state, which in turn holds a right of recourse against the judge. The court may only render a meritorious decision on claims that are admissible; lacking this, dismissal of the lawsuit is mandatory.

21 Bodiroga, N. (2022). *Civil Litigation Procedure*. Faculty of Law, University of Belgrade, Belgrade, p. 404.

CONCLUDING REMARKS

From the above, it is evident that the Civil Procedure Act prescribes the cases in which a claim may be dismissed, as well as the procedure the court must follow before issuing a decision on dismissal. This legal mechanism plays an important procedural role, as it safeguards the proper application of statutory rules concerning the conduct of proceedings and the adjudication of the claimant's request.

The law provides assistance to a party who has made errors in drafting the claim by allowing the court to order that such deficiencies be rectified within a specified time limit. However, if the claim is incomplete and unintelligible, and these deficiencies were made by the claimant who is a member of the legal profession—such as an attorney, public prosecutor, or authorised representative—the court will dismiss the claim by a ruling. In such instances, dismissal functions as a form of sanction for professionals who are expected not to make such substantial errors.

In practice, there are divergent views regarding the interpretation of Article 294(2) of the Civil Procedure Act, which concerns the mandatory holding of a hearing—attended only by the claimant—prior to the dismissal of the claim for legally enumerated reasons following a preliminary examination. Nevertheless, failure to comply with this provision inevitably results in a fundamental violation of civil procedure rules under Article 374(2) (7) of the Civil Procedure Act, as the omission to hold a hearing at which the claimant is given the opportunity to comment on the potential dismissal of the claim deprives the claimant of the right to be heard before the court.



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ODBACIVANJE TUŽBE U PARNIČNOM POSTUPKU U TEORIJI I PRAKSI

Apstrakt:

Da bi došlo do pokretanja parničnog postupka mora postojati volja stranke da traži od suda zaštitu povređenih ili ugroženih subjektivnih prava. Ta volja se manifestuje podizanjem tužbe pred nadležnim sudom. Tužba je parnična radnja stranke kojom se pokreće parnični postupak. Bez tužbe nema ni postupka. Sadržina tužbe je propisana Zakonom o parničnom postupku u nekoliko članova. Podnošenje tužbe sudu povlači određene posledice po stranke, pa je, shodno tome, sud u obavezi da u stadijumu prethodnog ispitivanja tužbe proveri da

li postoje smetnje za vođenje postupka u vidu procesnih pretpostavki. Ako iste postoje, on će naložiti da u određenom roku stranke to isprave, a ako ne postupe po nalogu tu tužbu će odbaciti. U radu će pored normativnog uređenja u pogledu razloga za odbacivanje tužbe, biti prikazane i situacije koje se u praksi pogrešno poistovećuju i mešaju sa institutom odbacivanja tužbe kao i primeri iz sudske prakse.

Ključne reči: odbacivanje tužbe, sadržina tužbe, neuredna tužba, razlozi za odbacivanje tužbe

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COMPENSATION FOR DAMAGE TO THE HONOUR AND REPUTATION OF POLITICIANS AND PUBLIC OFFICIALS IN THEORY AND PRACTICE

Abstract:

In the era of digital telecommunications development, never before has it been easier to express one's thoughts to a broad audience. Such content can reach people directly, in various ways, whether through print or digital media. Numerous social platforms, blogs, and other forms of communication are widely accessible. In part, this may be beneficial for facilitating the dissemination of information and keeping the public informed about various events. However, it simultaneously carries the risk of misuse and the dissemination of false information that may harm the reputation and honour of individuals who are the subjects of such publications. This paper focuses on civil law protection against violations of the honour and reputation of politicians and public officials. It will examine how infringements of personal honour and reputation occur, with particular attention paid to the specific position of politicians and public officials, who are, to a certain extent, obliged to tolerate the disclosure of certain private information due to the nature of their official roles.

Keywords: *Public official, compensation for damage, honour and reputation, politician*

INTRODUCTION

Freedom of thought and expression is enshrined in Article 46 of the Constitution of the Republic of Serbia. It guarantees the freedom of thought and expression, as well as the freedom to seek, receive, and disseminate information and ideas by speech, writing, image, or in any other way. Freedom of expression may be restricted by law when necessary to protect the rights and reputation of others, to safeguard the authority and impartiality of the judiciary, and to preserve public health, morality in a democratic society, and national security of the Republic of Serbia.

A public official is any person elected, appointed, or nominated to a public authority, excluding individuals who represent private capital in the management body of a company

that qualifies as a public authority.¹ This provision should be interpreted as referring to and applying to individuals directly elected by the citizens, as well as those elected, appointed, or nominated by the National Assembly, the President of the Republic, the Supreme Court of Cassation, the High Judicial Council, the State Prosecutorial Council, the Government of the Republic of Serbia, the Assembly of the Autonomous Province, the Government of the Autonomous Province, and the bodies of local self-government units.²

Honour represents the totality of moral values an individual possesses in the broadest sense. It is a personal good consisting of the reputation or esteem a person enjoys within a particular social environment.³ Professor Vizner similarly defined it as follows: “The object of the infringement is considered to be civil honour, understood as a personal non-material right consisting of the totality of moral values a person holds and enjoys as a member of a particular social community, in relation to their integrity, past conduct, knowledge and abilities, and other moral attributes.”⁴ Professor Stojanović shares a similar view: “Reputation is a concept derived from the notion of honour; it is the honour an individual has acquired in their community through their behaviour and values, and for this reason, it is not justified to place it on the same level as honour. Internal honour refers to the individual’s subjective view of their own worth, while external honour is the recognition of these values by the social environment, i.e. the opinion of others about the individual’s virtues.”⁵ The right of public officials to honour and reputation is more limited in comparison to persons who do not engage in activities of public interest. These rights are not autonomously guaranteed by the European Convention on Human Rights; however, through an extensive interpretation of the right to private life under Article 8 of the Convention, the European Court of Human Rights acknowledges the protection of such rights.⁶

COMPENSATION FOR DAMAGE TO THE HONOUR AND REPUTATION OF POLITICIANS AND PUBLIC OFFICIALS IN THEORY

The right to private life encompasses an individual’s right to exclude third parties from accessing facts related to the bearer of that right. The right to private life is recognised in international legal instruments such as the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966), and the *European Convention on Human Rights* (1950). In modern legal systems, this right is primarily guaranteed by constitutions and has subsequently been strengthened through reforms introducing mechanisms of civil and criminal legal protection.⁷ In Serbian domestic law, the protection of violated personality rights is governed by several legal provisions that are applied cumulatively. Civil procedure is regulated by the *Civil Procedure Act*, while

1 *Law on the Prevention of Corruption* (“Official Gazette of the RS”, nos. 35/2019, 88/2019, 11/2021 – authentic interpretation, 94/2021, and 14/2022)

2 *Authentic Interpretation of Article 2(1)(3) of the Law on the Prevention of Corruption* (“Official Gazette of the RS”, nos. 35/2019 and 88/2019)

3 *Legal Lexicon* (1970). Savremena administracija, Belgrade, p. 139

4 Vizner, B. (1978). *Commentary on the Law on Obligations*, Riječka tiskara, Zagreb, p. 904

5 Stojanović, Z. (2020). *Commentary on the Criminal Code*, Službeni glasnik, Belgrade, p. 568

6 Đorđević, M. (2019). Limitation of Media Freedom by the Right to Honour and Reputation of Public Officials, *Eudaimonia – Journal for Legal, Political, and Social Theory and Philosophy*, No. 3, p. 125

7 Petrović, Z. (1996). *Compensation for Non-material Damages Due to Violation of Personal Rights*, Novinsko izdavačka ustanova Vojska, Beograd, p.61

obligations and responsibilities of individuals are governed by the *Law on Public Information and Media*, and general rules on damages are regulated by the *Law on Obligations*. Criminal protection is provided under the *Criminal Code of the Republic of Serbia*.⁸

A violation of honour and reputation may occur through the dissemination of information. If the information is communicated directly to the injured party, it constitutes an insult; if it is communicated to a wider audience, it constitutes defamation. The truthfulness of the information is not decisive—what matters is whether the information infringes on the honour or reputation of the person concerned. False information typically causes greater harm than truthful information, although the manner in which the information is conveyed also plays a significant role.

It is irrelevant whether the insult or defamation occurred publicly or privately, or in what form it was conveyed (oral, written, through the media, etc.). However, what is essential for establishing liability is the absence of any legitimate interest, either on the part of the person disseminating the falsehood or the person receiving it.⁹

Chapter XII of the *Law on Public Information and Media* regulates information concerning individuals. A person's dignity—including honour, reputation, and personal integrity—is legally protected. Publishing information that infringes on a person's honour, reputation, or dignity, or presenting them in a false light by attributing traits they do not possess or denying traits they do possess, is prohibited unless the interest in publishing such information outweighs the interest in preserving dignity and the right to authenticity—particularly where the publication does not contribute to public debate about a matter, event, or individual of public concern.¹⁰

The same law also requires consent for publishing information from a person's private life. This includes personal records (letters, diaries, notes, digital recordings, etc.), images (photographs, drawings, videos, etc.), and voice recordings (audio, digital, etc.). Such content may not be published without the individual's consent if it can be reasonably determined who the person is.¹¹

Consent is also required for direct broadcasting of a person's image or voice on television, radio, or similar platforms. Without consent, publication of such material is prohibited if it would infringe on the individual's right to privacy or any other personal right.¹²

Exceptionally, information or personal records may be published without consent if, in a specific case, the public interest in disclosure outweighs the interest in preventing publication. The law presumes that the public interest prevails, especially when: the person has themselves disclosed the information or provided it to the media for publication; the information relates to a public figure, event, or issue of public interest, especially where it concerns a holder of public or political office; the person, by their public statements or behaviour in private, family, or professional life, has attracted public attention and thereby

8 As already stated, the paper will address civil law protection, but we must note that Chapter XVII of the Criminal Code regulates criminal offenses against honor and reputation from Articles 170 to 177.

9 Blagojević, B., & Krlj, V. (1983). *Commentary on the Law on Obligations*. Savremena administracija, Belgrade, p. 735.

10 Law on Public Information and the Media, *Official Gazette of the Republic of Serbia*, nos. 92/2023 and 51/2025 (hereinafter: LPIM), Art. 90.

11 LPIM, Art. 91.

12 LPIM, Art. 91.

given cause for publication; the information was communicated or recorded during public parliamentary debate; the publication is in the interest of justice, national security, or public safety; the person did not object to the information being collected or recorded, knowing it was intended for publication; the publication is for educational or scientific purposes; the publication is necessary for alerting the public to danger (e.g. preventing the spread of disease, locating a missing person, or warning about fraud); the recording includes crowds (e.g. at concerts, demonstrations, or public streets); the image was taken at a public gathering or shows the individual as part of a landscape, cityscape, square, street, or similar setting.¹³

The aforementioned article of the Law on Information and Broadcasting in point 2 prescribes deviations from the permission to publish information. Article 93(4) of the same law reaffirms that publication without consent is allowed when the information or record originates from public parliamentary debate. Furthermore, the law explicitly states that public and political figures are a particularly sensitive category and, due to the nature of their work, must tolerate certain disclosures even in the absence of consent.

Article 35 of the *Law on Public Information and Media* defines what constitutes a “media outlet.” This includes daily and periodical newspapers, news agency services, radio and television programmes, and their electronic editions, as well as independent electronic publications with editorial content (e.g., websites).

The law excludes from this definition books, films, audio and audiovisual carriers, scientific and professional journals aimed at specific professional groups, printed advertising materials, state publications, and various digital publications unless they are registered in the Media Register. Notably, internet platforms such as forums, social networks, blogs, and similar websites are not considered media under the law unless officially registered.¹⁴

Compensation for damage is governed by the *Law on Obligations*, which sets out general provisions on types and methods of compensation. Article 198 specifically addresses material damages in cases involving defamation or the dissemination of false information. A person who damages another’s honour or spreads false statements about their past, knowledge, abilities, or other aspects, knowing or having reason to know that the statements are false, is liable for the resulting material damage. However, a person is not liable if they did not know the information was false and had a legitimate interest in sharing it, or if such interest existed for the recipient.

The right to request the cessation of a violation of personal rights is regulated by the Law on Obligations. Everyone has the right to request from the court or another competent authority to order the cessation of an act that violates the integrity of a person, private and family life, or other personality rights. The court or another competent authority may order the cessation of such an act under the threat of imposing a monetary penalty, determined either as a lump sum or per unit of time, in favour of the injured party.¹⁵

The right to file a claim belongs to any person whose honour and reputation have been harmed due to a published piece of information. In the case of a violation of the right to private life, the person whose right has been infringed may, by filing a claim against the responsible editor of a public medium, request not only the remedies provided by law but also compensation for material and non-material damage, as well as the publication of the judgment.¹⁶

13 LPIM, Art. 93.

14 LPIM, Art. 37.

15 Law on Obligations (hereinafter: LO), Art. 157.

16 Veljković, D. (2020). *Commentary on the Law on Obligations* (Vol. I). Nova Konsulting, Belgrade, pp.

Monetary compensation is prescribed in Article 200 of the Law on Obligations. For endured physical pain, for mental suffering caused by the reduction of life activities, disfigurement, violation of reputation, honour, freedom or personal rights, the death of a close person, as well as fear, the court shall, if it finds that the circumstances of the case—especially the intensity and duration of the pain or fear—justify it, award fair monetary compensation, regardless of whether material damage has also been awarded or even if such damage is absent. Non-pecuniary or moral damage refers to the violation of the injured party's non-material personal rights. It is often said that non-pecuniary damage consists in the violation of moral assets. Moral assets include all personal goods belonging to an individual, such as bodily integrity, health, freedom, honour, and similar. These goods are, in fact, the objects of non-pecuniary damage.¹⁷

Regarding information disseminated online, whether on websites or social networks, there is a need to shift the approach to identifying the persons responsible for posting such content. Professors Petrović point out that although legal protection from the violation of honour and reputation on the internet does exist, traditional mechanisms of tort and criminal law have proven ineffective in enabling individuals to protect their honour and reputation. As a result, their use will likely decline. Instead of traditional mechanisms, consumer protection will increasingly be applied. In line with the concept of risk management concerning false, unverified, and harmful online content, individuals, as consumers of judicial and digital services, will be able—possibly with the assistance of state authorities where deemed opportune—to request that intermediaries providing internet services block false or unverified information. Major providers will have a special obligation to monitor or retrospectively approve content uploaded by their users.¹⁸

COMPENSATION FOR DAMAGE DUE TO VIOLATION OF THE HONOUR AND REPUTATION OF POLITICIANS AND PUBLIC OFFICIALS IN JUDICIAL PRACTICE

In terms of judicial practice, the judgment of the Court of Appeal in Novi Sad, case no. Gž-2416/23 of 5 October 2023, which upheld the judgment of the Basic Court in Novi Sad, case no. P-53961/21 of 23 February 2023, states that the personal rights of politicians and public officials are more limited than those of other individuals—they must tolerate and endure more than others, including the publication of certain information about them that other persons would not be subject to. According to the opinion of the mentioned court, as well as the Constitutional Court and the European Court of Human Rights, the limits of acceptable criticism are always broader when the target is a politician as a public figure. These limits are broad in such cases but are not absolute, meaning that the right to criticism is not unlimited. The personal rights of politicians and public officials are narrower than those of other individuals: they are required to tolerate more, to endure the publication of certain information about them that others would not have to bear; however, freedom of expression is also limited when they are the subject of reporting and criticism, by their right to honour and reputation. The right to honour and reputation belongs to all citizens; accordingly, the protection of the right to honour and reputation extends to politicians as

634–635.

17 Veljković, D., *op. cit.*, p. 638.

18 Mrvić-Petrović, N., & Petrović, Z. (2024). Legal protection of honour and reputation from publications on social media and websites. In *Law and Public Services: Liber amicorum Jovica Trkulja* (pp. 475). University of Belgrade, Faculty of Law; Institute of Comparative Law; Dosije Studio.

well, even when they are not acting in a private capacity. Nevertheless, in such cases, the conditions for protection must be weighed against the public interest in open debate on political matters. Namely, the injured party is entitled to financial compensation for the violation of honour and reputation if there is a causal link between the event that caused the harm and the resulting non-material damage, as well as if the court is convinced that it is fair and just in the specific case to award monetary compensation to the injured party.¹⁹

In that regard, the aforementioned court particularly took into account that the claimant had been involved in politics for many years, that statements and publications of a similar nature are a common occurrence on the political scene in Serbia, and that the claimant, as a public figure and active participant in political life, was expected—given the prevailing political circumstances—to endure all negative criticism with a higher degree of tolerance. As an experienced politician, he could have anticipated such criticism, and as a current political figure, he was obliged to demonstrate greater tolerance toward statements made by the defendant as his political opponent. Consequently, those statements were not of a nature to cause the claimant mental anguish due to an infringement of his honour and reputation that would justify the awarding of monetary compensation for non-material damage. Moreover, the boundaries of acceptable criticism are broader with regard to public figures than private individuals. Unlike ordinary citizens who do not hold public status, public figures are inevitably and knowingly exposed to close scrutiny of their words and actions by the public at large and are therefore required to exhibit a higher level of tolerance. The nature and status of politicians are of particular importance when assessing proportionality in terms of tolerance, and public figures must demonstrate a heightened degree of tolerance—especially when the discourse concerns the realm of political and public debate, without infringing upon the private or professional life of the claimant. Furthermore, even if the expressions used in the disputed statements were overly strong, it must be borne in mind that the freedom of expression of a political opponent inherently involves a certain degree of provocation, particularly when the person in question is engaged in matters of public interest. Therefore, from the moment the claimant entered political life, he had to accept being subjected to greater scrutiny and criticism than those who do not participate in such activities.²⁰

In the Supreme Court of Cassation judgment, Rev. No. 933/2015, the stance was taken that, in addition to accepting the legal reasoning presented by the second-instance court, the Supreme Court of Cassation finds the challenged judgment correct because the disputed newspaper article falls within the scope of political debate between the litigating parties, as both are public officials and politicians. Such individuals, in the realm of media and public scrutiny, must exhibit a higher degree of tolerance than other persons—ordinary citizens. Therefore, the limits of acceptable criticism and the disclosure of information concerning the exercise of their public and political functions are broader, given that these individuals hold public and political offices.²¹

According to the assessment of the Supreme Court of Cassation, as well as the Constitutional Court and the European Court of Human Rights in Strasbourg, the limits of acceptable criticism are always wider when the target of the criticism is a politician (public official). These limits are broad, but even then they are not absolute, meaning that the right to criticize is not unlimited. It is generally established that freedom of the media may be

19 Rutović, M. (author of the holding). Judgment of the Appellate Court in Novi Sad, case no. Gž-2416/23 of 5 October 2023, affirming the judgment of the Basic Court in Novi Sad, case no. P-53961/21 of 23 February 2023.

20 Ibidem

21 <https://www.vrh.sud.rs/sr-lat/rev-9332015-naknada-štete>

restricted for the purpose of securing respect for the rights and reputation of others (Article 29, paragraph 3 of the Charter of Human and Minority Rights; Article 19, paragraph 3(a) of the International Covenant on Civil and Political Rights; Article 10, paragraph 2 of the European Convention on Human Rights). The freedom of expression guaranteed by Article 10 of the European Convention on Human Rights is one of the fundamental pillars of a democratic society; according to paragraph 2, it applies not only to “information” or “ideas” that are favorably received or considered harmless but also to those that offend, shock, or disturb (cases *Caspells v. Spain* and *Vogt v. Germany*). The personal rights of politicians and public officials are narrower than those of other individuals: they must tolerate and endure more than others, bearing the publication of even damaging information about themselves that others need not endure. However, freedom of expression is limited when they are the subject of reporting and criticism concerning their right to honour and reputation. The right to honour and reputation belongs to all citizens; accordingly, the protection of these rights extends to politicians, even when they are not acting in a private capacity. Nevertheless, in such cases, the conditions for protection must be balanced against society’s interest in open discussion of political matters (*Lingens v. Austria*).²²

CONCLUSION

Although the compensation for damage caused by the violation of the honor and reputation of politicians and public officials is normatively regulated in theory, in practice compensation is awarded on a case-by-case basis. As illustrated by the examples, courts hold the position that politicians and public officials are persons who, to a certain extent and with a higher degree of tolerance, must endure the publication of information from their private lives, unlike individuals who do not hold such positions. This tolerance is not unlimited, and accordingly, the awarding of compensation depends on the degree of violation of honor and reputation. Protective instruments exist and are normatively regulated, but their application is based on the assessment of whether and to what extent the published information has caused damage to honor and reputation. Attention is also given to protecting the rights of the media to publish information in accordance with the principles of media freedom. Whether the damage is remediable or irreparable, and whether the harmful information published is true or false, also influences the manner in which compensation is awarded.

22 <https://www.vrh.sud.rs/sr/rev-18552017-sloboda-izražavanja>



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NAKNADA ŠTETE ZBOG POVREDE ČASTI I UGLEDA POLITIČARA I JAVNIH FUNKCIONERA U TEORIJI I PRAKSI

Apstrakt:

U eri digitalnog razvoja telekomunikacija, nikada nije bilo dostupnije nego danas izražavati svoju misao širokom krugu lica. Ona mogu neposredno, na razne načine da dođu do tih informacija koja se objavljuju bilo štampano bilo digitalno. Dosta socijalnih platformi, blogova, i drugih vidova komunikacije je dostupno širokom krugu lica. U određenom delu, to može biti korisno radi lakšeg obaveštavanja i informisanja ljudi o raznim događajima, ali sa druge strane nosi opasnost od zloupotreba i iznošenja neistinitih informacija koje mogu štetiti ugledu i časti tih lica koja su predmet tih informacija. Osvrt će biti na građanskopravnoj zaštiti povrede časti i ugleda političara i javnih funkcionera. U radu će se prikazati na koji način dolazi do povrede časti i ugleda lica sa posebnim osvrtom na čast i ugled političara i javnih funkcionera koji su u obavezi da u određenoj meri trpe iznošenje određenih privatnih informacija u javnost iz razloga što se nalaze na postavljenim funkcijama.

Ključne reči: *Javni funkcioner, naknada štete, čast i ugled, političar*

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MOTOR THIRD-PARTY LIABILITY INSURANCE AND ITS IMPORTANCE IN THE INSURANCE MARKET OF SERBIA

Abstract:

This paper examines the most significant segment of non-life insurance—motor third-party liability insurance. Following the introductory section, the focus is placed on its key features: purpose, objectives, regulatory framework, and open issues. Since many cars and other motor vehicles, driven by the needs of both the economy and individuals, continuously operate across different countries, it was necessary to analyze the international perspectives of this type of insurance, with particular emphasis on the Green Card system in Europe. Furthermore, the paper discusses the operations of motor liability insurers under extraordinary circumstances, such as those that arose during the COVID-19 pandemic. Special attention is also devoted to the motor liability insurance market in Serbia, taking into account insurance premiums and claims as the most relevant indicators.

Keywords: *motor third-party liability insurance / insurance in Serbia / international insurance / Green Card system / insurance during the COVID-19 pandemic*

INTRODUCTION

Motor third-party liability insurance emerged between the two World Wars, when the rapid development of road transport led to an increasing number of damages caused to third parties by motor vehicles, whose numbers were rising year after year. A motor vehicle is defined as a land-based, engine-powered means of transport (for carrying passengers, goods, towing, or as a working vehicle) whose movement is not dependent on tracks. In the context of insurance, this definition additionally includes a towed vehicle, i.e., a trailer.¹

Initially, motor third-party liability insurance was voluntary, but it soon became compulsory by law. In the territory of today's Serbia, it was introduced as mandatory as early as 1930. This type of insurance provides protection against the financial consequences of liability incurred by the owner or user of a motor vehicle for damages caused to third

1 Hansell, D. S. (1999). *Introduction to Insurance* (2nd ed.). London: LLP, p. 75.

parties (death, bodily injury, or impairment of health), as well as for the damage to or destruction of their property resulting from the use of the vehicle. Liability for damage to items accepted for carriage is excluded.²

KEY FEATURES OF MOTOR THIRD-PARTY LIABILITY INSURANCE

Motor third-party liability insurance serves the broader social good and has therefore been introduced as compulsory insurance in almost all countries. The only exceptions are a few African and Asian states, as well as certain U.S. federal states.³ According to the legislative provisions of some countries, the insurer's liability is unlimited (actual damages are compensated), while in others it is capped, but at a high monetary amount. A significant feature of modern motor liability insurance is its harmonization across countries, particularly within the European Union, due to the constant increase in cross-border traffic.

In Serbia, the minimum sums insured are set at the dinar equivalent of EUR 1,000,000 for personal injury per accident event, regardless of the number of injured persons, and EUR 200,000 for property damage per accident event, also regardless of the number of affected persons.⁴

Because motor third-party liability insurance is compulsory, the owner of a motor vehicle subject to registration must, at the time of registration, renewal, or issuance of temporary plates, provide proof to the competent state authority that a valid contract has been concluded with an insurance company. For vehicles not subject to mandatory registration, the owner must not only obtain insurance at the time of receiving the permit to operate the vehicle but also renew it regularly each year as long as the vehicle is in use.

It is important to emphasize that third parties are always protected by motor liability insurance, regardless of who is operating the vehicle covered by the policy. Moreover, in the event of a change of vehicle ownership during the contract period, all rights and obligations under the contract are transferred to the new owner, continuing until the expiration of the insurance coverage, which is typically concluded for a one-year term.

Motor liability insurance also incorporates significant psychological deterrents against the occurrence of insured events, through the use of premium discounts and surcharges. Vehicle owners who have not incurred claims during the previous insurance period are granted premium discounts, while those who have caused damages face increased premiums. In this way, insurance companies influence the personal side of risk in line with the technical requirements of insurance.⁵

Several decades ago, insurance companies in Serbia calculated premiums based on regional risk exposure, i.e., the geographic area in which the vehicle was primarily operated. Owners of vehicles in regions with denser traffic—and correspondingly higher accident

2 Cerović, M. (2012). *Osiguranje motornih vozila: tendencije razvoja*. Novi Sad: Univerzitet Privredna akademija – Pravni fakultet, p. 108.

3 Vojinović, Ž. (2025). *Osiguranje* (2nd ed.). Subotica: Ekonomski fakultet, p. 404.

4 Zakon o obaveznom osiguranju u saobraćaju. Službeni glasnik Republike Srbije, 51/2009, 78/2011, 101/2011, 93/2012, 7/2013, članovi 7 i 22.

5 Farny, D. (2011). *Versicherungsbetriebslehre* (5th revised ed.). Karlsruhe: Verlag Versicherungswirtschaft, p. 55.

rates relative to the number of vehicles—paid higher premiums. We believe this principle was justified and that its abolition was unwarranted. For years, Serbia has had “black spots” where the highest number of traffic accidents occur. Despite the heightened risk, vehicle owners from these municipalities currently pay the same premium as other drivers in the country, which we consider inconsistent with the basic principles of insurance.

A noteworthy novelty in the implementation of motor liability insurance in Serbia was a legal provision requiring insurance companies to allocate 1.2% of premiums for preventive measures, depositing these funds into a special account used to finance the introduction, maintenance, and improvement of remote traffic monitoring systems. Although the Law on Compulsory Traffic Insurance stipulated that this provision would apply only during the first five years of its validity, it would have been prudent to reassess such a solution and continue allocating part of the premiums for preventive measures even after this period. Nevertheless, upon the expiration of the statutory deadline, these contributions were discontinued despite professional recommendations to maintain them.

An illustrative example can be seen in the United Kingdom, where speed cameras have demonstrated clear effectiveness. Within just one year, the average speed on roads decreased by 4 km/h, the number of traffic offenders fell by 31%, the number of casualties was reduced by 42%, two million offenders were recorded, and EUR 200 million in fines were collected.⁶

INTERNATIONAL PERSPECTIVES ON MOTOR THIRD-PARTY LIABILITY INSURANCE

Despite differences in regulatory frameworks, scope, and coverage amounts, motor third-party liability insurance possesses pronounced international features. Almost everywhere in the world, there are associations of insurers representing companies engaged in motor liability insurance within a given country. These associations, through their offices for international (Green Card or other) certificates, guarantee compensation under motor liability insurance in two respects: (1) for damages caused by drivers of vehicles with foreign license plates while in the territory of the country where the association is based, and (2) for damages caused by drivers of vehicles with domestic license plates while abroad.

The well-known Green Card system has been established in Europe (including some non-European, mainly Mediterranean, countries). Its origins date back to 1949, when an international meeting of motor insurers was held in London, leading to the creation of the Council of Bureaux of the Green Card system. Similar systems have been established on other continents as well: the Orange Card system in the Middle East and North Africa, the Brown Card in West Africa, the Yellow Card in East Africa, the Pink Card in Central Africa, the Blue Card in Southeast Asia, and the White Card in some Asian countries.⁷

Serbia is a member of the Green Card system. Therefore, a person who concludes motor third-party liability insurance in Serbia enjoys full protection throughout the entire European area, and beyond, without paying additional premiums. If an insured motorist causes damage within the Green Card system territory, compensation will be paid by the

⁶ Lajal, S. (2010). Rat vozača i kamera. *Svet osiguranja i finansija*, 2, p. 39.

⁷ Council of Bureaux. (2025, July 17). About COB. Retrieved from: <https://www.cobx.org/article/4132/about-cob>

responsible insurance company. If it fails to do so, the insurers' association will fulfill the obligation. In cases where an uninsured vehicle causes damage abroad, compensation will be paid from the Guarantee Fund.⁸

For a driver entering Serbia with a vehicle registered in a state that is a signatory to the Green Card agreement, the license plate serves as a substitute for an international motor liability insurance certificate. If the vehicle originates from a country outside the agreement, the driver must hold a valid certificate recognized in the European Union. Should the driver lack such a certificate, a border motor liability insurance policy must be purchased upon entry into Serbia, issued by a domestic insurance company.⁹ During the 1990s, Serbia was temporarily excluded from the Green Card system due to international sanctions. Consequently, owners and users of foreign vehicles crossing into Serbia were required to purchase border insurance policies, and the same applied to Serbian nationals traveling abroad.

If damage is caused by the use of a motor vehicle with foreign license plates for which a valid international insurance certificate (or other proof of liability insurance) exists, the injured party submits the claim for compensation to a domestic insurance company authorized by the national insurers' association to handle Green Card matters, or directly to the association itself. The compensation provider will then recover the amount from the foreign insurer that issued the certificate of insurance.

MOTOR THIRD-PARTY LIABILITY INSURANCE IN EXTRAORDINARY CIRCUMSTANCES – THE CASE OF THE COVID-19 PANDEMIC

The pandemic caused by the COVID-19 virus at the end of 2019 took the world by surprise, including state authorities whose responses followed with delay. Never before, and never on such a scale, had events such as the closing of national borders, stay-at-home orders, restrictions on social contact, and the suspension of economic and social life been recorded. The crisis provided the insurance industry with an opportunity to demonstrate how, even under extraordinary circumstances, it continues to support numerous clients. This was especially important given that no other sector provides such a broad sense of security to the economy and society as a whole. The general assessment is that insurers in Serbia, as in other countries, regularly fulfilled their obligations despite the circumstances.¹⁰

Due to the so-called "lockdown" and restrictions on movement, motor liability insurers paid fewer claims as a result of the reduced use of vehicles. This effect was only partially offset by the opposite trend, as some people, seeking to avoid public transport because of protective masks and the risk of infection, switched to driving their own cars, thus generating higher mileage than before.

For example, in Germany, data based on mobile phone movement revealed that population mobility dropped by 20% in March 2020 and by as much as 40% in April compared to the same months of the previous year. These developments directly affected

8 Zakon o obaveznom osiguranju u saobraćaju. Službeni glasnik Republike Srbije, 51/2009, 78/2011, 101/2011, 93/2012, 7/2013, član 34.

9 Žarković, N. (2024). *Pojmovnik osiguranja* (3rd ed.). Novi Sad: Institut za rodnu i nacionalnu ravnopravnost, zaštitu prava radnika i zaštitu životne sredine, p. 64.

10 Žarković, N. (2021). *Životna osiguranja u uslovima pandemija kovida 19. Tokovi osiguranja*, 37(4), p. 32.

the frequency of motor liability claims. In 2020, the number of reported claims in Germany decreased by around 15% compared to the previous year.¹¹

These so-called “COVID windfalls” did not go unnoticed by policyholders in Western countries and by the public at large. Insurers began refunding premiums for inactive vehicles or reducing premiums upon renewal. There was even discussion of further steps—such as lowering the tariffs in price lists. Experts rightly warned that this would lead to significant losses once traffic returned to normal.¹²

The second-largest motor insurer in the United States, Geico, introduced a 15% COVID discount for renewals. However, one policyholder from Chicago, convinced that the discount was too low and should have been at least twice as much, filed a lawsuit, also arguing that the discount should apply not only to new policies but also to existing ones.¹³ In Serbia, such practices did not occur. Policies were issued in the traditional manner, and no premium discounts were granted to policyholders.

Insurers who refused to refund premiums risked losing a large share of their clients. In Germany, it was calculated that vehicle owners could save an average of 10%—and up to as much as 47% in extreme cases—by switching insurers. Additional pressure on premiums arose particularly for insurers offering “pay-as-you-drive” motor liability policies, based on telematics and satellite monitoring. One insurer, for instance, offered discounts of up to 45% for drivers under the age of 21 in 2021, while average savings reached as much as 30%. As one consequence of the pandemic, policyholders became more price-sensitive, giving momentum to the expansion of pay-as-you-drive policies. It is estimated that their number in Germany will increase from 400,000 today to approximately 2 million by 2028. Even with such a fivefold increase, telematics and satellite monitoring will still account for only a relatively small share of the total number of motor liability policies.¹⁴

Cost reduction is a topic of constant debate in the economy—and in the insurance industry since its earliest days. The intensifying competition in motor insurance continually fuels this debate. The pressures of operating in a pandemic environment heightened insurers’ concerns about cost management. One of the solutions adopted by some motor liability insurers was outsourcing claims handling to external service providers, who may or may not be ownership-linked to the insurer. The purpose of this strategy is to focus on core operations, take advantage of cost efficiencies, enhance flexibility, and respond more quickly to market changes.

Only those insurers who, in the coming years, fully exploit the possibilities of outsourcing certain activities—an approach significantly influenced by the lessons of the COVID crisis—will be able to gain cost advantages, acquire essential knowledge and expertise, and achieve another crucial goal: increased customer satisfaction. Unsurprisingly, these advantages have so far been utilized mainly by large insurers, but smaller companies will inevitably need to follow.

Research has convincingly demonstrated the scale of savings achievable through outsourcing. These range from single-digit percentages in sales and marketing to as much

11 Schmidt-Kasperek, U. (2021). Stotterstart aus dem roten Tief. *Versicherungswirtschaft*, February, p. 45.

12 Morawetz, M. (2020). Gute Ausgangslage. *Versicherungswirtschaft*, July, p. 68.

13 VW-Redaktion. (2025, July 5). Klage gegen Versicherer Geico, weil er die Kfz-Beiträge nicht rückerstattet. Retrieved from: <https://versicherungswirtschaft-heute.de/unternehmen-und-management/2020-07-28/klage-gegen-versicherer-geico-weil-er-die-kfz-beitraege-nicht-rueckerstattet/>

14 Schmidt-Kasperek, U. (2020). Crashkurs in die Gewinnzone. *Versicherungswirtschaft*, August, p. 19.

as 45% under optimal conditions in accounting and customer service centers. Such savings are attainable both in the short and long term. For example, outsourcing certain IT-related customer service functions can generate total savings of up to 40%, with short-term gains already reaching 30%. Conversely, in areas such as human resources and customer service centers, where total savings can reach 30%, it may take several years before significant reductions are realized.¹⁵

The major changes in claims management that were accelerated during the pandemic were not temporary solutions but have since become the norm. Returning to pre-COVID operational models was neither feasible nor desirable, as no one wanted to abandon the improvements achieved in motor liability claims handling and in other types of non-life insurance.

Another method of cost reduction is the application of modern technologies, which entails fundamental changes in ongoing operations toward the oft-mentioned digitalization process—an effort given particular momentum by the pandemic, especially through remote work. In this context, greater automation is being sought. Yet even in developed Western European countries, progress has been limited: in Germany, as of 2024, over 70% of motor liability insurance policies were still sold through agents and intermediaries.¹⁶

It is clear that the COVID-19 pandemic significantly influenced the implementation of motor third-party liability insurance. The positive changes that emerged during this period have continued to evolve to this day, albeit at varying speeds.

BASIC INDICATORS OF MOTOR THIRD-PARTY LIABILITY INSURANCE IN SERBIA

Movements in the insurance market can be monitored using various indicators. However, the two most important ones are undoubtedly insurance premiums and claims. For this reason, the following section focuses specifically on these indicators. We have chosen to analyze the most recent five-year period, between 2020 and 2024.

Table 1. Trends in the number of motor liability insurance policies and premiums in Serbia, 2020–2024

	2020.	2021.	2022.	2023.	2024.
Number of Policies	2.635.374	2.721.345	2.810.204	2.920.758	3.059.385
Premiums (million RSD)	35.534,7	36.378,1	38.378,2	45.585,9	50.044,5
Share in Non-Life Insurance Premiums (%)	42,4	39,4	36,5	36,5	34,6

Source: National Bank of Serbia, *Overview of the Number of Insurance Contracts, Policyholders, and Premiums by Types and Tariffs for Different Years*.

15 Kinder, C., & Prnjak, A. (2020). Das Personal vom Standort X. Versicherungswirtschaft, May, p. 31.

16 Eichholz, R. (2025). Vollgas – aber wohin? Versicherungswirtschaft, March, p. 57.

As shown in Table 1, during the observed five-year period the number of policies continuously increased, accompanied by a corresponding rise in calculated premiums. The average insurance premium in the first three years of the analysis was around RSD 13,500 per policy. During 2023 and 2024, however, the compulsory motor third-party liability premium increased on three occasions, raising the average amount per policy to RSD 15,608 in 2023 and RSD 16,358 in 2024.¹⁷

It can certainly be considered a positive development that the share of motor liability insurance premiums within total non-life insurance premiums has shown a nearly constant decline during the observed period. A decreasing share of compulsory insurance generally indicates that an insurance market is moving in a healthy direction, as it reflects the growing significance of voluntary insurance products. The development of voluntary insurance provides a more accurate reflection of the overall progress of the market. Of course, the decline in this share is only one of the expected indicators; to draw a fully substantiated conclusion regarding the growth and development of the overall insurance market, a broader set of indicators would need to be taken into account.

One of the unavoidable questions concerning insurance premiums relates to the method of their determination. It would be advisable, in our view, to move away from the current system of premium regulation—set by the National Bank of Serbia as the competent authority—and adopt a free-market approach, already implemented in many countries. This would mean that each insurance company would have the right to independently determine the level of premiums, based primarily on actuarial principles. The key issue in this respect is to ensure that insurers remain consistently capable of settling claims and maintaining the necessary reserves.

Table 2. Trends in Motor Liability Insurance Claims in Serbia, 2020–2024

	2020.	2021.	2022.	2023.	2024.
Number of Claims	66.444	76.728	80.072	84.677	95.146
Claims Amount (million RSD)	11.437,3	13.357,5	15.543,2	16.990,0	20.555,1
Share in Non-Life Insurance Claims (%)	31,8	36,8	33,7	29,9	31,8

Source: National Bank of Serbia, *Overview of the Number of Insurance Contracts, Policyholders, and Premiums by Types and Tariffs for Different Years*.

When it comes to claims, both their frequency and total value have shown a steady year-on-year increase, which is consistent with the findings presented in Table 1 regarding the continuous growth in the number of insurance policies sold. Since claims are the result of the materialization of various risks—many of which are largely beyond human control—the fluctuations in the share of motor liability claims within total non-life insurance claims are entirely understandable.

17 Axco. (2024). *Non-life Insurance Market Reports Serbia*. London: Axco Insurance Information Services, p. 4.

Furthermore, when comparing the shares of motor liability insurance in total non-life premiums with their shares in total non-life claims, it becomes evident that the proportion of claims is consistently lower than the proportion of premiums. This finding suggests that, under current circumstances, motor third-party liability insurance in Serbia represents a highly profitable line of business. Nevertheless, such a conclusion should be considered preliminary, as a comprehensive assessment would require the inclusion of a broader set of performance indicators, which exceeds the scope of this study.

Looking ahead, motor liability insurers in Serbia, in cooperation with the National Bank of Serbia, face the challenge of resolving several outstanding issues concerning the implementation of this type of insurance. Among the most pressing are the revision of outdated premium tariffs, the modernization of the system of discounts and surcharges, and closer alignment with global developmental trends in the insurance industry.

CONCLUSION

The modern insurance market is developing at an increasingly rapid pace, both internationally and in Serbia. Motor third-party liability insurance represents the largest segment of non-life insurance in terms of the number of contracts concluded, premium volume, and total claims. Insurance companies are therefore engaged in one of their most competitive market battles in this field. This type of coverage is particularly attractive due to its compulsory nature and the nearly complete collection of premiums. It is essential that insurance companies work professionally and efficiently to create conditions for the further development of motor liability insurance, based on established principles of the insurance profession, particularly in its technical and actuarial aspects.

Future developments in motor liability insurance, both in Serbia and globally, will inevitably have to take into account major transformations, including: the growing use of alternative fuels, the automation of motor vehicles, satellite-based monitoring, environmental protection, the fulfillment of sustainability requirements, progress in road safety, and the calculation of premiums increasingly influenced by new factors such as the degree and manner of vehicle usage.

Since motor vehicles have long been a necessity and the insurance industry operates with centuries of accumulated experience, it can be stated with a high degree of certainty that motor third-party liability insurance will continue to evolve successfully, meeting the future needs of both the economy and society as a whole. The challenge for insurers will be to refine their assessment of the risks that will continue to emerge throughout the operation of motor traffic and to offer policyholders affordable and comprehensive insurance coverage.



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OSIGURANJE OD AUTO-ODGOVORNOSTI I NJEGOV ZNAČAJ NA TRŽIŠTU OSIGURANJA SRBIJE

Sažetak:

U ovome radu istražen je najznačajniji deo neživotnih osiguranja, osiguranje od auto-odgovornosti. Nakon uvodnog dela, u žiži su se našla njegova ključna obeležja – zadatak, svrha, način uređenja, otvorena pitanja. Budući da mnogi automobili i druga motorna vozila, polazeći od potreba privrede i građanstva, neprekidno saobraćaju po različitim zemljama, bilo je neophodno analizirati i međunarodna stanovišta istražene vrste osiguranja, gde u Evropi posebno mesto pripada sistemu zelene karte. K tome još, u delu rada obrađuje se poslovanje osiguravača od auto-odgovornosti u vanrednim okolnostima kakve su nastupile tokom trajanja pandemije virusa korone. Posebna pažnja data je takođe tržištu osiguranja od auto-odgovornosti u Srbiji, gde su uzeti u obzir premija osiguranja i štete kao najmerodavniji pokazatelji.

Ključne reči: *osiguranje od auto-odgovornosti / osiguranje u Srbiji / međunarodno osiguranje / zelena karta / osiguranje tokom pandemije korone.*

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THE RIGHT TO STRIKE FOR POLICE OFFICERS

Abstract:

This paper addresses the complex and controversial issue of the right to strike for police officers in contemporary legal systems. It focuses on the legal restrictions arising from the specific nature of the police profession and its importance in maintaining public order, security, and the functioning of the state. The authors analyze the legal frameworks governing this matter in the Republic of Serbia, as well as in selected comparative legal systems, with reference to international standards and recommendations, primarily those issued by the International Labour Organization (ILO), the Council of Europe, and the European Court of Human Rights. The paper explores arguments for and against recognizing the right to strike for police officers, including security-related, ethical, professional, and political considerations. Special attention is given to possible alternative mechanisms for exercising labor and social rights of police officers, such as collective bargaining, arbitration, and institutional protection through trade unions. The aim of the paper is to provide a balanced and well-argued contribution to the professional and academic debate on the limits and possibilities of exercising the right to strike in the security sector, with emphasis on the need to reform and improve the legislative framework in accordance with democratic standards and the principles of the rule of law.

Key words: *strike, police officers, labor law, union, negotiation, legislation*

INTRODUCTION

The right to association and trade union organization represents a fundamental pillar of the protection of employees' labor and social rights. Its importance is affirmed by numerous international and national legal instruments, while trade unions play a key role in improving the professional and economic position of workers.¹ Strikes are among the most significant tools of trade union action, commonly employed to pursue labor-related demands.

1 Petrović, A. (2009). *Međunarodni standardi rada*, Niš: Pravni fakultet, p. 96.

However, strikes also carry potential risks for the uninterrupted functioning of public services and may produce broader societal consequences. Accordingly, although the right to strike is recognized as a fundamental human and labor right, it is not absolute and may be subject to restrictions when public safety, health, or essential societal interests are at risk. In this context, the right to strike for police officers becomes a particularly sensitive issue. Given the specific role of the police in maintaining public order and upholding the rule of law, many states impose full or partial prohibitions on the exercise of this right by police personnel. International standards, such as those set forth in the conventions of the International Labour Organization and the European Social Charter, permit such restrictions but only under strictly defined conditions and in accordance with the principles of a democratic society.²

In the Republic of Serbia, the Constitution³ guarantees the right to strike to all citizens. The legal status of police employees is primarily governed by the Law on Police,⁴ with supplementary application of the Law on Civil Servants⁵ and the Labour Law.⁶ This establishes a normative hierarchy wherein the Law on Police takes precedence, followed by the Law on Civil Servants for issues not specifically regulated, and ultimately by the Labour Law as the general framework for employment relations.⁷

The paper uses the comparative method, through the presentation and analysis of legal solutions in selected legal systems. Normative analysis of valid legal and sub-legal regulations of the Republic of Serbia is also used.

THE RIGHT TO STRIKE OF POLICE OFFICERS UNDER INTERNATIONAL STANDARDS

Although the right to strike is recognized in modern international law as a fundamental right of employees, it does not enjoy absolute protection. International standards clearly indicate that this right may be restricted when its exercise could seriously endanger other fundamental values of a democratic order, such as public security, the protection of life and health, or the uninterrupted operation of essential public services.⁸ For this reason, universal and regional international legal instruments do not treat the right to strike uniformly across all categories of workers. A particular distinction is made between private sector employees and those employed in public administration and services of general interest. This distinction is especially pronounced in the context of the right to strike within the security sector, including the police.⁹

2 Vučetić, D., Barun, I. (2012). Pravo na štrajk zaposlenih u jedinicama lokalne samouprave, *Zbornik radova Pravnog fakulteta u Nišu*, 62, p. 360-361

3 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, nos. 98/2006 and 115/2021

4 Law on Police, *Official Gazette of the Republic of Serbia*, nos. 6/2016, 24/2018, and 87/2018

5 Law on Civil Servants, *Official Gazette of the Republic of Serbia*, nos. 79/2005, 81/2005 (corr.), 83/2005 (corr.), 64/2007, 67/2007 (corr.), 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020, 142/2022, 13/2025 (CC decision), and 19/2025.

6 Labour Law, *Official Gazette of the Republic of Serbia*, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 (CC decision), 113/2017, and 95/2018 (authentic interpretation).

7 Vukašinović Radojičić, Z. (2006). Pravni položaj policijskih službenika i profesionalizacija policije, *NBP. Nauka, bezbednost, policija*, 11(3), p. 103-104

8 Petrović, A. *op. cit.*, p. 111

9 more in: Barun, I. (2011). MOR i sloboda sindikalnog udruživanja; U: *Tematski zbornik radova*

Core conventions of the International Labour Organization (ILO), particularly Convention No. 87 on Freedom of Association and Protection of the Right to Organize and Convention No. 98 on the Right to Organize and Collective Bargaining, explicitly delegate to member states the discretion to determine the extent to which these rights will apply to members of the police and armed forces. This delegation allows for the establishment of special legal regimes for employees in the security sector, including the possibility of fully excluding the right to strike. In response to the need for further clarification of the legal status of public servants, including police officers, the ILO adopted Convention No. 151 on Labour Relations in the Public Service in 1978. While this convention aims to extend labor rights, including collective bargaining, to public administration employees, it nonetheless permits states to determine the degree to which these guarantees will apply to high-ranking officials, those in confidential posts, and members of the police and armed forces. This approach reflects the recognized specificity of police functions under international law. A similar rationale is found in Article 31 of the European Social Charter, which allows for the restriction of the right to strike when necessary in a democratic society for the protection of the rights and freedoms of others, the public interest, national security, public health, or morals. This provision is particularly relevant to those employed in institutions that exercise state authority or whose activities directly affect public safety—such as the police. Furthermore, ILO instruments differentiate between public servants who exercise public authority and those engaged in technical or auxiliary functions. While the former—such as police officers—fall under national regulatory discretion regarding the right to strike and freedom of association, the latter category benefits from broader international legal protections, nearly equivalent to those granted to workers in the private sector.¹⁰

LEGAL FRAMEWORK GOVERNING THE RIGHT TO STRIKE IN THE REPUBLIC OF SERBIA

Throughout the historical development of state systems and labor relations, trade union organization has undergone numerous transformations reflecting broader social, political, and economic changes. From its initial forms during the early phases of industrialization to the modern era, workers have sought to unite and act collectively to defend their economic and social rights. In this context, collective labor law stands out as a fundamental pillar of the legal system regulating relations between employees and employers at the group level rather than individually.¹¹

The primary aim of collective labor law is to promote and protect the shared interests of employees through mechanisms such as collective bargaining, the conclusion of collective agreements, social dialogue, and, as a last resort, the right to strike. The strike, as the most powerful tool of labor struggle, serves as an expression of workers' ultimate dissatisfaction and a means of exerting pressure when peaceful resolution of labor disputes has failed.

However, the right to strike is not universally applicable to all categories of workers to the same extent. A particular challenge in regulating this right lies in its application

Pravnog fakulteta u Nišu „Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru“; Knjiga prva, p. 629-642.

¹⁰ Vučetić, D., Barun, I. (2012). *op. cit.*, p. 362

¹¹ more in: Galić, M. B., Raonić, G. R. (2024). Razvoj sindikalnog organizovanja kao istorijske tekovine i ustavom zagaranovanog prava. *Strani pravni život - Institut za uporedno pravo*, 2, p. 239-252

to employees within the security sector, especially police officers. In accordance with constitutional and legal provisions, the Republic of Serbia restricts the exercise of this right for members of the Ministry of Internal Affairs.¹²

The right to strike is guaranteed to all citizens of the Republic of Serbia by Article 61 of the Constitution, which stipulates that employees have the right to strike, in accordance with the law and the collective agreement. Also, the same article stipulates that the right to strike can be limited only by law, according to the nature or type of activity.¹³ The Law on Strike of the Republic of Serbia, regulates the conditions and procedures for organizing strikes as a means to protect the professional, economic, and social rights of employees. According to Article 1, the law governs how workers can collectively stop work to pursue their demands.

Article 2 emphasizes that employees have the freedom to decide whether to participate in a strike, and employers are prohibited from obstructing strike organization or participation, or from coercing workers. Strikes may be organized at the enterprise, sectoral, or regional level, including warning strikes (Article 3). Articles 4 and 5 require that the decision to strike be made by union bodies or a majority of employees, and that employers and relevant authorities be notified within prescribed deadlines. The law also sets limitations to protect public safety and ensure that non-striking employees can continue working (Article 9). Hiring replacement workers is prohibited except in urgent cases. Article 18 provides for disciplinary measures against those who organize strikes endangering safety or others' rights.

Labor inspectors are authorized to postpone enforcement of disciplinary measures against striking workers pending final court decisions (Article 22). Non-compliance with procedural requirements may result in fines for trade unions (Article 24). Overall, the legal framework strives to balance workers' right to strike with the need to maintain public order and the functioning of essential societal services.¹⁴

Police officers constitute a unique category of public civil servants due to the critical nature of their duties. As guardians of public interest, they perform indispensable roles such as maintaining public order and safety, enforcing the rule of law, protecting fundamental human rights and freedoms, preventing and investigating crime, and providing essential assistance to citizens, state bodies, and non-governmental organizations. The efficiency and professionalism of police work significantly depend on the officers' expertise, skills, and commitment. Consequently, the development of a professional, impartial, and politically neutral police force hinges on well-trained and motivated personnel.¹⁵ Given this distinctive role, the legal framework governing the rights and obligations of police officers, including their right to strike, differs significantly from that applicable to other employees.

12 Škorić, S., Čičovački, T. (2024). Pravo na štrajk kao kolektivno pravo zaposlenih, *XXI međunarodni naučni skup „Pravnički dani - Prof. dr Slavko Carić“, Odgovori pravne nauke na izazove savremenog društva*, p. 71-81

13 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, nos. 98/2006 and 115/2021.

14 Law on Strike, *Official Gazette of the Republic of Serbia*, Nos. 101/2005 and 103/2012.

15 Vukašinović Radojičić, Z. *op. cit.*, p. 103-104

LEGAL FRAMEWORK GOVERNING THE RIGHT TO STRIKE OF POLICE OFFICERS IN THE REPUBLIC OF SERBIA

The essential public safety functions entrusted to the police justify certain restrictions on their ability to engage in collective industrial action, such as strikes, to ensure that critical public services are not disrupted. Therefore, while police officers retain fundamental labor rights, including the right to organize, their right to strike is often limited or regulated by specific legal provisions reflecting the need to balance individual labor rights with broader societal interests. The right to strike for police officers is carefully circumscribed to maintain the delicate equilibrium between upholding democratic freedoms and safeguarding public order and safety.

The Law on Police serves as the principal legal instrument regulating the status of police officers. It explicitly forbids them from striking due to the unique nature of policing, its critical role in maintaining constitutional order, public safety, and the protection of citizens. Police personnel employed by the Ministry are entitled to strike in accordance with the law and collective agreement, and they may freely decide whether to participate. However, they are explicitly prohibited from striking under the following circumstances: during a state of war, emergency, crisis, or heightened risk; in the event of violent threats to Serbia's constitutional order; when a natural disaster or imminent danger thereof is declared in two or more police districts or across the nation; in case of other disasters or accidents that disrupt normal life and threaten public health or property; if their position precludes maintaining a minimum level of operations.¹⁶

Positions incapable of preserving minimum operations are designated by the Minister. Personnel—except those covered by point 2—may initiate a strike only if minimum operational levels, essential for public safety or vital services, are ensured. At least ten days prior to strike commencement, unit leaders must designate the employees responsible for maintaining at least 60% operational capacity. A “warning strike” must be announced at least five days in advance, while a formal strike notice is required not less than fifteen days before the planned start. The strike notice must include the strike committee's plan for maintaining minimum service levels, employee demands, the strike's start time, location, and representatives' details. During the strike, ministry officials and the strike committee are obliged to engage in negotiations aimed at peaceful dispute resolution, based on mutual trust and respect for economic and social interests. Strikes that involve public gatherings must comply with laws regulating public assemblies. Additionally, during a strike, participating police officers are not permitted to carry weapons or other coercive tools.¹⁷

In the legal system of the Republic of Serbia, subsidiary application is granted to the Law on Civil Servants and the Labour Law. When the Law on Police does not contain specific provisions governing certain aspects of employment relations, legal norms established by the Law on Civil Servants come into effect. This law also recognizes the possibility of differentiating rights and duties among employees in various public bodies, depending on the unique character of their functions and the nature of their official responsibilities.

In cases where neither the Law on Police nor the Law on Civil Servants provides explicit regulation, general labor norms contained in the Labour Law are applied. The Labour

16 Law on Police, *Official Gazette of the Republic of Serbia*, nos. 6/2016, 24/2018, and 87/2018.

17 Law on Police, *Official Gazette of the Republic of Serbia*, nos. 6/2016, 24/2018, and 87/2018.

Law, as a general legal act governing labor relations, establishes foundational principles for employment, thus serving as a legal safety net in the absence of more specialized regulation. Within the framework of collective labor law, police officers in Republic Serbia are entitled to freedom of association and collective bargaining, which allows them to organize into unions and negotiate working conditions. However, they are explicitly denied the right to strike. This restriction is based on the rationale that any interruption in the functioning of the Ministry of Internal Affairs could result in severe disruptions to public administration and could pose a threat to public safety and order.

Under Serbian law, the Labour Law provides comprehensive protections and guidelines for trade union activity. Article 206 guarantees workers the right to organize and operate within trade unions freely, without requiring prior approval. This freedom is formalized once a union registers in the official trade union registry, ensuring legal recognition and protection for its activities. While Article 215 primarily addresses general requirements for union activity, it leads directly into the definitions of union representativeness found in Article 218. They protect the right to organize and form unions (Art. 206), define legal recognition criteria, and ensure unions truly represent their members (Art. 218).¹⁸

While police officers in Republic Serbia cannot strike under the Law on Police, they remain fully entitled to unionize and engage in collective bargaining, in line with the Labour Law. This dual structure safeguards democratic labor freedoms while maintaining essential public service continuity and security. According to Article 4, Paragraph 2 of the Serbian Law on Civil Servants, the Special Collective Agreement is negotiated between the Government and representative trade unions established within the territory of the Republic of Serbia.¹⁹ For police officers, this provision is implemented through the *Special Collective Agreement for Police Officers*, which has been in effect since 2021.

SPECIAL COLLECTIVE AGREEMENT FOR POLICE OFFICERS IN REPUBLIC OF SERBIA

The Special Collective Agreement for Police Officers governs the working conditions, rights, and duties of police personnel in Republic Serbia. Its provisions are structured to address the unique responsibilities of policing, while ensuring formal mechanisms of dialogue, agreement, and dispute resolution. The Special Collective Agreement for Police Officers is a highly structured, legally binding framework that:

- Enables regular dialogue and mutual oversight (through commissions),
- Permits tailored, case-specific accords to enhance union-state cooperation,
- Provides formal processes for amending and terminating the agreement,
- Ensures continuity and clarity via transition provisions.²⁰

18 Labour Law, *Official Gazette of the Republic of Serbia*, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 (CC decision), 113/2017, and 95/2018 (authentic interpretation).

19 Law on Civil Servants, *Official Gazette of the Republic of Serbia*, nos. 79/2005, 81/2005 (corr.), 83/2005 (corr.), 64/2007, 67/2007 (corr.), 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020, 142/2022, 13/2025 (CC decision), and 19/2025.

20 *Special Collective Agreement for Police Officers*, *Official Gazette of the Republic of Serbia*, nos. 62/2019,

This agreement represents a sophisticated effort to balance security sector exigencies with progressive labor standards, reflecting both national priorities and compliance with international norms on collective labor rights. The *Special Collective Agreement for Police Officers* stands as a vital legal instrument that defines the framework of employment relations within Republic Serbia's internal security sector. By delineating the rights, obligations, and working conditions specific to police personnel, this agreement reflects the state's recognition of the distinct and demanding nature of police service. It not only establishes mechanisms for collective bargaining and institutional dialogue between the Ministry of Internal Affairs and representative trade unions but also ensures that police officers benefit from structured protections, despite restrictions on their right to strike.

Through its clear procedures for monitoring implementation, revising provisions, and resolving disputes, the agreement reinforces the principles of transparency, accountability, and mutual cooperation in labor relations. Furthermore, its alignment with broader legal and constitutional norms—as well as with international labor standards—demonstrates a balanced approach to upholding public security while respecting the socio-economic rights of those tasked with protecting it. Ultimately, the agreement exemplifies how tailored collective arrangements can coexist with national security imperatives, offering a model of labor governance within sensitive sectors of public administration.

REGULATION ON THE STRIKE OF POLICE OFFICERS

This regulation defines the specific procedures and organizational rules governing police officer strikes. It clarifies when and how strikes may be conducted within the Ministry of Internal Affairs. Regulation regarding the police officers' strike, it determines the following

- Article 2 – Legal Basis - The right to strike is grounded in constitutional and labor laws. However, because of the public security duties of the police, any industrial action must be carefully regulated to prevent disruptions to essential services.
- Article 5 – Strike Committee Formation - A designated strike committee leads the industrial action, representing the striking officers in negotiations and overseeing the implementation of operational safeguards during the strike.
- Article 7 – Operational Requirements - Officers involved in the strike cannot carry firearms or use coercive equipment. They are also prohibited from acting in ways that would compromise the safety of citizens or critical functions of the police.
- Article 8 – Legal Effectiveness - All measures prescribed by this regulation have binding legal force. If officers strike in violation of these rules, they may face disciplinary action or dismissal.²¹

This regulation establishes a structured and cautious approach to any form of industrial action by police officers. While recognizing their theoretical right to strike, it imposes stringent conditions—such as the formation of a strike committee, maintaining public safety, and the prohibition on carrying weapons—that underscore the priority of

62/2020 (Annex I), & 81/2021 (Annex II).

21 Regulation on the Strike of Police Officers, *Official Gazette of the Republic of Serbia*, no. 71/2007.

state security. Violations can lead to serious legal or disciplinary consequences. In effect, this regulation harmonizes the constitutional right to strike with the practical necessity of ensuring uninterrupted public order. This agreement specifically addresses the labor conditions, rights, and obligations of police personnel, tailoring its provisions to accommodate the unique nature of police duties and responsibilities. This specific legal arrangement in Republic of Serbia is aligned with relevant international labor standards, particularly the conventions of the ILO. Notably, ILO conventions permit member states to autonomously regulate the exercise of the right to strike within the security sector, including the police. The purpose of this protection is to realize the right to work as a specific human right that arises in connection with work.²² Thus, the national legislative framework aims to strike a balance between safeguarding the labor rights of public employees and preserving the fundamental interests of the state and society as a whole.

CONCLUSION

The right to strike is a fundamental component of labor rights in democratic societies, yet its application is not absolute—especially when it comes to public officials whose duties are tied to state security and public order. International legal standards, including those set by the ILO, recognize the unique nature of police work and thus permit member states to place reasonable limitations on the right to strike for police officers. This reflects the balance between protecting workers' rights and maintaining public safety and institutional stability. In the context of the Republic of Serbia, the legal framework governing the right to strike is well defined, comprising constitutional provisions, the Labour Law, the Law on Civil Servants, and most importantly, the Law on Police. These legal instruments establish a hierarchical regulatory structure in which police officers are explicitly excluded from the general right to strike due to the essential nature of their functions. Instead, alternative mechanisms such as collective bargaining, internal dialogue, and institutional dispute resolution are promoted as means of safeguarding their socio-economic interests. The Special Collective Agreement for Police Officers, along with the 2007 Regulation on the Strike of Police Officers, further refines the conditions under which strike-related actions may occur, delineating procedural requirements, responsibilities of organizing bodies, and strict limitations during states of emergency or crisis. These provisions ensure that while labor rights are acknowledged, they do not compromise the operational capacity of law enforcement agencies.

Republic of Serbia's approach aligns with international norms by affirming labor rights while preserving public security. It presents a pragmatic model of labor regulation in the security sector, where institutional stability and citizens' safety remain paramount.

22 more in: Vidojević B. (2021). Konvencije Međunarodne organizacije rada i njihova primena u nacionalnim zakonodavstvima, *Pravni stav*, br.1, Regionalno društvo pravnika „Šumadija“, p. 1-24



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PRAVO NA ŠTRAJK POLICIJSKIH SLUŽBENIKA

Apstrakt:

Rad se bavi složenim i kontroverznim pitanjem prava na štrajk policijskih službenika u savremenim pravnim sistemima. U fokusu su pravna ograničenja koja proističu iz specifične prirode policijske profesije i njenog značaja za očuvanje javnog reda, bezbednosti i funkcionisanja države. Autori analiziraju pravne okvire koji regulišu ovo pitanje u Republici Srbiji, ali i u odabranim komparativnim pravnim sistemima, uz osvrt na međunarodne standarde i preporuke, pre svega one koje donosi Međunarodna organizacija rada (MOR), Savet Evrope i Evropski sud za ljudska prava. Rad analizira razloge za i protiv priznavanja prava na štrajk policijskim službenicima, uključujući bezbednosne, etičke, profesionalne i političke dimenzije. Posebna pažnja posvećena je mogućim alternativnim mehanizmima za ostvarivanje radnih i socijalnih prava policijskih službenika, kao što su kolektivno pregovaranje, arbitraža i institucionalna zaštita putem sindikata. Cilj rada je da pruži uravnotežen i argumentovan doprinos stručnoj i akademskoj diskusiji o granicama i mogućnostima ostvarivanja prava na štrajk u sektoru bezbednosti, sa naglaskom na potrebe reformisanja i unapređenja zakonodavnog okvira u skladu sa demokratskim standardima i principima vladavine prava.

Ključne reči: štrajk, policijski službenici, radno pravo, sindikt, pregovaranje, zakonodavstvo

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II

INTERNATIONAL LAW AND THE CHALLENGES
OF CONTEMPORARY SOCIETY

UDC: 341.1/.8
DOI: 10.5937/PDSC25199E

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MODERN INTERNATIONAL LAW AND
THE RELEVANCE OF ITS RESEARCH

Abstract:

The pace of scientific discoveries and developments in international current affairs creates a pacing problem to which modern international law must deal with continuous adaptation. The growing and double-meaning influence of public international law on the national legal order and vice versa, leads to the idea of a global vision both in education and in legal research, with an emphasis on the relevance of comparison and transnationality. Without global standards of comparison, the current legal discourse cannot evolve in an autarchic manner, especially since the national legal order is also increasingly dependent on international norms and mechanisms. This paper is built on the way in which legal research must harmonise its methodology with this reality in a real and balanced way. Methodologically, attention is directed towards flexibility and adequacy to what society and legal education represent today.

Keywords: *relevance of legal research and legal education; methodological sustainability; international law; inter, multi and transdisciplinarity.*

INTRODUCTORY CONSIDERATIONS

The modern normative metamorphosis that characterises *the global legal order* is shaping a profoundly unstable epistemological framework, in which legal research faces the dual pressures of rapid updating and the preservation of a coherent methodological identity. In this plane dominated by interconnections, the constant trajectory of supranational

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normativity and the transgressive impact of technologies, the sustainability of legal research can no longer be conceived within traditional parameters. The present study proposes a reconfiguration of legal methodology through a multi- and transdisciplinary ecology of knowledge, in which law is increasingly *international* and acts not only as a vector of normative harmonisation, but also as a principle of epistemological structuring.

Firstly, what do we mean by the sustainability of legal research? Concretely, this concept is its capacity to remain relevant, methodologically coherent and epistemologically strong in the dynamics of norms, institutions and technologies, for continuity of critical reflection, conceptual updating and transformative impact on society and legal practice.¹

Both the global legal order that I mentioned at the outset and the international legal order must be understood in the most correct sense, since they do not represent a single positive system of law, nor a hierarchy of rules imposed at a global level. There is no 'global law' as the equivalent of a *lex universals*; therefore we will not understand the application of the current standards of national orders to a global legal order.² The proposed definition of the *global legal order* is that of a polycentric normative environment, composed of sources of public international law, transnational regulations and global governance mechanisms acting cumulatively, often without formal hierarchy, on the relations between state and non-state actors, in order to regulate phenomena of international relevance – a definition that remains valid today.

The perception of frivolity associated with the concept of 'global legal order' derives from the lack of a single source of legitimacy, from its polycentric and hybrid nature, which runs counter to the expectations of classical legal thinking oriented towards normative hierarchy and sovereign authority, from its rhetorical use in geopolitical discourses where the legal is often confused with the moral or strategic, and from academic approaches that treat the term in generalisations without rigorous theoretical grounding, creating the impression of a conceptual vacuum³. The term *global legal order* does not designate a planetary constitution, but rather a complex set of rules, mechanisms and practices governing transnational relations, including international agreements, international jurisprudence, soft law, technical standards, trade rules, as well as regulations on the environment, data and artificial intelligence, for example. The concept to which we refer reflects a polycentric legal space, in which multiple centres of normative power states, international organisations, transnational corporations, international NGOs and epistemic networks-generate rules with cross-border applicability⁴. We are witnessing the emergence of a different form of legality, composite and often informal, which does not correspond to the classical Kelsenian model, but is based instead on mutual recognition, normative

1 The characteristics under discussion have been brought into the literature since the 1990s, and are now becoming more acute. See Gibbons, Michael, Camille Limoges, Helga Nowotny, Simon Schwartzman, Peter Scott, and Martin Trow. *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies*. London: SAGE Publications, 1994. See generally Cotterrell and Roger. *Jurisprudence and Socio-Legal Studies: Intersecting Fields*. Routledge, 2024.

2 Rafael Domingo. 'The Global Legal Order.' Chapter. In *The New Global Law*, 121-53. ASIL Studies in International Legal Theory. Cambridge: Cambridge University Press, 2010.

3 See more in Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge: Cambridge University Press, 2021).

4 Ulrich Sieber, 'Legal Order in a Global World – The Development of a Fragmented System of National, International, and Private Norms,' *Max Planck Yearbook of United Nations Law Online* 5 (2001): 1-48, available at https://www.mpil.de/files/pdf3/mpunyb_01_sieber_14.pdf?utm, accessed 30 March 2024.

convergence and functional networks, such as the regulations issued by GAFAM⁵, ISO standards⁶, WHO standards⁷ or the Arctic Council.⁸

The current normative climate can be characterised by what might be termed *dynamic hyper-institutionalisation*, a phenomenon in which the production and modification of norms are no longer governed by stability, but by the accelerating pace of global change. Law, once seen as a stabilising system, is itself subject to a functional instability that erodes the traditional doctrinal capacity to predict and classify. In this new condition, the legal researcher can no longer be a mere interpreter of a relatively fixed corpus of rules, but must become an acrobat in the dense web of fluid, overlapping and interdependent rules. Here, of course, comes the appeal to William Twining, who warned against the ‘methodological provincialism’ of many legal approaches.

Methodological provincialism is a critical concept formulated by Twining, which denounces the tendency of scholars – particularly in Western legal traditions – to treat the methods, concepts and rules of their own national context as universally valid⁹. In other words, this is a narrow and self-referential view, which separatistly ignores the diversity of legal systems, normative pluralism and the complexity of international legal realities (be they cultural, religious, political, social, etc.). The solution proposed by Twining – the globalisation of legal education – implies a profound methodological reorientation: from the internal analysis of the norm to the transnational and comparative contextualisation of its meaning.

2. STUDY QUESTIONS, METHODS AND OBJECTIVE

Law systems that refuse to be absorbed into the habitus of globalisation proposed by Twining – by reorienting legal education towards transnational contextualisation – choose, instead, solutions of methodological resilience: either by doctrinal retreat, or by identity-based emphasis, normative regionalism or indigenous legal epistemologies, aimed at preserving the sovereignty of their own meaning and specificity of their own normative structure. Refusing *legal globalisation* is not without risks; it requires a coherent strategy of epistemic, methodological and institutional compensation. Otherwise, the preservation of

5 The acronym GAFAM stands for five of the most influential digital technology companies, often perceived as informal global regulatory power players: Google – part of Alphabet Inc., Apple Inc., Facebook Inc. – officially renamed Meta Platforms, Inc. (from October 2021), Amazon.com, Inc. and Microsoft Corporation.

6 ISO stands for: International Organisation for Standardisation, an independent, non-governmental international organisation based in Geneva, Switzerland, which develops and publishes international standards in a wide range of fields, from quality management (e.g. ISO 9001) to information security (e.g. ISO/IEC 27,001).

7 WHO is short for: World Health Organisation/World Health Organization (WHO), a specialised agency of the United Nations with a normative role in global health? WHO issues international guidelines, protocols and standards on health safety, disease prevention, immunisation, pandemics and international health regulations (International Health Regulations – IHR 2005).

8 The Arctic Council/Conseil de l’Arctique is a regional intergovernmental forum founded by the 1996 Ottawa Declaration, composed of Arctic states and organisations representing indigenous peoples. Although non-legislative, it issues guidelines, agreements and best practices on sustainable development, climate change and environmental security in the Arctic region.

9 ‘Much legal theory, especially that based on Western liberal traditions, suffers from a kind of methodological provincialism – assuming that what holds for one legal culture holds true globally.’ Twining, William. **Globalisation and Legal Theory**. London: Butterworths, 2000.

legal sovereignty becomes a costly, sometimes dangerous, endeavour, as it loses touch with international reality and the dynamics of living law. Modern societies are heterogeneous, with a mobile and digitised population. The refusal to integrate global influences is bound to lead to ruptures between law and society, between citizens' expectations and normative conservatism, with the risk of crises of democratic legitimacy and challenges to the authority of the rule. The term 'living law' ('droit vivant' in French, 'droit vivant' in English, 'droit viviente' in Spanish) has a doctrinal and philosophical origin and is associated with schools of legal thought that emphasise the law as actually applied in society, as opposed to written, abstract or formal law. The concept appears in several legal traditions, but can be traced in particular in the works of thinkers such as Eugen Ehrlich, an Austrian jurist with Romanian roots in the Austro-Hungarian area, one of the founders of the sociology of law.¹⁰

In the absence of a legal education open to methodological pluralism, professional training becomes dogmatic, provincial and irrelevant in international contexts, leading to the marginalisation of graduates and universities in international rankings. We add here that an autarkic system may favour rigid formalism and hyper-legalism, with no correlation with social or economic reality. The adaptive functionality of rules is lost and another risk arises: that of administrative inefficiency and conflict between rules and social practices. We live in a competitive society, and isolation translates into a fear of competition. Closed systems of law become unpredictable for investors, corporations and international bodies in the absence of harmonisation with international standards (e.g. data protection, ESG, commercial law). Further, the refusal to integrate international standards (human rights, climate governance, UN norms, etc.) weakens compatibility with international law, affecting diplomatic and trade relations (legal downgrading and straining international relations). Finally, the avoidance of international contextualisation makes systems self-referential, with no capacity to adapt to mutations, which is unacceptable.

Today's legal order is developing at a global level characterised by an unprecedented regulatory hyperproduction, fuelled by the systemic interdependencies generated by what we call 'globalisation', the fragmentation and multiplication of centres of power and the continuous acceleration of digital transformations. The difficulty lies in the mismatch between the rapid proliferation of new normative configurations and the conservative pace of legal research. In other words, the main problem is shaped and fuelled by the tension between the rapid pace of normative reconfiguration and the *methodological inertia* of legal research.

Law, subject to an intense pace of reformulation, is no longer evolving in a predictable or linear space, but in a fluid normative ecology, marked by overlaps, reconfigurations and multiple emergences, in which the classic distinctions between domestic and international, public and private, legal and technological are becoming increasingly permeable. Contemporary crises can no longer be dealt with legally in autonomous national registers, but require a legal response that is as unified, transnational and adaptable as possible, capable of keeping pace with the variety and instability of today's world¹¹. The rupture between the subject of legal research and its methodological tools

10 Eugen Ehrlich (1862-1922), in his *Grundlegung der Soziologie des Rechts* (1913), argued that "the centre of gravity of the development of law is not to be found in legislation or jurisprudence, but in society itself". In the case law of the European Court of Human Rights, the expression "The Convention is a living instrument" refers to the evolving interpretation, adaptable to social change – an institutionalised version of 'living law'. At the same time, in Latin American constitutional law, particularly in Colombia and Argentina, 'derecho viviente' is used to describe the interpretation of rules in the light of their constant application by the courts and society.

11 The central problem is the increasingly evident dissonance between the accelerated speed of normative

is producing visible effects: difficulties of anticipation, weakening of the social relevance of research, epistemic isolation and an inability to make a real contribution to modelling viable legal solutions to crises.¹²

Faced with these problems, the fundamental objective of this study is to propose a reconceptualisation of legal research through an articulated transdisciplinary methodology, which would allow overcoming traditional methodological limits and favour genuine epistemological sustainability. The proposed vision involves the decentralised coordination of the legal, sociological, technological and philosophical dimensions within a flexible but coherent and capable methodological framework, without compromising scientific rigour. Legal transdisciplinarity is not conceived here as a mere thematic extension, but as a change in the style of rationality – a way of thinking of law as a living science, embedded in a universe of meanings in constant (re)negotiation.

Consideration of the concepts of *legal consciousness*, *global legal pluralism*, *epistemic communities* and *inter-legalities* would support the reconfiguration of contemporary legal research¹³. Legal consciousness, which fine registers through which individuals perceive, negotiate and internalise the norm, reveals that law is not only written, but lived. And when this consciousness manifests itself in a world of global legal pluralism – where state jurisdictions, transnational norms, informal rules and supranational regimes coexist and collaborate – the mere interpretation of the norm becomes a veritable epistemic exercise. Some differences need to be clarified. For example, international legal pluralism is not synonymous with global legal pluralism, as it is frequently used in the literature focussing on the fragmentation of the international legal order, ‘régimes spécialisés’ and conflicts between international sources, whereas global legal pluralism is broader in scope and evokes the idea of the intersection between national, international, regional, religious, indigenous and transnational legal orders. It is in this laboratory that international agendas are shaped, political decision-making is (or would be more likely to be) influenced, and the cognitive infrastructure of transnational regulation exists. Complementarily, the theory of interlegalities (poetically and profoundly formulated by Boaventura de Sousa Santos) teaches us that between ‘big’ and ‘small’ rights, between formal and informal legalities, there is a dynamic of overlap, hybridisation and sometimes bottom-up normative creation.¹⁴

In legal doctrine, the terms ‘big rights’ and ‘small rights’ are used to distinguish between essential fundamental rights, with a high degree of constitutional protection and international protection, and rights of more limited or procedural legal value. ‘Big rights’ refer to fundamental freedoms such as the right to life, freedom of expression, freedom of religion or the prohibition of torture or the death penalty – rights considered indispensable

change – imposed by international dynamics – and the methodological inertia that we have signalled above, still anchored, in many cases, in a doctrinaire paradigm of positivist inspiration.

12 Basil Ugochukwu, in the article ‘From Reaction to Agency: A “Subaltern” Response to William Twining’s Globalisation and Legal Scholarship’, explores how Twining’s theories contain opportunities for marginalised legal systems to assert their relevance in the development of global legal theory. See Ugochukwu, Basil. 2013. ‘From Reaction to Agency: A “Subaltern” Response to William Twining’s *Globalisation and Legal Scholarship*’. *Transnational Legal Theory* 4 (4): 549–65. doi:10.5235/20414005.4.4.549.

13 Haas, Peter M. ‘Introduction: Epistemic Communities and International Policy Coordination.’ *International Organisation* 46, no. 1 (1992): 1–35. <http://www.jstor.org/stable/2706951>. Also see Berman and Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge : Cambridge University Press, 2012.

14 Santos, Boaventura de Sousa. ‘Law: A Map of Misreading. Towards a Postmodern Conception of Law.’ *Journal of Law and Society* 14, no. 3 (1987): 279–302.

to human dignity and democratic order. In contrast, 'small rights' include prerogatives such as the right to petition, access to public information or the right to a healthy environment (in legal orders where this does not have fundamental status), which, while important, can be more easily restricted by the state and require legislative transposition¹⁵. Although the distinction is not formalised in all legal systems, it is useful in analysing proportionality and the prioritisation of rights protection in constitutional and international jurisprudence¹⁶. Through these examples we demonstrate how legal scholarship today – if it is to remain relevant – is invited not only to observe, but to listen to these multiple, different voices and to cultivate an open, polyphonic and creatively adaptive methodology.

4. SOME OBSERVATIONS ON MODERN PUBLIC INTERNATIONAL LAW

Amid the dominance of systemic turbulence and the intensity of new technologies, environmental and geopolitical conflicts, public international law can no longer be perceived as a marginal branch of the international legal order. Beyond the traditional normative plane, we can see how it is taking shape today as a relevant methodological benchmark, an indispensable epistemological matrix in the articulation of legal research capable of operating in an environment marked by fragmentation, volatility and interdependence.¹⁷

Its reconfigurative function becomes evident in relation to new normative territories (mentioned in the introductory part), such as the regulation of artificial intelligence, genetics, the cybernetic legal order or climate change. In overcoming the isolation of national legal systems, we must follow the thread of transversal legal mapping, in which international norms operate as points of convergence, but also as vectors for recalibrating methodologies.

International law thus asserts itself not only as a normative corpus, but as a polyphonic methodological infrastructure in which dialogue between state actors, international organisations, technological entities and international civil society produces new forms of legality. This is a constitutive interlegality, in the sense formulated by Boaventura de Sousa Santos, in which legal pluralism is not an anomaly, but the very expression of global normative complexity. In this logical, legal research is called upon to overcome its doctrinal limitations and to rethink its tools in a transdisciplinary register. Thematic fragmentation – often accompanied by excessive specialisation – risks leading to epistemic exhaustion through an inability to see the multiple meanings of the global legal phenomenon. Only through a methodological compatibility between the doctrinal, empirical and technological dimensions can truly relevant legal research be sustained, capable of contributing to the architecture of future normative solutions. This is a requirement that implies a re-dimensioning of the way we understand the structure of normative authority: it is no longer enough to operate with pyramidal models of law; we must learn

15 Jiaqi, Li. 2025. 'A Study on Proportionality.' *International Journal of Social Science Research and Review* 8 (1), 218-32. <https://doi.org/10.47814/ijssrr.v8i1.2489>. <https://doi.org/10.47814/ijssrr.v8i1.2489>.

16 The concept of '**big rights**' and '**small rights**' has no **single, formalised origin** or canonical author who has explicitly and systematically enshrined it under this heading. Rather, it is a **rhetorical and analytical formula** used in contemporary doctrine, particularly in the context of **the proportionality test, the balancing of rights** and the **analysis of priorities in constitutional jurisprudence**.

17 Golder, Ben. 2023. 'International Law and the Politics of Genealogy: International Law and the Politics of History, by Anne Orford, Cambridge, Cambridge University Press, 2021, 382p., £22.99, (Paperback), ISBN: 9,781,108,703,628.' *Global Intellectual History* 9 (6): 745-59. doi:10.1080/23801883.2023.2023.218388881.

to think in terms of normative networks that are as compatible as possible, in which public international law functions as the central, though not exclusive, epistemological node.¹⁸

5. METHODOLOGICAL SHORTCOMINGS FROM DISCIPLINARITY TO TRANSDISCIPLINARITY

The problem of the sustainability of legal research in the face of this normative dynamic is not only one of content, but of method. Traditional legal methodology – centred on doctrinal analysis, jurisprudential interpretation and comparative analysis – risks becoming insufficient if it is not recalibrated through a cumulative consideration of the sociological, technological and philosophical dimensions of law. Here transdisciplinarity becomes not an option but a necessity. It is not a question of mere interdisciplinarity between law and the social sciences or technology, but of a methodological transcendence of epistemic boundaries, whereby legal research becomes truly capable of interrogating widely varied realities in a common language (at least to a sufficient degree) with other fields of knowledge. We reiterate that the meaning of methodological compatibility does not mean the abandonment of legal rigour, but the ability to re-envision it within a broader cognitive construction, by virtue of the sustainability of legal research.

Transdisciplinarity, a concept promoted by the physicist and philosopher Basarab Nicolescu, proposes overcoming disciplinary boundaries by knowledge beyond traditional fields. It is based on three fundamental pillars: the levels of reality, the logic of the included third party and complexity¹⁹. Levels of reality recognise the existence of multiple layers of reality, each with its own laws and rules, allowing a higher level of knowledge. The logic of the included third, unlike classical binary logic, accepts the coexistence of seemingly contradictory elements, facilitating reconciliation and the use of unlimited and different perspectives. Complexity emphasises the deep relationships between the elements of a system, requiring a comprehensive exploration that simultaneously embraces its multiple dimensions and their dynamics. Presumably, if these three pillars were applied, especially in the maintenance of international peace and security, we would be able to find better legal solutions to reconcile tensions.

The application of transdisciplinarity in the legal field is long overdue because it allows the normative to be articulated with modern realities. For example, in the field of cryptocurrency regulation, a transdisciplinary vision is not limited to the normative exegesis of the financial framework, but requires a microscopic deciphering of the economic configurations, the technological substrate and the sociological reverberations of these digital entities with a still oscillating legal status²⁰. Similarly, when we look at algorithmic justice, classical legal hermeneutics are not enough; a comprehensive approach is imperative, one that brings together the epistemology of computer science, the demands of applied ethics and the sensitivity of normative sociology to create the coherent and adaptable legal edifice we need.

18 See Koskeniemi, Martti. **To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870**. Cambridge: Cambridge University Press, 2021. <https://doi.org/10.1017/9781139019774>. <https://doi.org/10.1017/9781139019774>.

19 Nicolescu, Basarab. «Transdisciplinaritatea: Manifest.» **Curtea Veche Publishing**, 2018.

20 See Urquhart, Andrew, and Larisa Yarovaya. 2023. 'Cryptocurrency Research: Future Directions.' *The European Journal of Finance* 30 (16): 1849–54. doi:10.1080/1351847X.2023.2284186. Also see Ciaian, Pavel, Andrej Cupak, Pirmin Fessler, and d'Artis Kancs. 2024. 'Environmental and Social Attitudes and Investments in Crypto-Assets.' *Applied Economics* 56 (60): 9060–80. doi:10.1080/00036846.2023.2297742.

Man's specific, fundamental tendency to knowledge manifests itself in two directions: on the one hand, 'search' and 'discovery', and on the other hand, 'taking possession' and a 'utilisation-transformation' of the world and of one's own being, according to one's desires and aspirations. Constantin Rădulescu-Motru, a profound thinker of the Romanian space, emphasised that 'science is an attitude that is produced individually and maintained with great sacrifices'²¹, stressing that the act of scientific knowledge is not only a collective process but also a personal journey, marked by sustained efforts and renunciations. Although each discipline retains its specificity, transdisciplinary dialogue allows deeper access into the multitude of realities in which man lives. As a consequence, the search for answers to fundamental questions such as 'what?', 'why?' The concept of paradigm is pivotal in this endeavour, although we have heard it used many times lately in the most diverse contexts. A paradigm (as a methodological horizon) not only stabilises scientific knowledge, but also prepares a normative ground that guides researchers in exploring fields of study, whether multidisciplinary or transdisciplinary. Transdisciplinarity is distinguished from pluridisciplinarity and interdisciplinarity by its precise aim: to perceive the contemporary world through a multi-level view of specific issues, consciously crossing traditional disciplinary boundaries, seeking answers to questions that lie between, across and beyond disciplines.

All sciences go through periods of crisis, which generate new currents of thought and research. Thomas Kuhn explains the transition from one framework of scientific thinking to another by identifying anomalies that cannot be explained within the existing way of organising knowledge, specifically, a paradigm shift, which usually incorporates the previous paradigm by integrating new observations²². In this way, a common vision and a common language for researchers are shaped, allowing a more adequate description of the observed reality, so necessary for the path of the legal phenomenon towards the norm.

Therefore, the assumption of a transdisciplinary methodology is not equivalent to renouncing legal rigour, nor to solidifying the role of law as a science, but to repositioning it within an enlarged cognitive horizon, capable of encompassing the simultaneity of the registers of knowledge²³. Such a methodological openness provides the legal researcher not only with the necessary tools to safely traverse the contemporary normative landscape, but also with the possibility of building creative, adapted and sustainable responses in the post-digital world.

6. CONTINUOUS UPDATING, NECESSITY AND EPISTEMOLOGICAL IDENTITY CRISIS

In practice, the constant updating of information and research tools is a pressure which generates an insidious phenomenon: the identity crisis of the legal researcher, caught between the demands of the present and the classical landmarks of his training. Thematic fragmentation, extreme specialisation and the hyper-production of rules often

21 Rădulescu-Motru, Constantin. **Science and Energy**. București: Carol Göbl Institute of Graphic Arts, 1902.

22 Kuhn, Thomas S. **The Structure of Scientific Revolutions**. Chicago: University of Chicago Press, 1962.

23 Ristea, Ana-Lucia, Valeriu Ioan-Franc, and Constanța Popescu. **Metodică în cercetare științifică: Repere metodologice și didactice pentru formare cercetătorilor**. 2nd ed. București: Editura Expert, 2017.

lead to an analytical isolation that sabotages the overall perspective. This is where the sustainability of legal research comes into play, which must be thought of as a balance between dynamism and coherence: the ability to adopt new normative realities rapidly without compromising methodological consistency²⁴. This requires not only expertise but also continuous training – a genuine pedagogy of legal research in which content and form become complementary.

Today's legal researcher is at the crossroads between the imperatives of adapting to new normative realities and fidelity to the traditional theoretical foundations of the discipline, a duality that creates the tension at the heart of which the sustainability of legal research needs to be reconceptualised. For a beginning researcher, this can be an impossibility because the gateways out are in-depth expertise and continuous training, without which we cannot discuss the development of a pedagogy of legal research capable of harmonising content and form in a complimentary way. It must deconstruct and reconstruct, far from being merely an executor of codes. Legal rules are shaped by artificial intelligence, algorithmic platforms, climatic conflicts and structural migrations, so to reduce the training of jurists to the letter of the law is to expose them to normative illiteracy in the face of new normative powers. On the contrary, to train them transdisciplinarily is to anchor them in an ethos of discernment and critical courage. In fact, the tension between the need for constant updating and the maintenance of a coherent epistemological identity emphasises the importance of pedagogical reform in legal education.

Only in this way is there a real chance of training researchers who are able to adapt smoothly to changes in legislation and case law, while at the same time maintaining a solid anchoring in the theoretical principles of law. Alongside continuing education, participation in epistemic networks and academic mobility are becoming basic tools for cultivating a mindset of growth and adaptability among legal professionals.²⁵

In conclusion, continuous updating in legal research should not be perceived as a threat to epistemological identity, but as an opportunity for enrichment, its evolution and the harmonious blending of innovation with tradition, which eliminates the risk of volatility in the legal sciences.

7. THE PLACE OR NOT OF TRANSDISCIPLINARITY IN LEGAL PEDAGOGY

Legal pedagogy has evolved from traditional forms of instruction towards increasingly reflective and interdisciplinary models. In medieval European universities, law was taught as a discipline in its own right, separate from the liberal arts, but in parallel

24 Oranburg, Seth C. 'Advanced Online Continuing Legal Education: How to Leverage Technology-Mediated Education for Lawyers' Lifelong Learning.' *Journal of Legal Education* 72, no. 3 & 4 (2024): 555. Article available here: <https://jle.aals.org/cgi/viewcontent.cgi?article=1805&context=home>, accessed 25.02.2025. for a comparative view see Kelly, Orla, Peta White, Fabrizio Butera, Fabrizio Butera, Sam Illingworth, Pim Martens, Maud Huynen, Susan Bailey, Geertje Schuitema, and Sian Cowman. 'A Transdisciplinary Model for Teaching and Learning for Sustainability Science in a Rapidly Warming World.' *Sustainability Science* 18, no. 6 (2023): 2707–2722. <https://doi.org/10.1007/s11625-023-01407-z>. <https://doi.org/10.1007/s11625-023-01407-z>.

25 'The Case for Lifelong Learning to Advance and Extend a Legal Career' *Federal Bar Association*, June 2024. Blog post available here: <https://www.fedbar.org/blog/the-case-for-lifelong-learning-to-advance-and-extend-a-legal-career/>, accessed 25.02.2025. The example is welcome from the practitioner's perspective, counterbalancing research and practice.

the practical apprenticeship model (particularly in the Anglo-American tradition) has long survived²⁶. This dichotomy between practical and theoretical training has marked the history of legal education, with legal education always having to reconcile the practical demands of the profession with the academic, science-orientated approach.

The 19th century brought the institutionalisation of modern university legal studies (e.g. the *case method* introduced by Langdell at Harvard) and the standardisation of the curriculum in post-Napoleonic European law schools. Even within these formalised rules, the teaching of law remained largely *doctrinal* – focussed on learning the legal rules themselves – with little emphasis on the social context or other related areas.

In the second half of the twentieth century, academic movements such as *critical legal studies* and socio-legal research began to challenge the strict positivist interpretive discourse. These currents paved the way for a more interdisciplinary formulation of legal education, combining law with social sciences, economics, philosophy or cultural studies. Such critical perspectives demonstrated the first models of *transdisciplinary* legal pedagogy, transcending the conventional boundaries of law²⁷. The intersection of sociological analysis and critical theory in the study of law has revealed how legal norms are closely linked to power structures and historical contexts, broadening the horizons of future legal scholarship. Through these developments, legal pedagogy has gradually shifted from pure doctrinal memorisation to training oriented towards critical thinking and awareness of the role of law in society, paving the way for today's transdisciplinary approaches.

7.1. Comparisons of International Pedagogical Models

Contemporary reforms in law teaching emphasise transdisciplinarity in various legal systems around the world. I will examine three models below – France, Canada and Brazil – highlighting local particularities and convergence towards a legal pedagogy geared towards the integration of knowledge beyond the boundaries of law, but to its great benefit.

France

In France, the tradition of law faculties has long been marked by strict specialisation and autonomy from other disciplines. For example, until 1968, law and economics were taught together, after which economics was completely separated from law²⁸. Attempts to include courses from other fields (history, political science, accountancy, etc.) existed towards the end of the 20th century, but these remained fragmented, without creating organic links between extralegal knowledge and legal training. Undergraduate legal studies have thus proved reluctant to provide genuinely transdisciplinary training, and have had major difficulties in overcoming traditional disciplinary compartmentalisation.

26 Gibson, R. Dale. 'Legal Education – Past and Future.' *Manitoba Law Journal* 6, no. 1 (1974): 21. 1974 CanLII Docs 49. <https://canlii.ca/t/swmd> (accessed 1 April 2025).

27 Adebisi, Foluke. 'Should We Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy.' *Amicus Curiae*, Series 2, vol. 2, no. 3 (2021): 428–449.

28 Lamarche, Marie, and Sébastien Tournaux, « Pourquoi, comment un enseignement transdisciplinaire ? Et demain... » In *Les méthodes d'enseignement à la Clinique du droit de l'université de Bordeaux*, edited by Marie Lamarche and Sébastien Tournaux, 323–344. Pessac : Presses universitaires de Bordeaux, coll. V@demecum 2, 2024. Accessed 13 December 2024. <https://una-editions.fr/pourquoi-comment-un-enseignement-transdisciplinaire>. <https://una-editions.fr/pourquoi-comment-un-enseignement-transdisciplinaire>. DOI: 10.46608/vademecum2.9791030010732.11.

A turning point in French legal pedagogy in recent decades has been the introduction of the legal clinic (*enseignement clinique*). This type of programme, based on solving real cases in the community, has proved to be a favourable environment for transdisciplinarity. Confronted with authentic situations – complex and international – students discover that legal problems cannot be isolated from their social, economic, medical or psychological dimensions. For example, in a clinical project on the regulation of organ removal, students realised that they could not master the legal framework without familiarising themselves with elements of medicine and bioethics²⁹. Thus international biological law developed. Through *clinical education* there is a valuable opportunity to approach cases in a transdisciplinary way, using knowledge from several fields which, in fact, shows future lawyers the limits of law: not every social problem is best solved by legal instruments, and sometimes solutions are a matter of public policy, mediation, social work or other interventions or strategies. Legal methodology cannot be limited. Transdisciplinarity in this context teaches students ‘to learn to know, to do, to live together and to be’ – as the Centre International de Recherches et Études Transdisciplinaires defines it (in its foundational texts) – training them as well-rounded professionals, able to collaborate with experts from other fields. The contemporary French model, through its openness to interdisciplinarity (notably via legal clinics and dual specialisation programmes), thus reflects an effort to adapt the training of lawyers to what we call the complexity of today’s world and to go beyond the old *separate law tube*.

Canada

If we were to follow a Canadian model of legal education, we could not fail to notice that it is in the North American tradition, but it also has particularities that favour transdisciplinarity. Most law schools in Canada have incorporated in their curricula electives or double specialisations (of the *J.D./M.A.* type) that connect law with other fields – from public administration and economics to the environment, technology or indigenous studies. A notable example is McGill Law School’s *trans-systemic* programme, which weaves the study of civil law and *common law* into a single curriculum. It is an innovative solution that not only crosses the disciplinary boundary between different legal systems, but also involves a broader reflection on the common foundations of law, encouraging students to think beyond the confines of a national code or system. The McGill model – seen as *polyjuridical* and highly interdisciplinary – has inspired discussions about the ‘de nationalisation’ of legal education, showing that the training of lawyers in the 21st century must be more than vocational training in a particular jurisdiction.³⁰

In recent years, legal education reformers in Canada and the US have increasingly emphasised the need to reinvent law schools in a transdisciplinary and inclusive direction. The experience of the COVID-19 pandemic, for example, has accelerated thinking about the future of legal education. Camille Nelson (2022) argues that post-pandemic law schools have the opportunity for a forward-looking ‘reboot’, proposing the creation of more inclusive, transdisciplinary, technologically integrated and innovation-oriented law schools³¹. Such a school would break with the inertia of tradition and better serve society by preparing more capable lawyers, not just strictly for the area of law. In practice, some

29 *Ibid.*

30 Dedek, Helge, and Armand de Mestral. ‘Born to Be Wild: The “Trans-Systemic” Programme at McGill and the De-Nationalisation of Legal Education.’ *German Law Journal* 10, no. 6–7 (2009): 889–912. <https://doi.org/10.1017/S2071832200001401>.

31 Nelson, Camille A. “Redux: Towards an Empowering Model of Legal Education.” *Canadian Journal of Comparative and Contemporary Law* 8 (2022): 193–223.

Canadian initiatives already illustrate this vision: from courses on climate change taught in a multidisciplinary workshop format (by experts in the natural sciences, public policy and law), to community legal clinics where students participate in teams with medical or social work colleagues to facilitate systemic legal services³². All these examples highlight the tendency of the Canadian system to see legal education as a broad endeavour to train a lawyer polymath who can understand law in the broader social, technological and cultural context.

Brazil

Brazil's legal education system is an eloquent example of efforts to embrace transdisciplinarity. With one of the largest numbers of law schools in the world, Brazil has grappled with the issue of the quality and social relevance of legal education. Traditionally, the Brazilian curriculum has been highly theoretical and dogmatic, often disconnected from the country's economic, political and cultural realities. This *insular* character of legal education – 'alienated from reality... social reality' – has produced graduates who are well versed in the letter of the law, but less prepared for the complex issues of social justice and access to justice.³³

Aware of these shortcomings, academic and professional authorities in Brazil have initiated curricular reforms to modernise legal pedagogy. An important moment was the adoption of the *Diretrizes Curriculares Nacionais* (new national curricular guidelines) for law studies, which emphasised the integration of practical and theoretical training and the development of the socio-humanistic competences of future lawyers. In many faculties, an integrated curriculum linking classical legal disciplines with areas such as human rights, ethics, alternative conflict resolution and social sciences, has been implemented. The stated aim of these reforms is to train a critical, reflective graduate who is an agent of social transformation, in contrast to the technical lawyer of yesteryear. Thus, the ideology of an 'emancipatory education' has taken shape, based on a transdisciplinary vision of law and the human and social sciences. A concrete example is a pedagogical project implemented at a university in southern Brazil, where the aim was to articulate legal practical training with theory, by involving students in community legal clinics and inter- and multidisciplinary projects, so that they become aware of the cultural and human diversity of society and become active lawyers in the community.³⁴

Brazil has also placed particular emphasis on access to justice as a transdisciplinary theme in legal education. It has been recognised that the effective provision of access to justice (beyond mere access to the courts) requires a diversified methodology that embraces non-positivist thinking and tools from outside the *strict* law. To this end, modules on

32 Chen, Ling. 'Canadian Law Schools Must Do Their Part to Help Combat Climate Change.' **Policy Options Policy**, February 18, 2020. <https://policyoptions.irpp.org/magazines/february-2020/canadian-law-schools-must-do-their-part-to-help-combat-climate-change/>. <https://policyoptions.irpp.org/magazines/february-2020/canadian-law-schools-must-do-their-part-to-help-combat-climate-change/>.

33 Bendlin, Luciano Bendlin, Jair Zaleski, Jorge Amaro Bastos Alves, and Robson de Faria Silva. '**The Effectiveness of the Right of Access to Justice: A Proposal for the Implementation of Mediation and Conciliation Centres in Legal Practice Centres (NPJ)**'. *Revista Aracê* 7, no. 1 (2025): 3975-4010. <https://doi.org/10.56238/arev7n1-235>. Accessed 2 April 2025.

34 Duro Dias, Renato. 2015. 2015. „La educación jurídica En Brasil: Una Lectura crítica De Las Directrices Curriculares Nacionales Brasileñas Para El Derecho Y Sus Formas De recontextualización a Partir De Las teorías De Basil Bernstein?" *Revista Pedagogia Universitaria Y Didáctica Del Derecho* 1 (1):pp. 72–87. <https://doi.org/10.5354/0719-5885.2014.35964>.

mediation, conciliation, community law, judicial psychology and legal sociology have been introduced into the undergraduate programme. The legal practice centres (*Núcleos de Prática Jurídica*) in the faculties collaborate with public institutions and NGOs, giving students the opportunity to work in mixed teams (lawyers, psychologists, social workers) to solve the problems of disadvantaged citizens. Such a transdisciplinary initiative demonstrates double benefits: on the one hand, practical training of students by combining theory with concrete action; on the other hand, social impact by promoting alternative methods of conflict resolution and community legal needs³⁵. Studies have established that exposing Brazilian students to these transdisciplinary practices develops their interprofessional collaboration skills and sensitizes them to the social implications of law, countering the traditional tendency to see justice only through the lens of formal procedures.

Overall, the contemporary Brazilian model highlights how transdisciplinarity is actually positive for legal pedagogical reform. From national curricular policies to local innovations, the emphasis is shifting from national curricular policies to local innovations, towards training lawyers prepared to connect law with social reality and to act on changes in the spirit of justice and equity.

TRANSDISCIPLINARITY IN THE CONTEXT OF THE CONTEMPORARY EPISTEMOLOGICAL CRISIS

Today, many voices in academia speak of an epistemological crisis affecting the way we produce and validate knowledge – including in the legal sciences. It is sometimes described as a crisis of epistemic institutions: the traditional authority of universities, academies of sciences and courts of expertise is being challenged, amid the proliferation of information and the contestation of ‘official’ narratives³⁶. In the digital and *fake news* era, the old hierarchies of knowledge are being disrupted and rigid disciplinary boundaries are becoming obstacles to finding the best solutions to the challenges facing international society (economic or military wars, health crises, social injustices, etc.). We can therefore speak of a *crisis of disciplinarity*: hyper-specialisation and the isolation of academic fields make it difficult to take a macro approach to reality, which is becoming ‘unsustainable’ for the progress of knowledge and practical solutions³⁷. In this context of epistemic fragmentation, transdisciplinarity appears as a necessary response – a step towards evolution and a chance for innovation.

Transdisciplinarity implies the attitude or intention to transcend the boundaries between disciplines and to develop a unifying vision of knowledge. In legal pedagogy, this means that the training of future lawyers should not be limited to the *casuistry* and *dogma* of their own jurisdiction, but should expose students to methods and perspectives from

35 Bendlin, Luciano Bendlin, Jair Zaleski, Jorge Amaro Bastos Alves, and Robson de Faria Silva. ‘The Effectiveness of the Right of Access to Justice: A Proposal for the Implementation of Mediation and Conciliation Centres in Legal Practice Centres (NPJ)’. *Revista Aracê* 7, no. 1 (January 29, 2025): 3975-4010. <https://doi.org/10.56238/arev7n1-235>. <https://doi.org/10.56238/arev7n1-235>.

36 Katja Valaskivi & David G. Robertson (2022) Introduction: epistemic contestations in the hybrid media environment, *Popular Communication*, 20:3, 153–161, DOI: 10.1080/15405702.2022.2057998, available here: <https://doi.org/10.1080/15405702.2022.2057998>, accessed 02.04.2025.

37 Khoo, S.-M., Haapakoski, J., Hellstén, M. & Malone, J. (2018). Moving from interdisciplinary research to transdisciplinary educational ethics: bridging epistemological differences in researching higher education internationalisation(s). *European Educational Research Journal*, 18(2), 181–199. <https://doi.org/10.1177/1474904118781223> (Original Work Published 2019).

different fields. The current epistemological crisis – with its questions about the legitimacy of knowledge and the need for solutions to international problems – requires the legal education system to change its methodological horizon. As some authors have observed, traditional legal education has reached a degree of ‘functional decay’: excessively focussed on positive law, it fails to orient students towards a true picture of the links between law and the major problems of society³⁸. The classical curriculum, centred on *doctrinal law*, has often remained silent on the colonial and unequal implications of the global legal order, omitting the connections between the history of law and contemporary injustices (extreme poverty, global inequality, environmental degradation). As a consequence, by limiting itself to an idealised self-portrait of legality, legal education risks becoming merely a ritual of formal certification in a discipline that reproduces an unequal social order. Finally, such criticisms underline the *epistemologically closed* character of the traditional way of teaching law, which does not question its own premises and does not dialogue with other spheres of knowledge.

The solution proposed by a growing number of researchers and reformers is to move towards a transdisciplinary perspective aimed at redressing this situation. Foluke Adebisi, in the work already cited (2021), argues that in order to achieve a transformative goal, law schooling must go beyond mere demographic diversification and directly confront hierarchies of power and knowledge in the discipline. It argues for transdisciplinary and decolonial approaches to the production of legal knowledge, so that legal education no longer reproduces inequalities, but dismantles them³⁹. In the same spirit, the *law and...* initiatives (law and literature, law and economics, law and technology, etc.) have proved their usefulness, but they need to be taken further towards a synthesis centred on the whole. It is not just a question of adding courses from other fields, but of rethinking the place of law in the ecology of knowledge so that students can learn to distinguish critically between different epistemological registers.

Transdisciplinarity itself becomes an ethical and civic pillar for legal education in general, and for legal pedagogy in particular, in times of epistemological crisis. By working with other disciplines, future lawyers develop their ‘*epistemic humility*’ – the recognition that their perspectives need to be complemented by others – and learn to communicate in a way that is meaningful to the wider public, restoring the bridges between expertise and society⁴⁰. Of course, this method requires all specialists to be aware of this attitude, just as a transdisciplinary curriculum brings students into community projects alongside medical, architecture or political science students, for cases as diverse as poor housing or access to health services. In such ‘*transdisciplinary cohorts*’, future lawyers or magistrates learn not only applied legal knowledge, but also the ability to contextualise problems legally, to identify relevant non-legal dimensions and to work together as a team for the common good. Indeed, we are talking about a mode of training that responds directly to the epistemological crisis, as it reconnects law to people’s real needs and to the multiple forms of knowledge involved in solving them.

In today’s profoundly changing world, transdisciplinarity is no longer a marginal

38 Adebisi, Foluke. ‘Should We Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy.’ *Amicus Curiae*, Series 2, vol. 2, no. 3 (2021): 428–449. Article available here: https://research-information.bris.ac.uk/ws/portalfiles/portal/280152426/Final_version_Blackstones_tower_article_Adebisi.pdf, accessed 02.04.2025.

39 *Ibid.*

40 Nelson, Camille A. ‘Redux: Towards an Empowering Model of Legal Education.’ *Canadian Journal of Comparative and Contemporary Law* 8 (2022): 193–223. Article available here: <https://www.cjcl.ca/wp-content/uploads/2022/8-Nelson.pdf>, accessed 02.04.2025.

option, but claims a central and indispensable place. The epistemological crisis and the complexity of the contemporary world call for lawyers with flexible training, capable of linking legal thinking with the perspectives of other sciences and with a critical awareness of the role of law in society. Both the historical development of legal education and innovative models in different countries point in a converging direction: the *law school of the future* is an open, interdisciplinary and international problem-solving orientated one. Through transdisciplinarity, legal pedagogy can overcome the current crisis of relevance and legitimacy, renewing its mission to train lawyers as founders of a more just world, not just technicians of the law. We have before us both the challenge and the promise of transdisciplinarity in contemporary legal education.

FINAL REFLECTIONS

All the arguments and observations contained in this study lead naturally to a profound reconfiguration of the normative ecology of legal knowledge: a mutation from self-referential systems to an open cognitive network, in which law is not merely a *corpus of norms*, but a vector of meaning within a multifocal and emergent human universe. In the new epistemological horizon that I have described at the level of a desideratum, attention to international law is no longer merely a reaction to geopolitical interdependencies, but becomes a requirement of rigorous thinking, capable of transcending disciplinary boundaries and reacting as a science in a coherent and responsible manner. Although it may seem a simple thematic extension, it is an assumption of a methodology compatible with the complexity of reality – a transdisciplinary, flexible methodology, sensitive to the multiple registers of knowledge and to the tensions between the norm and the fact.

It is a reconstruction that does not entail abandoning the normative core of law, but, on the contrary, reconnecting it to the living matrix of the present – a matrix defined by ontological fluidity, systemic interdependence and continuous emergence. Law must thus rediscover its capacity for dialogue with the social sciences, new technologies, ethics and philosophy, taking on the role of an articulator of meaning in increasingly volatile contexts.

The sustainability of legal research is not measured in the volume of publications or in the breadth of the topics addressed, but in the ability to generate epistemological tools capable of understanding and shaping legal phenomena, in the seriousness, responsibility and altruism with which we should take steps in this direction. True innovation lies in the power of adaptation, conceptual mobility and the courage to interrogate fundamentals without sacrificing rigour. An essential triad is taking shape: the organic integration of international law, the adoption of a permeable and open methodology, and the affirmation of transdisciplinarity as a critical infrastructure of legal research, as genuine intellectual engagement.

The final call is not rhetorical, but an invitation to responsibility and creativity: the legal researcher of the 21st century is no longer a mere interpreter of the rule, but one in which every cognitive decision has the potential to shape not only the law, but the world itself.



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SAVREMENO MEĐUNARODNO PRAVO I ZNAČAJ NJEGOVOG ISTRAŽIVANJA

Apstrakt:

Tempo naučnih otkrića i razvoja u savremenim međunarodnim odnosima stvara problem tempa sa kojim se savremeno međunarodno pravo mora nositi kroz kontinuiranu adaptaciju. Rastući i višeznačni uticaj međunarodnog javnog prava na nacionalni pravni poredak i obrnuto predstavlja osnovu za ideju ideju globalne vizije kako u obrazovanju tako i u pravnim istraživanjima, sa naglaskom na značaj poređenja i transnacionalnosti. Bez globalnih standarda poređenja, savremeni pravni diskurs ne može da se razvija na autarhičan način, posebno imajući u vidu da nacionalni pravni poredak postaje sve više zavisn od međunarodnih normi i mehanizama. Ovaj rad se zasniva na načinu na koji pravna istraživanja moraju uskladiti svoju metodologiju s ovom stvarnošću na realan i uravnotežen način. Metodološki, pažnja je usmerena na fleksibilnost i prilagođenost onome što danas predstavljaju društvo i pravno obrazovanje.

Ključne reči: značaj pravnog istraživanja i pravne edukacije, metodološka održivost, međunarodno pravo; inter - , multi – i transdisciplinarnost.

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HISTORY OF ADMINISTRATIVE LITIGATION IN ROMANIA

Abstract:

The history of administrative litigation in Romania denotes the sinuous evolution of the relationship between the citizen and the state, in parallel with the development of modern legal institutions. Starting with the establishment of the Council of State in 1864, inspired by the French model, and continuing with the oscillating legal reforms of the early 20th century, Romanian administrative litigation has undergone significant transformations on several levels, from administrative jurisdiction to judicial control, from annulment mechanisms to simple declarations of illegality. The paper analyses the successive legal regimes that shaped administrative litigation, culminating in its constitutional recognition in the 1923 Constitution. By exploring key legislative landmarks such as the Bădărău, Toma Stelian and Cantacuzino Laws, this study is suggestive both in reflecting doctrinal tensions and in the growing awareness of citizens' rights before the administrative power.

Keywords: *administrative litigation, Council of State, constitutional law, Bădărău Law, Romania, Cantacuzino Law, Toma Stelian Law, administrative jurisdiction, rule of law, public administration.*

1. AN INTRODUCTION TO THE FIRST REGULATION OF ADMINISTRATIVE LITIGATION IN THE UNITED PRINCIPALITIES OF MOLDOVA AND WALLACHIA

Administrative litigation was instituted for the first time in our country by Law no. 167/1864 *for the establishment of the Council of State*¹. This law set up, following the French model, the Council of State, which had legislative powers (preparation of draft laws), administrative powers (administrative counselling and disciplinary jurisdiction for civil servants) and administrative litigation powers.²

1 M. Of. Of 11 February 1864.

2 Săraru, Cătălin-Silviu. 'A Cross-Country Examination: Administrative Litigation in China and Romania.' *Access to Justice in Eastern Europe* 3, no. 20 (2023): 232–248. <https://doi.org/10.33327/AJEE-18-6.3-a000313>. For a comparative view, see Popa Tache, Cristina-Elena. 'Administrative Review and Reform Movements from the Perspective of International Investment Law.' In *Administrative Law and Public Administration in the Global Social System: Contributions to the 3rd International Conference, Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective*, October 9, 2020, edited by Julien Cazala and Velimir Zivkovic, 212–218. Bucharest: ADJURIS – International Academic

In the field of administrative litigation, the Council of State, in accordance with Article 51 of the Law, hears the claims of private individuals and legal entities whose interests have been harmed by:

a) the decisions of ministers given with excess of power or in violation of the laws and regulations in being;

b) judgements or acts of execution of prefects or other administrative agents given in violation of laws or regulations;

c) decisions of public works commissions.

Also, by virtue of Article 49 of Law No 167/1864, the Council of State could adjudicate, as the first or final instance, all cases of an administrative contentious nature assigned to it by a particular law. Thus, for example, the *law of expropriation for reasons of public utility* of 20 October 1864 provided that an appeal to the Council of State could be lodged against the decision of the County Council fining members of the County Expropriation Commissions who were absent without good reason from its proceedings.

Article 131 of the 1866 Constitution provided for the abolition of the Council of State and required the adoption of an ordinary law to allocate its powers. On 9 July 1866, a few days after the promulgation of the Constitution, a *law* was passed on 9 July 1866 *on the division of the various powers of the Council of State*. By this law, the contentious powers of the Council of State were divided among the Courts of Appeal and the other courts of ordinary law, and the disputes in question were to be judged according to the ordinary rules.

2. ADMINISTRATIVE LITIGATION ESTABLISHED BY THE BĂDĂRĂU LAW

On 1 July 1905, the *Law for the Reorganisation of the High Court of Cassation and Justice* (Bădărău Law³) was adopted, whereby Section III of the High Court of Cassation and Justice became competent to hear appeals against certain categories of administrative acts listed in the law. The administrative litigation established by this Act concerned a relatively small number of categories of administrative acts of authority. It was a ***contenti contentieux in annulment***, being a judicial means of examining the legality of administrative acts and deciding on their annulment, and a ***contenti contentieux subjectif***, questioning the legality of an act only insofar as it harmed the subjective rights of the appellant.⁴

3. ADMINISTRATIVE LITIGATION ESTABLISHED BY THE TOMA STELIAN LAW

The administrative litigation system established by the Law of 1905 was abolished by a new law of 25 March 1910, reorganising the Court of Cassation and Justice (Toma

Publisher, 2021.

3 The 1905 law was proposed by the conservative government, led by G. Cantacuzino, with Alex. Bădărău.

4 See, in this regard, V. I. Prisăcaru, *Contenciosul administrativ român*, 2nd ed. All Beck București, 1998, p. 34; C.G. Rărăncescu, *Contenciosul administrativ român*, 2nd ed. 'Universală' Alcalay & Co., Bucharest, 1936, p. 90, 91.

Stelian Law). This law no longer recognised Section III of the High Court of Cassation and Justice as having jurisdiction in matters of administrative litigation, as disputes concerning the infringement of the rights of private individuals by administrative acts of authority were given to the county courts, which would hear cases under the rules of ordinary law.⁵

The system prior to the 1905 law thus reverts to the system prior to the 1905 law, with the only difference being that Article 74 of the Law established that these cases would be judged urgently and in priority. Thus, under the 1910 law, the ordinary courts were no longer entitled to annul illegal administrative acts.

Constantin Rarincescu emphasises that, 'although the litigation system of 1905 had been abolished, its basic idea had nonetheless made its way into the general legal consciousness, which could no longer reconcile itself with a reduced and limited litigation system, as in the system prior to the 1905 law. Thanks to this legal awareness, our courts gave a broad interpretation to Article 74 of the Law of 1910, which referred administrative litigation cases to the jurisdiction of these courts according to the *general principles of law*, considering that if, according to these principles, they could not annul an act but only award damages, there was nothing to prevent the State from being awarded even damages, at least when it prevents the lawful exercise of a right or refuses to satisfy a right of the plaintiff'⁶.

4. ADMINISTRATIVE LITIGATION ESTABLISHED BY THE CANTACUZINO LAW

The Law of 17 February 1912 reorganising the Court of Cassation and Justice (the Cantacuzino Law) reverted to the system established by the 1905 Law and administrative litigation cases were again assigned to Section III of the Court of Cassation. In contrast to the rules of 1905, however, the 1912 Law no longer vested the Court of Cassation with the right to annul the contested administrative act, but only with the possibility, under Article 63 of the Law, to declare the act illegal and to invite the administrative authority to fulfil the request, to abolish or to amend the act. Thus, the cancellation of the act was made by the administrative authority itself⁷. Therefore, the administrative litigation established by the Law of 1912 is only a *litigation for the determination of the legality* of the administrative act and not a *litigation for annulment* as in the case of the administrative litigation established by the Law of 1905.

The Law of 1912 granted to Section III of the Court of Cassation a general subject-matter jurisdiction in the field of administrative acts of authority, stating in Art. 5 para. 3 lit. f) that it judges 'The appeals of those who claim to be injured in their rights by an administrative act of authority made in breach of the law, as well as appeals against the refusal of the administrative authorities to settle a claim relating to such a right'. Excluded from the judgement of Section III of the Court of Cassation were acts of government and acts relating to the exercise of administrative guardianship and hierarchical control. The contentious appeal before the Court of Cassation could be lodged, according to Article 31 lit. a) of the Law, either before or after the hierarchical appeal.

5 See C. G. Rarincescu, op. cit., 1936, pp. 92, 93.

6 Idem, p. 93.

7 Idem, p. 93.

5. REGULATION OF ADMINISTRATIVE LITIGATION BY THE 1923 CONSTITUTION

Administrative litigation becomes a constitutional institution through its regulation by the 1923 Constitution⁸ in Article 107.

The administrative litigation regulated by the 1923 Constitution has the following features:

(a) the prohibition laid down in para. (1) of Article 107 of the Constitution of 1923 is characterised by the following features: (a) the prohibition of the establishment of special authorities of any kind with powers of administrative litigation. According to this prohibition, administrative tribunals, modelled on the French model, could not be set up to hear administrative disputes. It has been held in the legal literature that the prohibition laid down in the first sentence of Article 107 (1) of the Constitution did not apply to the special administrative courts, which continued to be set up and to operate after the adoption of the 1923 Constitution.⁹

b) the attribution of administrative litigation to the judiciary, as provided for in para. (2) of Article 107 of the Constitution. The courts had a general subject-matter jurisdiction to hear the claims of those whose rights had been infringed, according to para. (3) of Art. 107 of the Constitution, 'either by an administrative act of authority, or by an administrative act made in contravention of laws and regulations, or by the administrative authorities' unwillingness to settle the claim concerning a right'.

c) an *administrative contenti contentious of full jurisdiction* is established by which the court of law may annul the harmful administrative act and award damages to the injured person. According to the provisions of para. (4) of Article 107 of the Constitution, 'The judicial authorities shall judge whether the act is unlawful, may annul it or may award civil damages until the date of restoration of the injured right, and shall also have the power to judge the claim for damages, either against the administrative authority sued or against the guilty official'.

d) *subjective administrative litigation* is established, the action in court being reserved only to 'the person whose rights have been infringed' by the administrative authorities, according to para. (3) of Article 107 of the Constitution.

e) two categories of acts exempted from judicial review are established, in accordance with the provisions of para. (4) of Article 107 of the Constitution: acts of government and acts of military command.

8 M. Of. No 282 of 29 March 1923.

9 See C. G. Rarincescu, op. cit., 1936, pp. 98–99. The first administrative body with jurisdictional powers was the Court of Accounts, established by the Law of 24 January 1864. An example of special administrative jurisdictions set up after the adoption of the 1923 Constitution is the Central Revision Committee and the local revision committees set up by the Law of 3 January 1930, which were competent to control the legality of administrative acts and deeds of county and local public administration bodies.

6. THE FIRST SPECIAL LAW ON ADMINISTRATIVE LITIGATION ADOPTED IN 1925

In order to implement the provisions of Article 107 of the 1923 Constitution, the **Law of 23 December 1925 on Administrative Disputes** was adopted.

Naturally, the Law of 23 December 1925 on administrative litigation developed, along the lines of the 1923 Constitution, a litigation of full jurisdiction, with the court having the possibility, under Article 6 of the Law, to annul an act if it considers it to be illegal and to award civil damages, and subjective litigation, reserved only for those who 'claim to have suffered an injury to their rights,' under Article 1 of the Law.

Applications under the 1925 Administrative Judicial Procedure Act were brought before the Court of Appeal in whose district the plaintiff was domiciled (Article 4 – 1 – of the 1925 Act). Appeals to the administrative courts were not subject to the prior lodging of administrative appeals with the authority issuing the act (appeal by way of grace) or with the higher hierarchical authority (hierarchical appeal).¹⁰

Applications under the Administrative Judicial Procedure Act could be lodged with the court at any time (Article 4 – 2 – of the 1925 Act). From this rule two exceptions were instituted:

(a) in the case of the replacement, removal or retirement against the law of lawfully appointed irremovable officials, applications were to be made within 30 clear days of their publication in the Official Gazette.

b) if the individual has addressed an application to the administration, the legal claim could be made after the expiry of a period of 30 days from the expiry of 30 days from the date of registration by the administrative authority or from its notification by the gatekeeper, and within 30 clear days from that date.

Applications in administrative disputes were stamped and charged in accordance with the law for actions at common law (Art. 5 – 1 – of the 1925 Act).

The Court of Appeals judged administrative appeals as a matter of urgency and in preference to all other cases and in a panel of 3 and was obliged to write up its decisions in this matter no later than 5 days after the judgement (Art. 9 of the 1925 Law).

The decisions of the Courts of Appeal were subject to appeal to the Court of Cassation within 15 days of communication (Art. 11 – 1 – of the 1925 Law).

Legal claims could be brought both against the administrative authority that had adopted the harmful administrative act and against the officials who had signed the act if the claims were for payment of compensation for damages for harm caused or damages for delay. Officials could also bring an action for damages against the hierarchical superiors from whom they had received a written order to sign the act (Article 14 of the 1925 Act).

The jurisdiction of the Courts of Appeal and the Court of Cassation in matters of administrative litigation established under the 1925 Act related exclusively to the judgement of disputes concerning administrative acts of authority, which mainly sought the annulment of the unlawful act and, secondarily, the award of damages, whereas the judgement of disputes concerning acts of public management of the public administration

10 Idem, p. 115.

(administrative contracts) was left to the ordinary courts under ordinary law¹¹. However, by Decision No 1030/1929 of the Third Section of the Court of Cassation, it was held that administrative contracts are concluded by the administration to provide a public service and therefore have the character of acts of authority falling within the jurisdiction of the administrative courts under Article 1 of the Law of 23 December 1925.¹²

The Law of 23 December 1925 on administrative litigation established *litigation conducted by the courts of law* (courts of appeal and Section III of the High Court of Cassation) and remained the common law in this area until 1948.

Between 1930 and 1948, there was also administrative litigation conducted by *administrative courts* (Central Review Committee and Local Review Committees set up by Law No. 5 of 3 January 1930, later reorganised by Administrative Law No. 569 of 26 March 1936 and by Law No. 331 of 15 March 1939 into the Higher Administrative Court and Local Administrative Courts)¹³. We note that during this period, with the creation of these administrative jurisdictions, an approximation to the German system of administrative litigation was realised. However, compared to the German system, the jurisdiction of these administrative courts was limited. Thus, while *the courts of law* could examine the legality of all administrative acts *under the 1925 Administrative Jurisdiction Act* (with the exception of the grounds for non-reprimand set out in articles 2 and 3 of this Act), the *administrative courts* mentioned above could only review the legality of administrative acts adopted by local public administration authorities.

In order to avoid the double settlement of cases by *courts of law* and *administrative courts*, Article 52 para. 3 of the *Law for the Organisation of Administrative Courts no. 331 of 15 March 1939*, the principle *electa una via non datur recursus ad alteram* was applied, stating that 'the party who has chosen the court of administrative jurisdiction, according to the present law, may not apply to other administrative courts if the first court has given a decision on the merits or an interlocutory journal'¹⁴.

11 Idem, p. 199, 200.

12 C. Hamangiu, R. Hutschneker, G. Iuliu, Appeals in cassation and administrative litigation. Comentariul Comentariul legiilor Curții de Casație și a Contenciosului administrativ, după doctrină și jurisprudență, Ed. 'Națională' S. Ciornei, Bucharest, 1930, p. 448.

13 In the doctrine it has also been argued that both the review committees and, later, the administrative courts would represent, by their competence and their way of organisation, real administrative tribunals and not only administrative jurisdictions (see, in this sense, E. D. Tarangul, *Tratat de drept administrativ român*, Cernăuți, Ed. Tipografiei Glasul Bucovinei, 1944, pp. 613–615; A. Iorgovan, *Tratat de drept administrativ*, vol. II, 4 th ed. All Beck, Bucharest, 2005, p. 511, 512). As regards the review committees, it must be said that they were set up and functioned during the period when the 1923 Constitution was in force, which, as we have seen, prohibited the establishment of specialised courts in administrative litigation matters by Article 107. The review committees could therefore only have the legal nature of administrative-judicial bodies. As regards the legal nature of the administrative courts, we note that they were set up after the adoption of the 1938 Constitution (M. Of. no. 48 of 27 February 1938), which allowed, according to Article 73 para. (1), the establishment of a 'jurisdiction' by law. Moreover, the administrative courts were composed exclusively of magistrates, unlike the review committees composed of magistrates and civil servants. Therefore, the administrative courts can be said to have had a similar status to a special court of law, an interpretation which is also permitted by the provisions of Art. 73 para. 1 of the 1938 Constitution.

14 See in this sense V. I. Prisăcaru, *Contenciosul administrativ român*, 2nd ed. All Beck București, 1998, p. 63.

7. LAW ON THE ORGANISATION OF THE CENTRAL AND LOCAL REVISION COMMITTEES OF 1930

Law No. 5 of 3 January 1930 established the Central Revision Committee and the Local Revision Committees as administrative authorities with jurisdictional activity, which were competent to review only the legality of administrative acts and deeds of **county and local** public administration bodies.

The Local Review Committees were 7 in number (based in Bucharest, Iasi, Cluj, Chisinau, Chisinau, Chernivtsi, Timisoara and Craiova) and were competent, according to Article 36 of the Law, to decide:

1. on all actions directed against the legal acts of the county and municipal administrative bodies of any kind, except those of the municipality of Bucharest;
2. on all actions directed against acts of administrative control (guardianship) exercised by the mayors and prefects;
3. on appeals against administrative elections of communes and counties;
4. on proposals for the dissolution of county councils and communes of any kind, except for the municipality of Bucharest, with their suburban districts and communes.

The decisions of the local revision committee are subject to appeal to the Central Revision Committee.

The Central Revision Committee decides, according to Article 38 of the Law, on:

In the first and last instance:

(a) on actions directed against the legal acts of the administration of the municipality of Bucharest, with its suburban districts and communes;

b) on all actions directed against acts of administrative control (tutelage) of the Ministry;

c) on proposals for the dissolution of the Bucharest City Council, with its suburban districts and municipalities.

In the last instance:

On all decisions rendered in the first instance by the local review committees.

Decisions of the Central Revision Committee were subject to appeal to the High Court of Cassation.

8. REORGANISATION OF THE CENTRAL REVIEW COMMITTEE INTO THE HIGHER ADMINISTRATIVE COURT AND OF THE LOCAL REVIEW COMMITTEES INTO LOCAL ADMINISTRATIVE COURTS

Article 244 of Administrative Law No. 569 of 26 March 1936¹⁵ provided for the renaming of the *Local Review Committees* into *Local Administrative Courts* and of the *Central Review Committee* into the *Higher Administrative Court*, which retained their previous functions.

Subsequently, the *Law on the Organisation of the Administrative Courts No. 331 of 15 March 1939*¹⁶ repealed the *Law on the Organisation of the Central Committee and Local Review Committees of 1930*.

Under the 1939 Act, the Higher Administrative Court and the Local Administrative Courts were bodies of administrative jurisdiction which scrutinised, like the review committees previously, the **legality of acts adopted exclusively by local public authorities**.

There were 10 Local Administrative Courts, one in each county¹⁷, with their seat in the county's city of residence, while the Higher Administrative Court had its seat in the capital of the country.

According to the provisions of Article 37 of the 1939 Law, the Local Administrative Courts decided in the first instance:

1. on actions brought against unlawful administrative acts committed by local administrative bodies.

2. on actions brought by private persons injured by the unlawful refusal or unjustified silence of the local administration to perform an act or to render a service due.

The administrative courts could:

a) annul the act in whole or in part.

b) order the reinstatement of the injured parties to all the rights they had before the annulled act.

c) order that the service due be rendered or refrain from the action decided by the contested act.

d) order that the claims be entered in the local government budgets for the following financial year.

According to Article 40 of the Law of 1939, the Higher Administrative Court shall hear appeals against decisions of the administrative courts, applications for the transfer

15 M. Of. No 73 of 27 March 1938.

16 For an analysis of the competence and functioning of the review committees and then of the administrative courts, see V. I. *Prisăcaru*, op. cit., 1998, pp. 54–63.

17 The Administrative Law of 14 August 1938 established 10 counties as administrative-territorial units: Argeş County, Crişuri County, Danube County, Jiu County, Mării County, Mureş County, Nistru County, Prut County, Suceava County and Timiş County. The creation of these counties, which have no historical tradition, took place in the context of the dictatorship of King Charles II, following the administrative model of Fascist Italy and Yugoslavia during the dictatorship of King Alexander I.

of cases from one administrative court to another, conflicts of jurisdiction between administrative courts, and other matters assigned by law (for example, according to the provisions of Article 154 para. 2 of the Administrative Law of 1938, the decisions of the administrative courts in which they ruled on the applications of neighbouring owners for the annulment of illegally issued building permits were subject to appeal to the Higher Administrative Court).

The decisions of the Higher Administrative Court, like those of the Central Review Committee, could be appealed to the High Court of Cassation.

9. ADMINISTRATIVE LITIGATION BETWEEN 1948 AND 1967

The development of administrative litigation in Romania was halted with the establishment of the communist regime¹⁸. On the basis of the communist principle of the unity of state power and the subordination of all state bodies to the Grand National Assembly, it was considered that the courts could not control the activities of state administrative bodies. In order to implement this doctrine, Decree No 128/1948 was adopted to *abolish the administrative contentious proceedings and administrative courts*. This Decree repealed the Law on Administrative Disputes of 23 December 1925 and the Law on the Organisation of Administrative Courts of 15 March 1939.

From 1948 until the adoption of the 1965 Constitution, the courts could not review the legality of administrative acts, except in the cases expressly provided for by law (such exceptions were regulated in a limited number of normative acts, among which we mention: Decree No 184/1954 regulating the penalisation of contraventions, Decree No 278/1960 on civil status documents, etc.).

The Constitution of 1965¹⁹ re-established the general competence of the courts to review the legality of administrative acts on the basis of the provisions of Article 35 (*a person who has been injured in his rights by an unlawful act of a state body may, under the conditions provided by law, request the competent bodies to annul the act and to compensate for the damage*) in conjunction with the provisions of Article 103 (*Courts and Tribunals shall hear the claims of those who have been injured in their rights by administrative acts and may also rule, under the conditions provided by law, on the legality of such acts*).

10. REGULATION OF ADMINISTRATIVE LITIGATION BY LAW NO 1/1967

On the basis of the provisions of the 1965 Constitution, Law No 1/1967 was adopted *on the adjudication by the courts of claims of those injured in their rights by unlawful administrative acts*²⁰. According to the provisions of Article 1 of Law No 1/1967, a person whose right has been infringed by an unlawful administrative act may apply to the competent court, in accordance with the law, for the annulment of the act or for an order that the administrative body sued take the appropriate measure to remove the infringement

18 See comparatively Scherzberg, Arno, and Josephine Seidl. 'Administrative Litigation in Germany.' In *Administrative Litigation Systems in Greater China and Europe*, edited by Yuwen Li, 22. 1st ed. London: Routledge, 2014. <https://doi.org/10.4324/9781315565651>. <https://doi.org/10.4324/9781315565651>.

19 B.Of. no. 1 of 21 August 1965.

20 B.Of. No 67 of 26 July 1967.

of his right and for compensation for the damage. Likewise, the unjustified refusal to fulfil a request concerning a right, as well as the failure to fulfil such a request within the time limit prescribed by law, was considered an illegal administrative act.

It should be noted that Law No 1/1967 provided for *subjective litigation*, based solely on the infringement of a subjective right of the plaintiff, and *of full jurisdiction*, with the court being able to pronounce measures to repair the damage. Compensation could only be awarded for material damage, as the communist system was reluctant to award compensation for non-material damage.

Law No 1/1967 established the rule of judicial review of administrative acts, with acts that could not be challenged being an exception to this rule expressly laid down by law.²¹

Judicial review of administrative acts was of a subsidiary nature and could be exercised only after an attempt had been made to restore legality through the administrative complaint procedure, in the form of an appeal for pardon or hierarchical appeal.²²

The review exercised by the courts was strictly aimed at the legality of administrative acts, not at the appropriateness of their adoption.²³

In the legal doctrine, it is considered that the institution of administrative litigation regulated during the communist period by the 1965 Constitution and Law no. 1/1967 had a purely propagandistic role characteristic of the totalitarian state, being purely formal, with no relevance in the defence of citizens' rights and counteracting abuses by administrative authorities.²⁴

21 The categories of administrative acts exempted from review by the courts were mentioned in Articles 14, 15 and 16 of Law No 1/1967, and they are numerous: Art. 14 – 'The provisions of this law shall not be applicable to: a) administrative acts in connection with the defence of the country, state security or public order; b) administrative acts of planning; c) administrative acts of jurisdiction and administrative acts for the review of which the law provides for a different jurisdictional procedure than the one provided for by this law; d) acts in which the administrative body participates as a legal person under civil law. Likewise, the provisions of this Law shall not be applicable to the claims of state organisations concerning administrative acts. Article 15 – 'Acts concerning urgent measures taken for the prevention and control of epidemics, epizootics and epiphytic diseases or in other cases of calamity, and any measures taken in exceptional situations of the same nature shall not be subject to review by the courts as to their legality. Article 16 – 'Requests concerning the assessment and deduction of taxes and duties, insurance premiums by operation of law as well as fines provided for in the tax laws shall be dealt with by the bodies provided for by the special law and under the conditions laid down therein'.

22 See I. Iovănaş, *Dreptul administrativ şi elemente ale ştiinţei administraţiei*, Ed. Didactică şi Pedagogică, 1977, Bucharest, p. 292. Art. 3 of Law no. 1/1967 provided: 'Before applying to the court for the annulment of the act, the injured party shall, in defence of his right, within 30 days from the date on which he was notified of the administrative act, apply to the issuing body, which is obliged to resolve the complaint within the time limit prescribed by law. If the aggrieved party is not satisfied with the solution given to his/her complaint, he/she may refer the matter to the court within 30 days from the date of communication of the solution. If the aggrieved party has also lodged a complaint with the higher administrative body, the 30-day period referred to in the preceding paragraph shall be calculated from the date on which that body communicates the decision on the complaint. The complaint may also be submitted to the court if the issuing administrative body or the higher hierarchical body fails to resolve the complaint within the time limit prescribed by law. In all cases, however, the application to the court may not be lodged later than 6 months from the date of communication of the administrative act the cancellation of which is sought.'

23 I. Iovănaş, *op. cit.*, 1977, p. 290.

24 A. Iorgovan, *op. cit.*, vol. II, 2005, p. 514.

11. REGULATION OF ADMINISTRATIVE LITIGATION BY LAW 29/1990

After the Revolution in 1989 and the return to democracy, the *Administrative Disputes Act No 29/1990* was adopted.²⁵

According to Article 1 of this law, any natural or legal person, if he considers that his rights, recognised by law, have been infringed by an administrative act or by the unjustified refusal of an administrative authority to resolve his claim concerning a right recognised by law, may apply to the competent court for the annulment of the act, the recognition of the right claimed and compensation for the damage caused. The failure to reply to the petitioner within 30 days of the registration of the petition shall also be deemed to be an unjustified refusal to deal with the petitioner's request concerning a right recognised by law, unless the law provides for a different time limit.

Therefore, Law 29/1990 established *subjective litigation of full jurisdiction*. For the first time, it was expressly provided that the court would decide on both material and **non-material** damages.

Another novelty introduced by Law No 29/1990 was the establishment of the administrative litigation sections of the Supreme Court of Justice and the courts.

The legal action was conditional on the exercise of the preliminary administrative appeal procedure by offering the possibility to the issuing administrative authority or hierarchically superior administrative authority to revoke or modify the allegedly illegal administrative act.

Law no. 29/1990 established the possibility for the court to oblige the head of the administrative authority who failed to send the required works within the time limit set by the court to pay the State a fine of 500 lei for each day of unjustified delay.

The legal action could also be brought personally against the official of the defendant's authority, who could be obliged to pay damages jointly and severally with the administrative authority.

The management acts (administrative contracts and private management. acts) made by the State as a legal person and for the administration of its patrimony, were exempted from the application of the Administrative Judicial Procedure Act, and could be challenged according to the ordinary procedure.²⁶

25 M. Of. No 122 of 8 November 1990. For a doctrinal analysis of the provisions of this law see A. Negoită, *Lei contenciosului administrativ*, in *Dreptul* nr. 6/1991, p. 3-13; A. Negoită, *Lei contenciosului administrativ - aspecte de drept procesual* in *Dreptul* nr. 7-8/1991, p. 12-20; D. Brezoianu, *Contenciosul administrativ*, Ed. Metropolis, Bucureşti, 1995; V.I. Prisăcaru, op. cit., 1998, p. 163-248.

26 See R.-N. Petrescu, *Criterii de distingere între actele administrative de autoritate şi actele de gestiune ale statului - implicaţii pe planul contenciosului administrativ*, in *Dreptul* nr. 10/1992, p. 43. See on foreign investments Popa Tache, Cristina Elena. 'About the Human Rights and Consumer Protection in the Digital Age of Digital Services Act 2022 or What Aspects Interested Investors Should Pay Attention To.' *International Investment Law Journal* 3, no. 2 (July 2023): 121-132.

12. THE REGULATION OF ADMINISTRATIVE CONTENTIOUS PROCEEDINGS BY THE 1991 CONSTITUTION AND THE 2003 CONSTITUTIONAL AMENDMENTS

The 1991 Constitution²⁷ established in Article 48 para. (1) established the possibility for a person whose right has been infringed by a public authority through an administrative act or through the failure to respond to a request within the legal time limit to obtain recognition of the right claimed, the annulment of the act and compensation for the damage, the conditions and limits for the exercise of this right being established, according to Art. 48 para. (2) by organic law. Article 72 para. (3) lit. k) of the 1991 Constitution (now Art. 73 – 3 – lit. k) of the Constitution revised in 2003) expressly provided that **the regulation of administrative contentious proceedings is made by organic law.**

Following **the revision of the Constitution in 2003**, some changes have been made to the institution of administrative litigation. Article 52 para. (1) of the Constitution revised in 2003 gave the possibility to bring an action in the administrative contentious procedure not only to a person who has been injured in a right, but also to a person who has been injured in a legitimate interest. Article 126 para. (6) of the Constitution revised in 2003 restricted the scope of administrative acts exempted from judicial review (the non-reprimand clause) to acts concerning relations with Parliament and military acts of command. The revised Constitution also specified that the administrative courts had jurisdiction to hear the claims of persons injured by ordinances or, where appropriate, by provisions of ordinances declared unconstitutional.

The constitutional amendments made in 2003 to the institution of administrative litigation and the evolution of social realities have made it necessary to adopt a new law on administrative litigation. Thus, Law No 29/1990 was repealed by **Law No 554/2004 on Administrative Litigation**, which is still in force.

13. THE REGULATION OF ADMINISTRATIVE CONTENTIOUS PROCEEDINGS BY LAW NO 554/2004

By Law no. 554/2004, the legislator has created a more complex regulation of administrative litigation, adapted to the evolution of society. This law regulates, in addition to **subjective litigation**, based on the violation of a *subjective right* or of a *legitimate private interest*, **objective litigation**, based on the violation of a *legitimate public interest*. Law no. 554/2004 extends the scope of the persons to whom the law recognised the possibility of bringing an action in objective litigation from the prefect (covered by the 1991 Constitution) to the People's Advocate, the National Agency of Public Servants, the Public Ministry, specifying in Art. 1 para. (8) that this type of action is in principle open to any subject of public law.

Law no. 554/2004 recognised the possibility of bringing an action before the administrative contentious court also for a third party who has been injured in a right or legitimate interest by an administrative act of an individual nature addressed to another subject of law.

The Act expressly provides that administrative contracts, which are assimilated

27 M. Of. No 233 of 21 November 1991.

to administrative acts within the meaning of the Act, may also be challenged before the administrative court.

The law also regulates the plea of illegality, actions against government ordinances, the conditions for appealing administrative normative acts in administrative contenti contentious proceedings, the nature of procedural deadlines, the procedure for enforcement of final judgments in administrative contentious proceedings, as well as other aspects that will be analysed below.

The evolution of society has meant that over time this law has undergone numerous amendments made by the legislator²⁸ or imposed by decisions of the Constitutional Court, which have admitted exceptions of unconstitutionality.²⁹

14. CONCLUSIONS

The evolution of administrative litigation in Romania has been characterised by a legal dynamic specific to the modern Romanian state in search of a balance between the authority of the administration and the rights of citizens. Beginning with the establishment of the Council of State by Law no. 167/1864 and continuing with the successive reforms of the first half of the 20th century, one can observe an alternation between centralising tendencies and those of opening towards effective jurisdictional control over administrative acts. The relevance of this development lies in the lessons it provides for the present. The Bădărău Law of 1905 represented a significant stage in the consolidation of subjective and annulment litigation, while the Toma Stelian Law of 1910 marked a regression by returning to the trial of cases by the ordinary courts without the possibility of annulment of acts.

28 Law no. 554/2004 was amended by O.U.G. no. 190/2005 for the implementation of some necessary measures in the process of European integration (M. Of. no. 1179 of 28 December 2005), Law no. 262/2007 for the amendment and completion of the Administrative Disputes Law no. 554/2004 (M. Of. no. 510 of 30 July 2007), O.U.G. no. 100/2007 for the amendment and completion of some normative acts in the field of justice (M. Of. no. 684 of 8 October 2007), Law no. 100/2008 for the amendment of para. (1) of Article 9 of the Administrative Litigation Law No 554/2004 (Official Gazette No. 375 of 16 May 2008), Law No 202/2010 on some measures to speed up the resolution of cases (Official Gazette No. 714 of 26 October 2010), Law No 299/2011 for the repeal of para. (2) of Article 21 of the Administrative Litigation Law No 554/2004 (M. Of. no. 916 of 22 December 2011 and deemed unconstitutional in its entirety by DCC no. 1039/2012), Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure (M. Of. no. 365 of 30 May 2012), Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code (M. Of. no. 757 of 12 November 2012), Law no. 138/2014 for the amendment and completion of Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing some related normative acts (Official Gazette no. 753 of 16 October 2014), Law no. 212/2018 for amending and supplementing the Administrative Litigation Law no. 554/2004 and other normative acts (Official Gazette no. 658 of 30 July 2018), Government Ordinance no. 57/2019 on the Administrative Code (Official Gazette no. 555 of 5 July 2019). For an analysis of the transformations undergone by the Administrative Contentious Proceedings Law no. 554/2004 under the legislative amendments made to it over time see *V. Vedinaș, Tratat teoretic și practic de drept administrativ*, vol. II, Ed. Universul Juridic, Bucharest, 2018, pp. 161–179.

29 The provisions of Law no. 554/2004 have been the subject of numerous exceptions of unconstitutionality, some of which have been admitted by the Constitutional Court (such are the decisions of admission of exceptions of unconstitutionality: DCC no. 189/2006, DCC no. 647/2006, DCC nr. 65/2007, DCC nr. 660/2007, DCC nr. 797/2007, DCC nr. 1609/2010, DCC nr. 302/2011, DCC nr. 1039/2012, DCC nr. 459/2014). For an analysis of the Constitutional Court's decisions on Law no. 554/2004 see *C.-S. Săraru, Administrative Litigation Law no. 554/2004. Examen critic al Deciziilor Curții Constituționale. 2004–2014*, Ed. C. H. Beck, București, 2015.

Subsequently, the Cantacuzino Law of 1912 brought a compromise solution in the form of the *contencios de constatare*, which reflected a more moderate legal vision of the relationship between the administration and the courts.

The constitutionalisation of administrative litigation by Article 107 of the 1923 Constitution was a point of legal maturity, enshrining the idea of the protection of subjective rights against abuses by the administration, even if the establishment of separate administrative courts was still not allowed. It is a historical development that supports the comparative view of the world states and therefore presents both legislative changes and paradigm shifts in the Romanian legal mentality in relation to the rule of law and the control of administrative legality.



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ISTORIJA UPRAVNOG SUDSKOG POSTUPKA U RUMUNIJI

Apstrakt:

Istorija upravnog sudskog postupka u Rumuniji označava vijugav razvoj odnosa između građanina i države, uporedo s razvojem modernih pravnih institucija. Počev od uspostavljanja Državnog saveta 1864. godine, nadahnutog francuskim modelom, i kroz promjenljive pravne reforme s početka 20. veka, rumunsko upravno sudstvo prošlo je kroz značajne transformacije na više nivoa – od administrativne nadležnosti do sudske kontrole, od mehanizama poništavanja do prostih deklaracija nezakonitosti. Rad analizira uzastopne pravne režime koji su oblikovali upravno parničenje, sa vrhuncem u njegovom ustavnom priznanju u Ustavu iz 1923. godine. Kroz istraživanje ključnih zakonodavnih prekretnica, poput Badarau, Toma Stelian i Cantacuzino zakona, ova studija ukazuje kako na doktrinarne napetosti tako i na rastuću svest građana o svojim pravima pred administrativnom vlašću.

Ključne reči: *Upravni spor, Državni savet, ustavno pravo, Zakon Badarau, Rumunija, Zakon Cantacuzino, Zakon Toma Stelian, upravna nadležnost, vladavina prava, javna uprava.*

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AI FOR JUSTICE OR JUSTICE FOR AI? A CRITICAL ANALYSIS OF ALGORITHMIC DECISION-MAKING PROCESS IN JUDICIAL SYSTEMS

Abstract:

This paper explores the evolving interplay between Artificial Intelligence (AI) and justice, critically examining whether AI serves justice or if justice is being reshaped to accommodate AI. Central to this analysis is the European Union's AI Act, which establishes a comprehensive regulatory framework aimed at governing the use of AI technologies, particularly within high-stakes domains like the judicial system. The paper investigates the transformative impact of AI on the deliverance of justice, assessing both the efficiency gains and the significant risks associated with its deployment in legal decision-making processes. Particular attention is given to ethical concerns arising from algorithmic bias, opacity in decision-making, and the potential erosion of fundamental legal principles such as fairness, accountability, and human oversight. A comparative methodology is employed to analyze the approaches of the European Union and the United States, highlighting differences in regulatory philosophy, institutional safeguards, and public discourse around AI in justice. Special emphasis is given on the study of two significant cases in which justice is delivered through the deployment of AI tools: the first one refers to Rowicz case (EU law) and the second one to Loomis case (international law). While the EU adopts a precautionary and rights-based approach, the U.S. leans toward innovation-driven, market-led regulation. This transatlantic comparison underscores the urgent need for harmonized legal standards that uphold justice in an era increasingly mediated by algorithms, questioning whether AI can truly serve justice—or if legal systems must adapt to ensure justice remains human-centered.

Key Words : Justice, Artificial Intelligence, transparency, accountability, Loomis case, Rowicz.

1. INTRODUCTION

The rapid integration of Artificial Intelligence into judicial systems worldwide presents a profound question that cuts to the heart of legal philosophy: Are we deploying AI to serve justice, or are we gradually reshaping justice to accommodate AI? This fundamental tension between technological capability and judicial integrity forms the central thesis of our contemporary legal landscape's most pressing challenge.

Artificial Intelligence has undoubtedly emerged as a transformative technology with applications reaching into virtually every aspect of human society. From healthcare diagnostics to educational personalization, AI promises efficiency, consistency, and data-driven decision-making¹. Yet when this technology enters the sacred halls of justice, we must ask whether these promises align with the fundamental principles upon which our legal systems are built².

The justice sector's adoption of AI reflects a broader societal belief in technology's ability to solve complex problems, but unlike other fields focused on efficiency, justice systems bear the unique responsibility of upholding rights, due process, and public trust. This analysis explores whether AI in judicial contexts truly advances "AI for Justice"—technology serving fair and effective legal administration—or instead signals "Justice for AI," where legal norms are reshaped to fit technological limits and commercial pressures. By examining key cases like *State v. Loomis* (2016) in the U.S. and the EU's pending *Case C-159/2025 (Rowicz)*, we assess whether courts are adapting AI to meet justice standards or compromising justice to accommodate AI.

SECTION I: THE LOOMIS CASE.

THE FACTS AND CONSTITUTIONAL CHALLENGE.

The case of *State v. Loomis*³ presents a stark example of how the question "AI for Justice or Justice for AI?" plays out in practice. Brandon Loomis, convicted of a felony in Wisconsin in 2014, became the unwitting subject of a legal precedent that would fundamentally alter the relationship between algorithmic systems and judicial decision-making in American criminal justice⁴.

The facts reveal how AI systems can fundamentally alter the trajectory of individual lives through opaque decision-making processes. Loomis, despite denying involvement

1 AI technology may offer multiple services. See Negnevitsky, M. (2020). *Artificial intelligence: A guide to intelligent systems* (3rd ed.). Addison Wesley.

2 Regarding the relationship between AI and law see Byuers, J. (2018). *Artificial intelligence – The practical legal issues*. Legal Brief Publishing. Ashley, K. (2017). *Artificial intelligence and legal analytics: New tools for practice in the digital age*. Cambridge University Press.

3 *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). <https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=171690>

4 See a detailed presentation of Loomis Case in : Harvard Law Review. (2017, March 21). Wisconsin Supreme Court requires warning before use of algorithmic risk assessments in sentencing. *Harvard Law Review*, 130. <https://harvardlawreview.org/print/vol-130/state-v-loomis/>, Smith, M. (2016, June 22). In Wisconsin, a backlash against using data to foretell defendants' futures. *The New York Times*. <https://www.nytimes.com/2016/06/23/us/backlash-in-wisconsin-against-using-data-to-foretell-defendants-futures.html>

in the crime, accepted a plea deal that left his sentence to judicial discretion. The judge, seeking to make an informed sentencing decision, ordered a Pre-Sentence Investigation that included the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) risk assessment. This algorithmic system generated scores indicating that Loomis presented high pre-trial risk, high risk of recidivism, and high risk of violent recidivism.

The impact of these algorithmic predictions was dramatic. Instead of the one-year county jail sentence with probation that both prosecution and defense had negotiated, the court imposed seven years with four years of confinement. This substantial departure from the agreed-upon sentence demonstrates how AI systems can effectively override human judgment and negotiated agreements, raising fundamental questions about who or what ultimately controls judicial outcomes.

Loomis's legal challenge to the use of COMPAS in his sentencing presents a clear test of whether the legal system would prioritize traditional constitutional protections or accommodate AI system limitations. His defense argued that relying on the COMPAS algorithm violated his Sixth Amendment rights, particularly his right to confront witnesses and his right to due process, because the algorithm's proprietary nature made it impossible to scrutinize or challenge its assessments.

This challenge represented a crucial moment where the legal system had to choose between two paths: either requiring AI systems to meet established constitutional standards or modifying constitutional interpretations to accommodate AI system limitations. The defense's argument was fundamentally about maintaining traditional legal principles that ensure defendants can understand and challenge evidence used against them.

The Wisconsin Supreme Court's decision reveals which path the legal system chose. The court ruled that the use of COMPAS did not violate constitutional rights, but the reasoning behind this decision is telling. Rather than requiring the AI system to meet transparency standards that would enable meaningful challenge, the court instead modified the constitutional analysis to accommodate the AI system's opacity.

The court's reasoning that COMPAS was "*just one factor among many*" and that "*the Court needed all the help it could get*" suggests a prioritization of AI assistance over constitutional rigor. The Court additionally gave a general overview of the acceptable COMPAS assessments uses (diverting low-risk prison-bound offenders to a non-prison alternative, assessing whether an offender can be supervised safely and effectively in the community and imposing terms and conditions of probation, supervision, and responses to violations)⁵ and highlighted the caution a judge should possess when treating risk assessments, mandating that pre-sentencing investigation (PSI) reports containing COMPAS risk assessments must make certain disclosures to sentencing courts. This "written advisement of its limitations" should explain that:

- i) COMPAS is a proprietary tool, which has prevented the disclosure of specific information about the weights of the factors or how risk scores are calculated;
- ii) COMPAS scores are based on group data, and therefore identify groups with characteristics that make them high-risk offenders, not particular high-risk individuals;

Several studies have suggested that the COMPAS algorithm may be biased in how it classifies minority offenders;

5 881 N.W.2d 768.

- iii) COMPAS compares defendants to a national sample, but has not completed a cross-validation study for a Wisconsin population, and tools like this must be constantly monitored and updated for accuracy as populations change; and
- iv) COMPAS was not originally developed for use at sentencing. On the contrary, it was destined to assist post-sentencing.

This decision effectively creates a legal framework where AI systems can influence judicial decisions without meeting the same transparency and accountability standards required of human testimony or evidence.

The Wisconsin Supreme Court's decision, allowed to stand by the U.S. Supreme Court's denial of certiorari, established a precedent that appears to prioritize "Justice for AI" over "AI for Justice", which is the core question in our case.

This precedent raises profound questions about the direction of legal evolution. On the one hand, it has been proved that there is a 70% chance that any randomly selected higher-risk individual is classified as higher risk than a randomly selected low-risk individual⁶. On the other hand, it is also generally confirmed that risk assessment instruments can predict who is at risk to recidivate with at least some degree of accuracy within societies that are marked by a high degree of diversity – like that of the United States⁷.

The Loomis precedent suggests that when AI capabilities conflict with traditional legal protections, courts may be more willing to adapt legal standards than to require AI systems to meet established constitutional requirements. This adaptation represents a fundamental shift in the balance of power between technology and legal principles, with potentially far-reaching implications for the future of constitutional protections in an AI-driven legal system.

The Loomis decision essentially resolved the transparency paradox by accepting AI decisions without requiring full understanding. This approach prioritizes AI capability over human understanding, suggesting that the benefits of AI decision-making can justify the acceptance of opaque processes. However, this acceptance comes at the cost of traditional accountability mechanisms and may create a two-tiered justice system where some decisions are subject to scrutiny and challenge while others are protected by claims of algorithmic complexity.

SECTION II: THE LOOMIS CASE UNDER THE LIGHT OF THE EU AI ACT

REGULATORY PHILOSOPHY: JUSTICE AS THE STANDARD

The European Union's approach to AI regulation, as embodied in the EU AI Act, represents a markedly different response to the fundamental question of AI's role in justice systems. Rather than adapting legal principles to accommodate AI limitations, the EU AI Act attempts to require AI systems to conform to established legal and ethical principles. This approach suggests a commitment to "AI for Justice" rather than "Justice for AI."

⁶ Lightbourne, J. (2017). Damned lies and criminal sentencing using evidence-based tools. *Duke Law & Technology Review*, 15(1), 1–25.

⁷ James, N. (2015). *Risk and needs assessment in the criminal justice system* (CRS Report No. R44087). Congressional Research Service.

The EU AI Act's approach to high-risk AI systems, particularly those used in law enforcement and judicial decision-making⁸, establishes justice and fundamental rights as the benchmark against which AI systems must be measured. Rather than asking how legal systems can accommodate AI limitations, the Act asks how AI systems can be designed and deployed to serve justice effectively while respecting fundamental rights.

The EU AI Act's transparency requirements directly address the core problem identified in the *Loomis* case: the use of opaque AI systems in contexts where transparency is essential for justice. Article 13's requirement that high-risk AI systems be "sufficiently transparent" to enable users to "interpret the system's output and use it appropriately" represents a clear statement that AI systems must serve human understanding rather than requiring humans to accept AI outputs without comprehension.

The EU AI Act prioritizes the needs of justice over the commercial interests of AI developers by requiring transparency and human oversight in high-risk contexts, including judicial settings. Rather than modifying justice systems to fit opaque AI tools, the Act insists that only transparent and accountable systems be used, addressing concerns raised in cases like *Loomis*, where judges relied on opaque algorithms. Article 14 mandates effective human supervision to preserve human agency in decisions affecting fundamental rights, ensuring AI serves rather than replaces human judgment. Unlike the *Loomis* court, which adapted legal standards to fit AI limitations, the EU AI Act upholds legal and ethical norms, requiring contestability, bias mitigation, and transparency—signaling that AI must adapt to justice, not the other way around.

According to the European leaders, the EU AI Act aims to establish harmonised rules on artificial intelligence. It is part of a wider package of policy measures to support the development of trustworthy AI, which also includes the AI Innovation Package, the launch of AI Factories and the Coordinated Plan on AI⁹. In order to build a powerful and trustful AI it is an imperative need to respect certain legal and ethical guidelines. This approach treats justice and fundamental rights as non-negotiable standards that AI systems must meet.

SECTION III: THE EU AI ACT UNDER EXAMINATION IN THE EU LEGAL SYSTEM: THE CASE C-159/2025 (ROWICZ).

THE CASE AND ITS SIGNIFICANCE

The preliminary ruling request in Case C-159/2025 (Rowicz)¹⁰ presents a crucial test of whether European courts will follow the regulatory philosophy established by the EU AI Act or succumb to the same pressures that led to the *Loomis* decision. The case

8 According to art.6.2 of the EU AI Act and the Annex III, AI systems intended to be used by a judicial authority serving in the administration of justice as well as any AI tools used for purposes of law enforcement are classified as high-risk AI systems. See European Parliament. (n.d.). *Annex III: High-risk AI systems (Artificial Intelligence Act)*. Retrieved June 27, 2025, from <https://artificialintelligenceact.eu/annex/3/>.

9 European Commission. (n.d.). *Regulatory framework for artificial intelligence*. Retrieved June 27, 2025, from <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai>.

10 <https://curia.europa.eu/juris/document/document.jsf?jsessionid=AF710376452DA4C6D70CE45E6AF710376452DA4C6D70CE45E6461B292?text=&docid=301557&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3854517>.

involves Poland's Random Case Allocation System (SLPS), an AI system developed by the Ministry of Justice to assign judges to cases.

The *Rowicz* case highlights a core conflict between the efficiency offered by AI and the constitutional principle of judicial independence. While the SLPS system, developed by Poland's Ministry of Justice, may enhance administrative efficiency and consistency, its executive origin raises serious concerns about the separation of powers. This creates a constitutional dilemma: should the operational benefits of AI justify potential compromises to judicial autonomy?

By allowing the executive branch to control judicial assignments through an AI system, the SLPS blurs institutional boundaries and risks indirect executive influence over the judiciary. Though the algorithm may appear neutral, its development, implementation, and oversight by the executive open the door to impermissible forms of control, undermining traditional safeguards of judicial independence. The *Rowicz* case will test whether European courts will uphold EU AI Act principles, even when doing so could mean restricting widely used AI tools.

More broadly, the case raises concerns about democratic accountability and the concentration of institutional power in the executive. When AI systems impacting justice outcomes are developed outside of judicial oversight, they shift power dynamics and erode traditional checks and balances. The outcome of *Rowicz* will indicate whether the EU's commitment to "AI for Justice" is substantive or merely rhetorical in the face of institutional convenience and executive influence.

SECTION IV: THE LOOMIS CASE VS. ROWICZ CASE.

The comparison between the American approach exemplified by *Loomis* and the European approach embodied in the AI Act and tested in *Rowicz* reveals two fundamentally different philosophies about the relationship between AI and justice.

The *Loomis* decision may be an ideal example of adaptation of legal standards and constitutional interpretations to AI systems, on the basis of the respect of specific requirements. This approach prioritizes the benefits that AI systems can provide to judicial administration, even when those benefits come at the cost of traditional legal protections.

Therefore, AI systems as beneficial tools that should be integrated into legal processes with minimal interference. When conflicts arise between AI capabilities and legal requirements, this approach tends to resolve those conflicts by modifying legal standards rather than requiring changes to AI systems.

This philosophy reflects a faith in technological solutions and a willingness to adapt legal institutions to take advantage of technological capabilities. However, it also raises concerns about the gradual erosion of legal protections and the increasing dependence of legal institutions on commercial AI products that may not be designed with legal principles in mind.

The EU AI Act corresponds to a more concrete, pure legal and human-centric approach in the sense that AI systems shall be adapted to legal and ethical principles rather than expecting legal systems to adapt to AI limitations.

This approach treats justice and fundamental rights as non-negotiable standards that AI systems must meet.¹¹

The aforementioned approach recognizes that AI systems can provide valuable benefits to legal institutions but insists that these benefits cannot come at the expense of fundamental rights or core legal principles. When conflicts arise between AI capabilities and legal requirements, this approach requires changes to AI systems rather than modifications to legal standards.

The contrast between the *State v. Loomis* decision and the European Union's regulatory framework, exemplified in cases like *Rowicz*, reveals fundamentally different philosophies regarding AI deployment in judicial and administrative systems. These differences manifest across four critical dimensions that define the relationship between artificial intelligence and democratic governance.

i) the principle of transparency.

The Wisconsin Supreme Court in *Loomis* effectively normalized algorithmic opacity in judicial decision-making. The court acknowledged that the COMPAS risk assessment tool's proprietary algorithms remained entirely opaque to defendants, judges, and even court officials, yet deemed this acceptable provided certain procedural safeguards were observed. This approach treats algorithmic inscrutability as an inevitable cost of technological advancement, requiring judicial actors to work around rather than through AI systems.

The *Loomis* framework established a troubling precedent by suggesting that due process requirements could be satisfied even when neither the defendant nor the judge could understand how critical risk assessments were generated. The court's reasoning implicitly accepted that commercial interests in protecting trade secrets could outweigh fundamental transparency requirements in criminal justice proceedings¹².

In stark contrast, the EU's regulatory framework, as demonstrated in *Rowicz* and codified in the AI Act, treats explainability not as a desirable feature but as a fundamental prerequisite for AI deployment in high-risk contexts. This approach recognizes that algorithmic transparency is essential for maintaining the rule of law and ensuring that automated systems remain subject to meaningful legal oversight.

The EU framework requires that individuals subject to AI-driven decisions must be able to understand the logic, significance, and consequences of the automated processing. This goes beyond mere notification of AI use to demand substantive explainability that enables meaningful challenge and review. The *Rowicz* case exemplifies this principle by establishing that automated decision-making systems must provide sufficient transparency to allow for effective judicial review and individual redress.

ii) the element of human agency.

11 See a detailed commentary of the EU AI Act in Ceyhan Necati Pehlivan, Forgó, N., & Valcke, P. (2024). *The EU artificial intelligence (AI) act: A commentary*. Kluwer Law International.

12 See about the impact of the principle of transparency in the deliverance of justice in Ryberg, J. (2022). *Sentencing and algorithmic transparency*. Oxford Academic Books., Zerilli, J. (2022). *Algorithmic sentencing: Drawing lessons from human factors research*. Oxford Academic Books., Begby, E. (2021). *Automated risk assessment in the criminal justice process: A case of 'algorithmic bias'?* Oxford Academic Books., Monahan, J., & Skeem, J. (2016). Risk assessment in criminal sentencing. *Annual Review of Clinical Psychology*, 12, 489–513. <https://doi.org/10.1146/annurev-clinpsy-021815-092945>

The *Loomis* decision effectively legitimized a model where AI systems can substantially influence or even override human judgment in critical decisions. While the court nominally required judges to consider additional factors beyond the COMPAS score, the practical reality created a system where algorithmic recommendations carried disproportionate weight precisely because their basis could not be interrogated or challenged.

This approach fundamentally alters the relationship between human decision-makers and automated systems, positioning judges as consumers rather than controllers of algorithmic outputs. The inability to examine the reasoning behind risk assessments means that human oversight becomes largely ceremonial, reduced to either accepting or rejecting recommendations they cannot fully evaluate ¹³.

The EU Framework: Human Agency Principle.

The EU approach, exemplified in *Rowicz*, insists on maintaining meaningful human agency throughout automated decision-making processes. Thus, human operators retain genuine authority over AI systems and possess the information necessary to exercise that authority effectively.

Under this framework, automated systems must be designed to support rather than supplant human judgment. The *Rowicz* case established that meaningful human oversight requires not only the formal authority to override AI recommendations but also the practical capability to do so based on comprehensible information about how those recommendations were generated. This ensures that human decision-makers remain the ultimate arbiters of consequential choices affecting individual rights.

iii) the constitutional approach.

The Loomis Accommodation Model

The Wisconsin Supreme Court in *Loomis* constituted an extraordinarily important decision, because it was the first ever to address the constitutionality of the use of algorithms in sentencing¹⁴. Rather than requiring AI systems to meet established constitutional benchmarks, the court adapted constitutional requirements to fit around technological constraints.

This approach represents a concerning inversion of the traditional relationship between technology and constitutional rights. Instead of technology serving constitutional values, constitutional interpretation was modified to accommodate technological limitations. The court's reasoning suggested that the benefits of AI-assisted decision-making could justify accepting reduced procedural protections, fundamentally altering the constitutional landscape without explicit democratic authorization ¹⁵.

13 See De Miguel Beriain, I. (2018). Does the use of risk assessments in sentences respect the right to due process? A critical analysis of the Wisconsin v. Loomis ruling. *Law, Probability and Risk*, 17(1), 45–53. <https://doi.org/10.1093/lpr/mgy001>, as well as Freeman, K. (2016). Algorithmic injustice: How the Wisconsin Supreme Court failed to protect due process rights in State v. Loomis. *North Carolina Journal of Law & Technology Online*, 18, 75–97. http://ncjolt.org/wp-content/uploads/2016/12/Freeman_Final.pdf

14 De Miguel Beriain, I. (2018). Does the use of risk assessments in sentences respect the right to due process? A critical analysis of the Wisconsin v. Loomis ruling. *Law, Probability and Risk*, 17(1), 45–53. <https://doi.org/10.1093/lpr/mgy001>.

15 See a critical approach of the use of AI tools in justice from a constitutional point of view in O'Neil, C. (2016). *Weapons of math destruction: How big data increases inequality and threatens democracy*. Crown.,

The EU Approach: Technology Must Meet Constitutional Standards

Contrary to *Loomis* case, the European framework asserts that AI systems must comply with existing human rights and constitutional standards, not the other way around. The *Rowicz* case reflects this by affirming that automated systems cannot be used unless they meet the same procedural and substantive safeguards required of human decision-makers. This approach upholds constitutional values over technological convenience, requiring AI to adapt to legal standards rather than compromising protections for the sake of innovation.

iv) issues of democratic accountability.

The *Loomis* decision reflected a troubling deference to commercial AI products, accepting private companies' assertions about algorithmic effectiveness without requiring independent validation or public oversight. This approach essentially outsourced critical aspects of judicial decision-making to private entities while insulating those entities from meaningful public accountability¹⁶.

The court's acceptance of COMPAS without rigorous public evaluation or ongoing oversight created a precedent for incorporating commercial AI products into governmental functions without the transparency and accountability mechanisms typically required for public institutions. This model treats AI systems as consumer products rather than components of democratic governance subject to public scrutiny and control.

The EU Framework: Public Accountability and Democratic Oversight

The European approach, exemplified in *Rowicz* and formalized by the AI Act, requires AI systems used in government to be subject to strong public accountability measures. These include independent audits, transparent documentation, and oversight by democratically accountable institutions. Recognizing that such systems become part of the democratic process, the EU mandates transparency, performance evaluation, and mechanisms for oversight and correction, ensuring AI in public administration adheres to the same standards as other governmental functions.

Implications for Democratic Governance

The contrasting approaches illustrated by the *Loomis* and *Rowicz* cases reflect fundamentally different conceptions of the relationship between artificial intelligence and democratic governance. The *Loomis* model suggests that democratic institutions must adapt to technological constraints, accepting diminished transparency, reduced human agency, and weaker constitutional safeguards as trade-offs for innovation and efficiency. In contrast, the European approach, exemplified by *Rowicz*, maintains that AI must conform to existing democratic and legal standards—ensuring transparency, human oversight, constitutional compliance, and accountability. This divergence underscores that the

Hamilton, M. (2015). Risk-needs assessment: Constitutional and ethical challenges. *American Criminal Law Review*, 52(2), 231–274.

16 Liu, H.-W., Lin, C.-F., & Chen, Y.-J. (2019). Beyond *State v. Loomis*: Artificial intelligence, government algorithmization, and accountability. *International Journal of Law and Information Technology*, 27(2), 122–141. <https://doi.org/10.1093/ijlit/eaz004>. srani, E. (2017, August 31). Algorithmic due process: Mistaken accountability and attribution in *State v. Loomis*. *Harvard Journal of Law & Technology Digest*. <https://jolt.law.harvard.edu/digest/algorithmic-due-process-mistaken-accountability-and-attribution-in-state-v-loomis-1>. Van Meter, M. (2016, February 25). One judge makes the case for judgment. *The Atlantic*. <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/>.

integration of AI into governance is not merely a technical issue but a societal decision about which values to uphold.

These cases also challenge the notion of algorithmic neutrality, exposing how AI systems inevitably encode the biases and priorities of their creators. Loomis highlights the risks of commercial AI prioritizing efficiency and risk assessment over due process, while Rowicz demonstrates how government-developed AI may advance administrative or political objectives that undermine judicial independence. The central issue, therefore, is whether justice systems will adapt to these embedded biases or demand that AI technologies be designed to uphold legal and ethical standards. The path chosen will have profound implications not only for innovation but for the legitimacy, fairness, and democratic accountability of legal institutions.

6. RECOMMENDATIONS - CONCLUSIONS

The central question—"AI for Justice or Justice for AI?"—is not just theoretical but urgently practical, as current decisions on AI integration will shape legal institutions for generations. To ensure AI serves justice rather than distorting it, several key recommendations emerge: transparency must be a fundamental requirement to maintain accountability and legitimacy; human agency and oversight must be preserved through meaningful control and expertise; bias testing and mitigation must be continuous, not one-off; and democratic participation must be embedded in AI governance to align systems with public values.

This dilemma is fundamentally one of values: whether to design AI systems that uphold the principles of justice—even at the cost of reduced functionality or increased development expenses—or to reshape legal frameworks to accommodate the inherent limitations and commercial interests of AI technologies. Resolving this issue requires inclusive democratic deliberation, extending beyond the perspectives of technologists and policymakers, as the legitimacy and fairness of justice systems rely on public trust and collective societal values. As AI becomes increasingly integrated into legal institutions and commercial incentives intensify, the challenge of preserving justice system integrity against the pressures of technological accommodation will only grow. The choice before us is critical: to develop AI tools that support and remain subordinate to human judgment and democratic oversight, or to risk creating a system where efficiency is prioritized over fairness, transparency, and accountability—ultimately shaping not only the performance of justice but its ethical foundation and societal legitimacy.



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VEŠTAČKA INTELIGENCIJA ZA PRAVDU ILI PRAVDA ZA VEŠTAČKU INTELIGENCIJU? KRITIČKA ANALIZA ALGORITAMSKOG PROCESA DONOŠENJA ODLUKA U PRAVOSUDNIM SISTEMIMA

Apstrakt:

Ovaj rad istražuje razvijajući odnos između veštačke inteligencije (AI) i pravde, kritički ispitujući da li AI služi pravdi ili se pravda preoblikuje kako bi se prilagodila AI. U središtu ove analize je Akt o veštačkoj inteligenciji Evropske unije, koji uspostavlja sveobuhvatan regulatorni okvir za upravljanje korišćenjem AI tehnologija, naročito u oblastima visokog rizika poput pravosudnog sistema. Rad istražuje transformativni uticaj AI na pružanje pravde, ocenjujući kako dobitke u efikasnosti tako i značajne rizike povezane sa njenom primenom u procesima donošenja pravnih odluka. Posebna pažnja posvećena je etičkim nedoumicama koje proizilaze iz algoritamske pristrasnosti, netransparentnosti u odlučivanju i mogućem narušavanju osnovnih pravnih načela kao što su pravičnost, odgovornost i ljudski nadzor. Komparativna metodologija koristi se za analizu pristupa Evropske unije i Sjedinjenih Američkih Država, ističući razlike u regulatornoj filozofiji, institucionalnim merama i javnoj debati o veštačkoj inteligenciji u oblasti pravde. Poseban naglasak stavljen je na proučavanje dva značajna slučaja u kojima se pravda ostvaruje primenom alata veštačke inteligencije: prvi se odnosi na slučaj Rowicz (pravo EU), a drugi na slučaj Loomis (međunarodno pravo). Dok EU usvaja preventivni i na pravima zasnovan pristup, SAD-e teže regulatornom pristupu zasnovanom na inovacijama i vođenom tržišnim principima. Ova transatlantska komparacija naglašava hitnu potrebu za usklađenim pravnim standardima koji podržavaju pravdu u eri algoritamskog posredovanja, postavljajući pitanje da li AI zaista može služiti pravdi ili pravni sistem mora da se prilagodi kako bi pravda ostala usredsređena na čoveka.

Ključne reči: *pravda, veštačka inteligencija, transparentnost, odgovornost, slučaj Loomis, slučaj Rowicz*

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20. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). <https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=171690>
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**THE LAW OF THE SEA IN THE AGE OF CYBER THREATS:
PROTECTING MARITIME INFRASTRUCTURE
AND THE MARINE ENVIRONMENT**

Abstract:

The maritime sector's rapid digitalization has resulted in substantial vulnerabilities to the marine ecosystem. Cyber threats have emerged as a critical challenge to global shipping, port operations, and offshore infrastructure. More specifically, the technological advancements in ports, vessels, offshore platforms, and ocean-monitoring systems have created greater risks from cyberattacks, including GPS spoofing, ransomware, and system hijacking, as they depend more on linked technology. These risks might cut off international commerce, put at risk human lives, and impose major ecological harm, involving pollution from compromised systems or oil spills. Notwithstanding these hazards, the United Nations Convention on the Law of the Sea (UNCLOS) lacks specific provisions to address cybersecurity, thereby creating a legal void in maritime governance. Drawing from legal analysis and real-world incidents, the article examines how current international maritime law might be understood or adjusted to address cyber threats. Furthermore, by emphasizing limitations in attribution, jurisdiction, and enforcement, the article proposes pathways to integrate cybersecurity into the broader maritime security and environmental protection agenda. Finally, it assesses the way international organizations—especially the International Maritime Organization (IMO)—may help to advance legislative remedies. The article offers suggestions for modernizing the maritime legal framework to ensure resilient, safe, and environmentally sustainable oceans in the digital era through an analysis of legal texts, current cyber events, and governance practices. The goal is to spark dialogue on modernizing international maritime law for the digital age.

Keywords: *International Maritime Law, Critical Maritime Infrastructure, Cyber Threats, Attribution & Jurisdiction, Maritime Governance*

1. INTRODUCTION

In an era marked by accelerated globalization and economic interdependence, maritime infrastructure has emerged as a cornerstone of global trade and strategic mobility. The strategic and economic importance of maritime infrastructure has intensified on the uninterrupted functioning of ports, shipping lanes, and offshore platforms. According to UNCTAD, maritime transport continues to handle over 80% of the volume of global merchandise trade, with recent figures indicating that global maritime trade reached 12.3 billion tons in 2023 and is projected to grow by 2.4% annually through 2029.¹ This reliance underscores the maritime domain's critical role in sustaining supply chains, ensuring energy security, and enabling international commerce. Concurrently, the digitalization of maritime operations – spanning automated navigation, smart port systems, and integrated logistics platforms – has expanded the sector's cyber-attack surface, exposing critical infrastructure to a growing range of cyber threats.^{2,3} Cyber-attacks targeting maritime systems have increased in frequency and sophistication, with incidents such as the ransomware attack on CMA CGM, the NotPetya incident affecting Maersk (2017), and ongoing GPS spoofing events in the Strait of Hormuz, highlighting the sector's vulnerabilities.^{4,5} These developments signal a pressing need for robust cybersecurity governance tailored to the unique operational and legal complexities of the maritime domain.

Despite the accelerating digital transformation of maritime infrastructure and the corresponding rise in sophisticated cyber threats, the international legal framework, most notably the United Nations Convention on the Law of the Sea (UNCLOS), remains largely silent on cybersecurity concerns. The absence of explicit provisions addressing cyber incidents at sea raises critical questions about the adequacy of existing legal norms in governing emerging technological risks. UNCLOS was drafted in a pre-digital era and is not equipped to address the complexities of cyberattacks on global shipping, port operations, and offshore installations.⁶ Against this backdrop, the central research question guiding this study is *'to what extent is international maritime law, particularly UNCLOS, capable of addressing the evolving threat of cyber-attacks targeting maritime infrastructure, and what legal reforms or governance mechanisms are required to enhance cybersecurity resilience in the sector?'*

To address the core research question, this article pursues four interrelated objectives. First, it critically analyzes the structural and doctrinal limitations of the UNCLOS and related legal instruments in effectively responding to maritime cyber threats, as highlighted in the recent legal scholarship.⁷ Second, it examines the role of international institutions, particularly the International Maritime Organization (IMO), in shaping cybersecurity governance through instruments such as the *Guidelines on Maritime Cyber Risk Management* and the evolving *Maritime Autonomous Surface Ships (MASS) Code*.⁸

1 UNCTAD. (2023). *Review of Maritime Transport 2023*. United Nations Conference on Trade and Development.

2 IMO. (2021). *Guidelines on Maritime Cyber Risk Management*. International Maritime Organization.

3 ENISA. (2023). *Threat Landscape for the Maritime Sector*. European Union Agency for Cybersecurity.

4 Lloyd's List. (2022). *Cyber Risks in Shipping: An Evolving Threat*.

5 Marlink. (2024). *Cyber Threat Intelligence Brief: Maritime Sector Trends*.

6 Kraska, J. (2015). *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*. Harvard National Security Journal, 6, 1–46.

7 Tanaka, Y. (2023). *The International Law of the Sea* (4th ed.). Cambridge University Press.

8 International Maritime Organization (IMO). (2021). *Guidelines on Maritime Cyber Risk Management*

Third, the study assesses selected cyber incidents, such as the NotPetya attack on Maersk and targeted disruptions to maritime communications systems, to evaluate how current legal and operational frameworks align with best practices in cybersecurity and international law.^{9,10} Finally, it proposes policy and legal recommendations to bridge normative gaps and integrate cybersecurity into the broader framework of maritime safety, environmental protection, and multilateral cooperation. By addressing these objectives, the study contributes to the growing discourse on modernizing maritime legal governance to meet the challenges of technological advancement, and advocates for the development of a more resilient, adaptive, and future-oriented legal framework.

2. THE INTERNATIONAL LEGAL FRAMEWORK FOR THE LAW OF THE SEA. CONTEMPORARY CHALLENGES AND THE COMPREHENSIVE FRAMEWORK OF MODERN MARITIME LAW

The evolution of maritime law from ancient commercial practices to modern international frameworks represents one of the most significant legal developments in human history. The foundational principles of contemporary maritime law can be traced back to the ancient Rhodian Sea Laws, which governed commercial trade and navigation in the Byzantine Empire beginning in the 7th century and established crucial precedents for maritime jurisdiction and dispute resolution.¹¹ These early regulations established a uniform standard for the treatment of merchant ships as they moved from port to port and introduced the revolutionary concept that maritime disputes should be governed by specialized maritime law rather than local territorial courts.¹² The influence of these ancient codes extended far beyond their original Mediterranean context, laying the groundwork for the sophisticated legal architecture that governs today's global shipping industry.

In general, maritime regulations are divided into two main categories. The first is the rules of the law of the sea, which define the rights and obligations of states to regulate and act against foreign ships in various maritime areas. These are mainly contained in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Second, more detailed technical requirements covering safety, navigation, personnel and monitoring standards are set out in various conventions, which are usually adopted by the International Maritime Organization (IMO). These international regulations are then implemented and, in some cases, supplemented by national regulations (National regulations govern local businesses and regulate local maritime matters.)¹³

(MSC-FAL.1/Circ.3). <https://www.imo.org/en>

9 Marlink. (2024). *Cyber Threat Intelligence Brief: Maritime Sector Trends*. Marlink Maritime Cybersecurity Division.

10 OECD. (2022). *Cybersecurity in Critical Infrastructure: Policy Gaps and Governance Needs*. Organisation for Economic Co-operation and Development. <https://www.oecd.org/>

11 Britannica. "Rhodian Sea Law." Accessed June 25, 2025, <https://www.britannica.com/event/Rhodian-Sea-Law>

12 Maintenance and Cure. "The Intriguing History of Maritime Law." July 12, 2024. <https://maintenanceandcure.com/maritime-blog/the-intriguing-history-of-maritime-law/>

13 <https://eur-lex.europa.eu/EN/legal-content/summary/united-nations-convention-on-the-law-of-the-sea.html>, Tamada, D., & Zou, K. (Eds.). (2021). *Implementation of the United Nations Convention on the Law of the Sea: State Practice of China and Japan*. Springer.

The modern international legal framework for maritime activities reached its culmination with the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982, which marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world.¹⁴ UNCLOS represents a comprehensive legal revolution that lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources, fundamentally transforming how nations interact with maritime spaces.¹⁵ The Convention establishes detailed provisions for territorial seas, exclusive economic zones, continental shelves, and the high seas, creating a unified legal framework that balances sovereign rights with the principle of freedom of navigation.¹⁶ This international legal architecture has become indispensable in an era where maritime trade accounts for approximately 80% of global goods movement, providing the essential legal foundation for the complex web of international commerce, environmental protection, and maritime security that defines our interconnected world.

The integration of technological innovations, particularly megaships and autonomous vessels, into existing maritime legal frameworks presents fundamental challenges that current international regulations are ill-equipped to address. New technological development in autonomous and unmanned vessels challenges the international legal framework prevailing at sea, with current regulations applicable to international shipping constituting regulatory barriers preventing their operation on a worldwide scale.¹⁷ Professor Henrik Ringbom of the Scandinavian Institute for Maritime Law argues that “the regulatory framework for autonomous ships is fundamentally flawed because it assumes human decision-making at every critical juncture,” warning that current maritime conventions cannot adequately address liability when artificial intelligence systems make navigation decisions.¹⁸

The international law of the sea represents one of the most ancient and continuously evolving branches of public international law, fundamentally shaped by humanity's enduring relationship with maritime spaces and the practical necessities of regulating oceanic activities. As Professor Yoshifumi Tanaka observes in his authoritative work “The International Law of the Sea”¹⁹, this field has been fully revised to include up-to-date coverage of essential issues, covering new and important matters such as the headline debate of migrant movement across the seas, and the definition of islands in light of the South China Sea Arbitration, while also addressing chapters on conservation of marine living resources and biological diversity, protection of the marine environment, and international peace and security at sea, as well as building further on such topics as the impact of climate change on the oceans.²⁰ The historical development of maritime

14 United Nations Division for Ocean Affairs and the Law of the Sea. “Overview - Convention & Related Agreements.” Accessed June 25, 2025. https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

15 International Maritime Organization. “United Nations Convention on the Law of the Sea.” Accessed June 25, 2025. <https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx>

16 Tanaka, Y. (2023). *The International Law of the Sea* (4th ed.). Cambridge: Cambridge University Press.

17 Ringbom H., Røsæg E., Solvang T., *Autonomous Ships and the Law* (IMLI Studies in International Maritime Law), (Routledge, 2020)

18 Ibid

19 Tanaka, Y. (2023). *The International Law of the Sea* (4th ed.). Cambridge: Cambridge University Press.

20 Caddell, Richard and Thomas, D.R. (Eds.) (2013). *Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal Implications and Liabilities*. Lawtext Publishing Limited.

law reflects the fundamental tension between the freedom of navigation essential for international commerce and the sovereign rights of coastal states over adjacent waters. Unlike many other branches of international law that emerged from specific treaties or diplomatic conferences, the law of the sea evolved organically from customary practices of maritime nations, trade customs, and the practical necessities of regulating navigation, fishing, and maritime commerce. This evolutionary character distinguishes it from more recently codified areas of international law, as it represents centuries of accumulated state practice and *opinio juris* that have been subsequently codified and systematized through multilateral conventions, most notably the 1982.

Modern law of the sea, anchored by UNCLOS as the “constitution for the oceans,” balances sovereignty, cooperation, and maritime commons management.²¹ Contemporary scholarship reveals how foundational principles—like the ICJ’s maxim “The land dominates the sea”—are strained by emerging challenges, particularly sea-level rise threatening maritime boundaries.²² ²³The field’s dynamism is evidenced by ongoing scholarly engagement with climate impacts, delimitation disputes, and technological innovations, demonstrating international law’s capacity to adapt while preserving foundational norms.²⁴

3. CYBER THREATS TO MARITIME INFRASTRUCTURE AND THE MARINE ENVIRONMENT

The increasing reliance of the maritime sector on digital technologies and interconnected systems has significantly widened its vulnerability to sophisticated cyber threats. Critical components of maritime infrastructure – including ports, vessels, and offshore platforms – are now exposed to various forms of cyberattacks that can have severe economic, operational, and environmental consequences. Ports, which function as complex digital ecosystems, are especially at risk. Attacks targeting port IT infrastructure, such as terminal operating systems (TOS), customs databases, and cargo tracking systems, can result in operational paralysis and significant supply chain disruptions. For example, the 2020 ransomware attack on the Chinese shipping giant COSCO resulted in communication

21 See analytically P. Hoagland, J. Jacoby, M.E. Schumacher, *Law Of The Sea*, Editor(s): John H. Steele, Encyclopedia of Ocean Sciences, Academic Press, 2001, Pages 1481-1492, ISBN 9780122274305, <https://doi.org/10.1006/rwos.2001.0415>. <https://www.sciencedirect.com/science/article/pii/B012227430X004153>. Also see thestudentlawyer.com/2024/09/08/autonomous-vessels-and-maritime-law-bridging-the-gap-between-innovation-and-regulation/

22 Mara R Wendebourg, Interpreting the Law of the Sea in the Context of Sea-Level Rise: The Ambulatory Thesis and State Practice, *Journal of Environmental Law*, Volume 35, Issue 3, November 2023, Pages 499–507, <https://doi.org/10.1093/jel/eqad024>

23 U.S. Government Accountability Office. (2024). *Coast Guard: Autonomous Ships and Efforts to Regulate Them*. GAO-24-107059. Washington, D.C.: U.S. Government Accountability Office. Available at: <https://www.gao.gov/products/gao-24-107059>

24 Sun, K., Khan, M., Bibi, A., & Chang, Y.-C. (2025). New Frontiers in the Law of the Sea and Policy Integration. *Water*, 17(3), 444. <https://doi.org/10.3390/w17030444>. Also see New Technology, Equity and the Law of the Sea, <https://www.rifs-potsdam.de/en/blog/2021/09/new-technology-equity-and-law-sea>, Emerging Technology and the Law of the Sea Workshop at <https://www.wmu.se/news/emerging-technology-and-the-law-of-the-sea-workshop>. Also see Khaskheli, Muhammad & Wang, Shumin & Zhang, Xin & Shamsi, Imran & Shen, Chenghuan & Rasheed, Sanobar & Ibrahim, Zakir & Baloch, Dost. (2023). Technology advancement and international law in marine policy, challenges, solutions and future prospective. *Frontiers in Marine Science*. 10. 10.3389/fmars.2023.1258924. And <https://lawclimateatlas.org/resources/maritime-law-and-climate-change/>

outages and operational delays across several global terminals.²⁵

Ships, particularly those equipped with integrated bridge systems, automatic identification systems (AIS), and electronic chart display and information systems (ECDIS), are increasingly susceptible to manipulation. Notable threats include GPS spoofing and AIS manipulation, which can result in false positional data, leading to mis-navigation or collision. Reports of GPS interference in the Black Sea (2017) and the Persian Gulf (2019) highlight the strategic use of such techniques in geopolitically sensitive areas.²⁶ The vulnerability is further amplified in the context of autonomous and remotely operated vessels, which rely heavily on software systems, satellite communications, and artificial intelligence. As Ringbom argues²⁷, these vessels shift the burden of navigation and risk assessment from human seafarers to cyber-physical systems, thereby expanding the potential attack surface.

Furthermore, offshore platforms, such as oil and gas rigs and undersea cable nodes, represent another critical point of vulnerability. A successful cyber intrusion could compromise control systems, trigger environmental disasters, or halt energy production. According to the International Association of Oil & Gas Producers (IOGP), the blending of operational technology (OT) and information technology (IT) systems in offshore facilities creates a cyber risk environment where traditional firewalls and antivirus software are insufficient to threat mitigation.²⁸

Across these infrastructures, common attack vectors include phishing campaigns, ransomware deployment, malware injection via supply chain compromise, and exploitation of unpatched software vulnerabilities. The 2017 Not Petya malware attack that crippled Maersk's global IT network remains one of the most cited examples, causing estimated losses of over \$300 million and disrupting operations in more than 600 ports worldwide.²⁹ These incidents underline the urgent need to bolster cyber resilience in maritime systems and rethink existing risk management strategies to include the full spectrum of digital threats.

Building on the identification of potential cyber threats to ports, ships, and offshore platforms, it is essential to recognize that these threats extend beyond economic and operational disruption, posing significant risks to the marine environment. The integration of digital systems into maritime operations has increased the likelihood that a cyberattack could trigger environmentally damaging events, such as oil spills, chemical leaks, vessel collisions, or unauthorized discharge of pollutants. These outcomes not only violate international maritime safety and environmental standards but also threaten the ecological integrity of marine and coastal ecosystems.³⁰

One of the most concerning scenarios involves the manipulation of navigational systems through GPS spoofing or AIS data tampering. As previously discussed, ships reliant

25 ENISA. (2023). *Threat Landscape for the Maritime Sector*. European Union Agency for Cybersecurity.

26 Humphreys, T. E. (2017). *Statement on the Vulnerability of Civil GPS*. University of Texas at Austin, Radionavigation Laboratory.

27 Ringbom, H. (2019). *Regulating Autonomous Ships—Concepts, Challenges and Precedents*. *Ocean Development & International Law*, 50(2–3), 141–169.

28 IOGP. (2022). *Cybersecurity Guidelines for Upstream Oil and Gas Operations*. International Association of Oil & Gas Producers.

29 Kaspersky Lab. (2018). *NotPetya Report: Lessons Learned from the Maersk Breach*.

30 Simón, L., & Marqués, J. M. (2021). *Cybersecurity, Maritime Safety, and Environmental Protection: A Policy Trilemma*. *European Security*, 30(3), 444–466. <https://doi.org/10.1080/09662839.2021.1936227>

on automated positioning and routing systems are vulnerable to misdirection. A cyberattack that causes a vessel to run around or collide with another ship in an environmentally sensitive area could result in the release of hazardous substances, with devastating ecological consequences. This is not a hypothetical risk – GPS spoofing incidents reported in the Black Sea and Strait of Hormuz illustrate the plausibility of such scenarios.³¹

Similarly, offshore platforms and undersea infrastructure present a high-risk target due to their complex integration of operational technology (OT) systems. A cyber-induced failure in SCADA or pressure control systems could disable blowout preventers or safety valves, leading to uncontrolled hydrocarbon releases. As noted by Peterson et al.³², many offshore rigs still operate on legacy systems that lack modern cybersecurity defences, rendering them particularly susceptible to such attacks. In extreme cases, the environmental impact of a cyber-triggered incident could rival major disasters like the Deepwater Horizon spill, only with far less warning or opportunity for human intervention.

Port facilities also face environmental vulnerabilities from cyber intrusions. A cyberattack that disables monitoring systems for ballast water treatment, waste discharge, or hazardous cargo storage could result in violations of international regulations such as MARPOL (IMO, 1973/1978).³³ Moreover, the disruption of communications between environmental monitoring units and response teams during an incident can delay containment measures, exacerbating environmental harm and increasing the risk of legal liability. As maritime systems grow more automated and reliant on digital coordination, the environmental consequences of cyberattacks become more profound and multifaceted. Simón and Marqués³⁴ argue that cyber risks must be explicitly integrated into maritime environmental protection regimes, as the convergence of digital vulnerabilities with ecological hazards creates a complex regulatory challenge. This underscores the urgent need for international legal and policy frameworks that do not treat cybersecurity and environmental protection as separate domains, but rather as interdependent pillars of maritime governance in the digital age.

4. THE IMO MASS CODE AND CYBERSECURITY AT SEA: REGULATING AUTONOMOUS VESSELS IN AN ERA OF DIGITAL VULNERABILITIES

The deployment of autonomous vessels promises to reduce maritime accidents—notably human error, which contributes to ~75% of insurance losses—while enhancing operational efficiency. However, these advancements introduce novel vulnerabilities, termed collectively as ‘cyber risks’, encompassing software malfunctions, navigational failures, and cyber piracy,³⁵ defined by the IMO as threats compromising data or systems to precipitate

31 Goward, D. (2017). *GNSS Spoofing in the Black Sea: Test or Attack?* GPS World. <https://www.gpsworld.com>

32 Peterson, G., Clarke, R., & Kalil, T. (2020). *Cybersecurity of Offshore Oil and Gas Infrastructure: Challenges and Mitigation Strategies*. MITRE Corporation.

33 International Maritime Organization (IMO). (1973/1978). *International Convention for the Prevention of Pollution from Ships (MARPOL)*.

34 Simón, L., & Marqués, J. M. (2021). *Cybersecurity, Maritime Safety, and Environmental Protection: A Policy Trilemma*. *European Security*, 30(3), 444–466. <https://doi.org/10.1080/09662839.2021.1936227>

35 HC Burmeister et al., ‘Can unmanned ships improve navigational safety?’ (2014) Transport Research Arena <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.846.5385&rep=1&type=pdf> accessed 09/10/2018

safety/operational failures. Consequently, cybersecurity is a key component of the modern maritime industry, as the digitalization of ports and vessels creates new threats.³⁶ These vulnerabilities (e.g., software malfunctions, cyber piracy) fundamentally disrupt maritime law's anthropocentric foundations. Consequently, integrating autonomous cyber defense systems on ships will enable automatic detection and blocking of cyberattacks.³⁷ Artificial intelligence and machine learning will ensure constant monitoring of the ship's digital environment and the application of protective measures without human intervention.³⁸

The IMO has addressed these challenges through systematic institutional adaptation.³⁹ Beginning with a 2021 Regulatory Scoping Exercise (RSE) to assess existing treaties' applicability,⁴⁰ it developed a roadmap culminating in a goal-based MASS Code. Originally slated for 2024 adoption, the timeline was revised to accommodate regulatory complexity: a **non-mandatory Code** will enter force in 2025, transitioning to a mandatory instrument by 2028. This phased approach reflects the IMO's recognition that autonomous vessels require foundational legal innovation—not incremental adjustments—to reconcile emerging technologies with maritime safety frameworks.⁴¹

5. LEGAL GAPS AND REGULATORY CHALLENGES

The increasing exposure of maritime infrastructure to cyber threats has revealed significant gaps and inconsistencies in the existing international legal framework. Despite the rapid digitalization of the sector, the cornerstone of maritime law – the United Nations Convention on the Law of the Sea (UNCLOS) – offers no explicit provisions addressing cybersecurity. This legal void presents challenges across several key dimensions: attribution of cyberattacks, jurisdiction over digital incidents, enforcement mechanisms, and liability for environmental or economic damages.

First, attribution remains a central challenge. Cyberattacks are frequently conducted through anonymized networks or proxy actors, making it difficult to identify responsible parties with the confidence required under international law.⁴² When a ship is affected by GPS

36 Melnyk, O., Drozdov, O., & Kuznichenko, S. (2025). Cyber-security in Maritime Transport: An International Perspective on Regulatory Frameworks and Countermeasures. *Lex Portus*, 11(1), 7–19. <https://doi.org/10.62821/lp11101>. Also see Neumann, T. (2024). Cybersecurity in maritime industry. *TransNav*, 18(4), 765–774. <https://doi.org/10.12716/1001.18.04.02>

37 Karim, Md Saiful (2022) Maritime cybersecurity and the IMO legal instruments: Sluggish response to an escalating threat? *Marine Policy*, 143, Article number: 105138.

38 Chupkemi, D. C., & Mersinas, K. (2024). Challenges in Maritime Cybersecurity Training and Compliance. *Journal of Marine Science and Engineering*, 12(10), 1844. <https://doi.org/10.3390/jmse12101844>

39 See analytically at International Maritime Organization. (2018, May 23). IMO Doc. MSC/C 99/WP.9, Annex 1, para. 4. Also see Aldo Chircop, (2019) “Maritime Autonomous Surface Ships in International Law: New Challenges for the Regulation of International Navigation and Shipping” in Myron H Nordquist, John Norton Moore & Ronán Long, *Cooperation and Engagement in the Asia-Pacific Region* (Leiden: Brill) 18.

40 <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Autonomous-shipping.aspx>

41 Kouroupis, Konstantinos and Leonidas Sotiropoulos, „Cyber Challenges amid the Digital Revolution in Maritime Transport”, *Juridical Tribune - Review of Comparative and International Law* 14, no. 2 (June 2024): 321–340.

42 Pipyros, K. (2016). Legal and technical difficulties of attributing cyberattacks under international law. *Information & Computer Security*, 24(1), 108–123.

spoofing or a port suffers a ransomware attack, determining whether the perpetrator is a state actor, a criminal group, or an individual hacker is rarely straightforward.⁴³ This ambiguity impairs the ability of states to respond under established international legal doctrines such as the state responsibility of self-defense under Article 51 of the UN Charter.⁴⁴

Second, jurisdictional complexities further hinder effective legal responses, Cyberattacks can traverse multiple jurisdictions instantaneously, involving vessels flagged under one state, ports operated by another, and infrastructure or cloud services hosted in yet other territories. This fragmentation creates uncertainty regarding which state has the competence to investigate, prosecute, or demand reparations. The concept of flag state jurisdiction, traditionally robust in maritime law, becomes less effective when dealing with cross-border digital operations that may not involve any physical intrusion.⁴⁵

Third, there are significant enforcement challenges. The International Maritime Organization (IMO) has made notable strides through the issuance of the *Guidelines on Maritime Cyber Risk Management* and the development of the *Maritime Autonomous Surface Ships (MASS) code*.⁴⁶ However, these instruments are largely non-binding and rely on voluntary compliance. Furthermore, national implementation remains uneven, particularly among flag states with limited cybersecurity expertise or resources.⁴⁷

Finally, liability mechanisms and compensation procedures for maritime cyber incidents remain inadequately defined. Existing liability regimes, such as those established under the *International Convention on Civil Liability of Oil Pollution Damage (CLC)* or *MARPOL*, are centered on physical damage and pollution, with no clear provisions addressing cyber-induced harm. Consequently, victims of cyber incidents, whether they are port authorities, shipowners, or environmental entities, may find it difficult to seek compensation or hold perpetrators accountable under current maritime law.⁴⁸

6. EVALUATION OF THE LEGAL AND PRACTICAL CHALLENGES IN RESPONDING TO MARITIME CYBER INCIDENTS

As noted above, legal challenges in addressing maritime cyber incidents stem from jurisdictional ambiguities, fragmented regulatory frameworks, and liability attribution complexities. Existing international maritime law, primarily the United Nations Convention on the Law of the Sea (UNCLOS), lacks explicit provisions for cyber threats,⁴⁹ creating

43 Pipyros K, Thraskias C, Mitrou L, Gritsalis D, Apostolopoulos, T. (2018). A new strategy for improving cyber-attacks evaluation in the context of the Tallinn Manual. *Computers & Security* 74:371-383

44 Schmitt, M. N. (Ed.). (2017). *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Cambridge University Press.

45 Papagiannakis, K., & Apostolidis, K. (2022). Flag State Jurisdiction in the Age of Cyber Threats: Reassessing Legal Boundaries. *Journal of Maritime Law & Commerce*, 53(2), 145–171.

46 IMO. (2021). *Guidelines on Maritime Cyber Risk Management (MSC-FAL.1/Circ.3)*. International Maritime Organization.

47 Chircop, A. (2021). *The IMO and Maritime Cybersecurity: Governance Challenges in the Age of Digital Threats*. *Ocean Yearbook*, 35, 219–241.

48 van Ginkel, B., & van der Voet, L. (2022). Legal Remedies for Victims of Maritime Cyber Incidents: Gaps in International Liability Regimes. *Netherlands International Law Review*, 69(1), 89–108.

49 Barney, S. M. (2001) "Innocent Packets? Applying navigational regimes from the Law of the Sea Convention by analogy to the realm of cyberspace." *Naval Law Review*. Vol. 48.: 61., <https://www.diplomacy.edu/blog/law-sea-law-internet-inspiring-analogy/>

gaps in governing state responsibilities and victim redress.⁵⁰ For instance, incidents like Iranian GPS spoofing near the Strait of Hormuz blur jurisdictional lines—whether such acts constitute “use of force” or “interference with navigation” under UNCLOS remains contested. Similarly, attributing liability for attacks involving state-sponsored actors⁵¹ (e.g., Houthi cyber operations against Saudi ports) or third-party technology providers proves difficult, as current liability regimes prioritize physical damage over data compromise. Regulatory fragmentation exacerbates these issues; while the EU’s NIS Directive⁵² and IMO’s cybersecurity guidelines offer baseline standards, their non-binding nature and uneven adoption across flag states hinder cohesive legal enforcement.⁵³

Practical challenges arise from the maritime sector’s technical vulnerabilities, resource constraints, and coordination deficits. Legacy systems—exemplified by Maersk’s unsegmented IT infrastructure during NotPetya—remain pervasive, impeding rapid threat containment. Resource limitations, particularly among smaller operators, delay investments in advanced defenses like multi-factor authentication or system redundancy, leaving critical infrastructure exposed.⁵⁴ Coordinating incident response across stakeholders (e.g., shipowners, ports, insurers)⁵⁵ is further complicated by geopolitical tensions, as seen in the April 2024 global ransomware attack, where conflicting national protocols slowed information sharing. Moreover, evolving threats like AI-driven botnets (reported in Marlink’s 2024 data) outpace static defense strategies, demanding continuous adaptation.⁵⁶ Without harmonized international protocols and scalable public-private partnerships, the industry’s reactive posture risks perpetuating operational disruptions and safety hazards.

7. CONCLUSION

The digital transformation of the maritime sector has significantly improved operational efficiency, yet it has also exposed critical vulnerabilities to cyberattacks targeting ships, ports, and offshore infrastructure. This study has revealed that the existing international legal framework—particularly UNCLOS—is ill-equipped to address the unique challenges posed by cyber threats. Key issues include the lack of explicit legal provisions for cybersecurity, difficulties in attributing cyberattacks, jurisdictional fragmentation, and outdated liability regimes that do not account for data-related or environmental damages caused by cyber incidents. Although the IMO has taken steps

50 Jiménez, W. G., & Lodder, A. R. (2015). Analyzing approaches to internet jurisdiction based on a model of harbors and the high seas. *International Review of Law, Computers & Technology*, 29(2-3), 266-282

51 See Characteristically Sotiropoulos, L. (2024). *Geopolitics and maritime terrorism: Challenges and the legal complexities in the Red Sea*. XXI međunarodni naučni skup Pravnički dani - Prof. dr Slavko Carić, na temu: Odgovori pravne nauke na izazove savremenog društva - zbornik radova.

52 <https://digital-strategy.ec.europa.eu/en/policies/nis2-directive>, <https://www.hilldickinson.com/insights/articles/cyber-security-regulations-applicable-maritime-transport-sector>, <https://gtg.com.mt/cybersecurity-and-maritime-in-the-eu-technology-lawyers/>

53 <https://www.imo.org/en/OurWork/Security/Pages/Cyber-security.aspx>

54 Clavijo Mesa, M. V., & Patino-Rodriguez, C. E. (2024). *Cybersecurity at Sea: A Literature Review of Cyber-Attack Impacts and Defenses in Maritime Supply Chains*. MDPI.

55 Ingasio de la Peña Zarzuelo, I. (2021). *Cybersecurity in Ports and Maritime Industry: Reasons for Raising Awareness on This Issue*. Transport Policy, Elsevier.

56 <https://www.porttechnology.org/news/marlink-reports-increase-in-maritime-cyber-threats/>, <https://smartmaritimetwork.com/2025/05/21/ai-driven-maritime-cyber-threats-on-the-rise-report/>

through non-binding guidelines and the development of the MASS Code, enforcement remains inconsistent, and legal harmonization is lacking.

To address these challenges, this paper recommends a multi-pronged strategy for reforming international maritime governance. First, cybersecurity provisions should be codified either through a new protocol to UNCLOS or a standalone binding instrument addressing digital threats at sea. Second, international cooperation should focus on developing reliable attribution mechanisms and protocols to facilitate coordinated legal and technical responses. Third, the IMO should accelerate the transition of voluntary instruments—such as the MASS Code—into binding standards, coupled with a global compliance and reporting mechanism. Fourth, liability regimes must be updated to explicitly recognize cyber-induced harm, including data breaches, operational paralysis, and indirect environmental consequences. Additionally, capacity-building programs for developing maritime states and enhanced public-private collaboration are essential to ensure global resilience and equitable implementation of cyber safeguards.

Looking ahead, future research should focus on empirical mapping of maritime cyber incidents, comparative analyses of national legal frameworks, and the evolving role of AI and automation in maritime liability. Moreover, interdisciplinary studies are needed to assess the environmental implications of cyberattacks and to explore new cooperative models—such as cyber peacekeeping or regional cyber incident response frameworks—that can support the secure and sustainable governance of the maritime domain in the digital era.



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ZAKON MORA U DOBA SAJBER PRETNJI: ZAŠTITA POMORSKE INFRASTRUKTURE I MORSKOG OKRUŽENJA

Apstrakt:

Brza digitalizacija pomorskog sektora dovela je do značajnih ranjivosti morskog ekosistema. Sajber pretnje su postale ključni izazov za globalni pomorski saobraćaj, lučke operacije i priobalnu infrastrukturu. Preciznije rečeno, tehnološki napredak u lukama, plovilima, priobalnim platformama i sistemima za nadzor okeana povećao je rizike od sajbernapada, uključujući lažiranje GPS signala, ucenu putem zlonamernog softvera i preuzimanje sistema, budući da oni sve više zavise od međusobno povezanih tehnologija. Ovi rizici mogu dovesti do prekida međunarodne trgovine, ugrožavanja ljudskih života i

izazivanja značajne ekološke štete uključujući zagađenje iz kompromitovanih sistema ili izlivanja nafte. Uprkos ovim opasnostima, Konvencija Ujedinjenih Nacija o pravu mora (UNCLOS) ne sadrži posebne odredbe koje regulišu sajber-bezbednost, što dovodi do pravne praznine u oblasti pomorskog upravljanja. Polazeći od pravne analize i stvarnih incidenata, članak istražuje na koji način se trenutno međunarodno pravo može tumačiti ili prilagoditi kako bi se odgovorilo na sajber pretnje. Štaviše, naglašavanjem ograničenja u atribuciji, nadležnosti i sprovođenju, članak predlaže načine za uključivanje sajber-bezbednosti u širu agendu pomorske bezbednosti i zaštite životne sredine. Konačno, članak ocenjuje na koji način međunarodne organizacije – posebno Međunarodna pomorska organizacija (IMO) – mogu doprineti unapređenju zakonodavnih mera. Članak pruža predloge za modernizaciju pomorskog pravnog okvira radi obezbeđivanja otpornijih, bezbednijih i ekološki održivih okeana u digitalnom dobu, kroz analizu pravnih tekstova, aktuelnih sajber događaja i praksi upravljanja. Cilj je da se podstakne dijalog o modernizaciji međunarodnog pomorskog prava za digitalno doba.

Ključne reči: Međunarodno pomorsko pravo, kritična pomorska infrastruktura, sajber pretnje, atribucija i nadležnost, pomorsko upravljanje.

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THE POSSIBLE EFFECTS OF THE NEW ECD ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW IN THE MEMBER STATES OF THE EUROPEAN UNION

Abstract:

The new Environmental Crime Directive (ECD) was adopted in April 2024 and is expected to be implemented by 2026 by the Member States of the European Union. The criminal law protection of the environment has a relatively long history in the European region, but it has been surrounded by controversy and legal debate. Directive 2024/1203/EU is replacing the Environmental Crime Directive of 2008. The latter legislation has faced continuous criticism since its acceptance. The “new” ECD was influenced by remarks on the protection of the environment through criminal law and by events in the international sphere, including the emerging concept of ecocide. In the presentation and paper, the Authors would like to explore the ECD’s novelties to answer the question, “*Is there anything new under the sun*” in the era of criminal law protection of the environment with particular regard to the European sphere. Furthermore, the approach must be critical, as environmental protection has a long history in the European Union; therefore, the new instruments should learn from the previous legislative shortcomings. Firstly, the Authors will highlight the history of environmental criminal law in the European Union and the failures of the previous ECD. Additionally, the international influencing factors, with special regard to ecocide, are emphasised. Finally, the potential changes in the Member States’ environmental crime legislation are summarised.

Keywords: *environmental protection, criminal law, environmental crime directive, EU Law*

1. INTRODUCTION

In the summer of 2025, climate change is more real than ever. In Central Europe, one day it’s a scorching 40°C, and only a few days later, the citizens must face severe storms as the temperature drops by half. Droughts are persistent problems for agriculture, and

desertification has become a reality in the European sphere as well. Besides climate change and global warming, other ecological issues need to be addressed. In the past few decades, we have been confronted with unprecedented biodiversity loss and species extinctions. The Living Planet Report, published by the WWF in 2024, reveals a staggering 73% decrease in wildlife populations since 1970.¹ Human-induced factors, including habitat loss, the adverse effects of invasive species, overexploitation, pollution, and climate change, primarily drive ecological dispare.² The unsustainable economic exploitation of species significantly contributes to this crisis, with numerous animals and plants being hunted, collected, harvested, and exploited for financial gain. It has been proven that criminal activities, such as transnational environmental crime, wildlife trafficking, and corruption, undermine conservation efforts. Under these circumstances, humanity must raise the question of how to combat climate change and hold those responsible for severe environmental degradation accountable. Environmental crimes pose an exceptional threat to society and humanity. Some environmentally detrimental activities are classified as crimes in national legislation and are subject to severe penalties. Furthermore, environmental crimes are often intertwined with serious and organised crime. As a result, the Council of the European Union has prioritised action against such activities as part of EMPACT (European Multidisciplinary Platform Against Criminal Threats).³ The European Union has set a wide range of environmental goals as part of the European Green Deal⁴, which are threatened by environmental crimes and ecological harm.

Regarding acts that harm the environment, the question also arises as to when it is necessary to impose the harshest criminal sanctions and what grounds can justify classifying environmental offences as serious crimes. The *ultima ratio* nature of criminal law means that it is the 'last resort', the most severe sanction that can be imposed for violating a legal interest.⁵ In the European Union, this question is answered by the new binding legislation. The adoption of the "new" Environmental Crime Directive, which was accepted on 11 April 2024 and entered into force on 20 May 2024, supports the protection of the environment through criminal law, replacing Environmental Crime Directive 2008/99/EC. Directive 2024/1203/EU includes a comprehensive list of conduct to be established as criminal offences in the national legal order of Member States. In comparison to the 2008 Directive, several new offence categories have been introduced, including "*qualified criminal offences*" that are conduct similar to ecocide.

In our article, we aim to highlight the key milestones of environmental criminal law in the European sphere, as well as the road that led to the acceptance of the "new" Environmental Crime Directive. Additionally, the shortcomings of Directive 2008/99/

1 WWF (2024): *Living Planet Report 2024: A System in Peril*. (Retrieved on 9 July 2025) from WWF: <https://wwflpr.awsassets.panda.org/downloads/2024-living-planet-report-a-system-in-peril.pdf>.

2 United Nations Environment Programme (2023, September 5): *Five drivers of the nature crisis*. (Retrieved on 9 July 2025) from UNEP: <https://www.unep.org/news-and-stories/story/five-drivers-nature-crisis>.

3 Council of the European Union (2023, March 9): *Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025 - Council conclusions*. (Retrieved on 9 July 2025) from Council of the European Union: <https://data.consilium.europa.eu/doc/document/ST-7101-2023-INIT/en/pdf>.

4 European Commission (2025): *Delivering the European Green Deal: On the path to a climate-neutral Europe by 2050*. (Retrieved on 10 July 2025) from European Commission: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en.

5 Karsai, K. (2013): *Ultima Ratio and Subsidiarity in the European Criminal Law*. *FORUM: ACTA JURIDICA ET POLITICA*, 3(1), p. 54.

EC are highlighted, summarising the issues that motivated the European Commission to initiate the adoption of a new legal instrument. Finally, the main “innovations” of Directive 2024/1203/EU are summarised, with special regard to the so-called “qualified offences” that demonstrate the European Union’s commitment to penalising acts comparable to ecocide. As the implementation of the “new” Environmental Crime Directive is still in progress, it is crucial to initiate a dialogue on potential legislative changes in the environmental criminal law of the Member States.

2. HISTORY OF THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW IN THE EUROPEAN SPHERE

In recent decades, there has been a growing demand in Europe for the criminalisation of acts against the environment. Currently, there are several legal instruments in EU law dedicated to environmental protection, including binding legislation related to criminalisation. However, a long road led to the moment when we can say that, in the European Union, there is a willingness to penalise those acts that harm the environment the most. The history of criminal law instruments for environmental protection in Europe can be found not only in EU law but also in the Council of Europe (CoE), which has played a crucial role in shaping environmental protection, both in general and specifically in the context of criminal law. EU law development was significantly influenced by a convention adopted by the Council of Europe in the late 1990s, which unfortunately did not receive substantial support from the Member States of the CoE.

The Convention on the Protection of the Environment through Criminal Law was adopted in 1998 under the auspices of the Council of Europe.⁶ The Convention sought to highlight the need for a common policy and to harmonise national laws on certain environmental crimes. To date, the Convention has been signed by fourteen states; however, only one, Estonia, has ratified it, and it has not yet entered into force.⁷ Another recent milestone was the adoption of a new international treaty within the framework of the Council of Europe. In 2025, the Member States adopted a new instrument, the Convention on the Protection of the Environment through Criminal Law. The international treaty is a significant step, as it is the first internationally recognised, legally binding instrument to address a wide range of environmental crimes.⁸ The convention still needs to be ratified by the states. Still, it remains a significant element in the fight against environmental crime, emphasising the willingness of European states to tackle ecological degradation and sanction the perpetrators of such acts.

Regarding the efforts of the European Union, the first attempt at criminalising environmental crimes was a Framework Decision adopted at the beginning of the 2000s. The preamble to Framework Decision 2003/80/JHA⁹ on the protection of the environment

6 Council of Europe (1998, November 4): Convention on the Protection of the Environment through Criminal Law. Strasbourg. ETS No. 172.

7 Council of Europe (2025, July 8): *Chart of signatures and ratifications of Treaty 172*. (Retrieved on 8 July 2025) from Council of Europe: <https://www.coe.int/en/web/Conventions/full-list?module=signatures-by-treaty&treaty=172>

8 Council of Europe (2025): *Protection of the Environment through Criminal Law*. (Retrieved on 8 July 2025) from Council of Europe: <https://www.coe.int/en/web/cdpc/convention-on-the-protection-of-the-environment-through-criminal-law>

9 Council Framework Decision 2003/80/JHA of 27 January 2003, OJ L 29, 5.2.2003, p. 55–58. CELEX-

through criminal law also references the Convention, which was taken into account when drafting the provisions of the Framework Decision.¹⁰ The five categories of criminal offences defined in the Convention have essentially been transferred to the Framework Decision and Directive 2008/99/EC¹¹ on the protection of the environment through criminal law. The draft Framework Decision, adopted by the Council at the turn of the millennium, was drawn up. At the same time, the European Commission initiated legislative work on the subject and adopted a proposal for a directive on environmental protection through criminal law in 2001.¹² This date also marked the beginning of a dispute over the competence to protect the environment through criminal law in the European Union.¹³ On 27 January, 2003, the Framework Decision on the protection of the environment through criminal law was finally adopted; however, it was ultimately annulled by the European Court of Justice in 2005 as „*the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community*”.¹⁴ Until the adoption of the Directive, the debate on the protection of the environment through criminal law and the resolution of the conflict of competences had lasted several years, until the Treaty of Lisbon¹⁵ clarified the Union's competence in the field of criminal law and its power to oblige Member States to adopt criminal law provisions. On the basis of this Treaty, the European Parliament and the Council may establish minimum standards in the field of criminal law through directives.¹⁶

3. THE “OLD” ENVIRONMENTAL CRIME DIRECTIVE

The specific competence provided in the Treaty of Lisbon ultimately led to the adoption of Directive 2008/99/EC on the protection of the environment through criminal law. Directive 2008/99/EC relied on the original Framework Decision and the original CoE Convention from 1998, with some notable differences. The second draft directive included, among other things, minimum rules at the Community level for the constituent elements of serious environmental crimes and the penalties for severe environmental crimes.¹⁷ It is also important to note that autonomous crimes are entirely independent from administrative law and the decisions of administrative authorities. The issuance of a permit is irrelevant in cases where the act causes death or serious bodily injury to anyone, or where there is a specific risk of such harm, in which case criminal liability can be established.¹⁸ Thus, all elements of the offence are constituted by the unlawfulness of the conduct, committed intentionally

32003F0080.

10 Council Framework Decision 2003/80/JHA, Preamble (10).

11 Hereinafter referred to as the “old” Directive.

12 Proposal of 13 March 2001 for a European Parliament and Council Directive on the protection of the environment through criminal law. OJ C 180 E of 26.6.2001.

13 Often also labelled as the ‘pillars’ dispute.

14 Case C-176/03 13 September 2005, ECLI:EU:C:2005:542. para 53.

15 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271, CELEX-12007L/TXT.

16 Görgényi I. (2018): Protection of the environment through criminal law considering the european standards – Környezetvédelmi büntetőjog az európai elvárásokra figyelemmel. *Journal of Agricultural and Environmental Law*, XIII(25), doi:10.21029/JAEL.2018.25.46. pp. 49–54.

17 Görgényi, I. (2011): The renewal of environmental criminal law in the new millennium - A környezetvédelmi büntetőjog megújulása az új évezredben. *Miskolci Jogi Szemle, Special Issue*, p. 101.

18 Görgényi (2011): p. 100.

or at least with serious negligence.¹⁹ The Directive established minimum standards, but Member States were free to adopt stricter measures: „*As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment. Such measures must be compatible with the Treaty.*”²⁰ Article 3 defined nine criminal offences, which Member States were required to implement into their national law and impose penalties with a deterrent effect on such conduct. The Directive aimed to harmonise the laws of the Member States and to protect the environment more effectively.

Looking back over the time that passed since the adoption of the „old” Directive, it had not lived up to the expectations, which is why the Commission adopted a proposal as part of the European Green Deal, for a new EU Directive on combating environmental crime in December 2021. The proposal aimed to enhance environmental protection by requiring Member States to adopt additional criminal law measures. It defines new environmental crimes, sets minimum penalties, and aims to enhance cooperation between law enforcement authorities.²¹

In addition, the Commission launched an EU consultation from 8 February 2021 until 03 May 2021, to gather a wide range of views from experts and EU citizens²² on how the provisions of the Directive could be adapted and expanded. As part of the consultation, participants were invited to complete a questionnaire and submit comments. The comments indicated that changes to the Directive may be necessary in several respects.²³ Among the key observations, enforcement, the introduction of a restorative justice system and strengthening cooperation between states were mentioned. The clarification and unambiguous definition of the concept of criminal offences, as well as the criminalisation of simple negligence, were also raised. Furthermore, it was emphasised that the penalties imposed by Member States are not dissuasive and therefore need to be strengthened. The need to define certain offences as autonomous offences was also expressed.²⁴

On this basis, it can be said that the proposal and consultation reflected the EU’s need to strengthen the legislative basis and further develop cooperation between Member States to ensure stronger environmental protection. On the European stage, despite EU regulations, an increasing number of states are committing themselves to tightening their domestic laws, particularly with regard to penalties for environmental crimes and climate-related standards. Unsurprisingly, Sweden has once again emerged as a champion

19 Ibid.

20 Directive 2008/99/EC, Preamble (12).

21 European Commission (2021, December 15): *European Green Deal: Commission proposes to strengthen the protection of the environment through criminal law*. (Retrieved on 8 July 2025) from European Commission Press Release: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744.

22 E.g. With the involvement of scientific/research institutes, government authorities responsible for environmental policy, national prosecutors and professional networks of prosecutors, national judges and professional networks of judges, national law enforcement professionals or professional networks of law enforcement professionals, local/regional authorities, European or international bodies dealing with environmental crime, non-governmental organizations, businesses/industries or business/industry associations, consumer organizations, and citizens.

23 European Commission (2021): *Environmental crime – improving EU rules on environmental protection through criminal law*. (Retrieved on 8 July 2025) from European Commission: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12779-Improving-environmental-protection-through-criminal-law/public-consultation_en.

24 Ibid.

of environmental protection. Furthermore, France has been really active in accepting new laws. *Emmanuel Macron* also spoke out specifically about the ecocide taking place in the Amazon region ahead of the G7 meeting in the summer of 2019. Subsequently, in the summer of 2021, the French National Assembly and Senate approved the strictest climate regulations to date, which impose extremely severe penalties on polluters, including heavy fines and imprisonment. Luxembourg, which has an exceptionally high ecological footprint, has also introduced stricter penalties, including fines and prison sentences, for environmental crimes. Further initiatives are also underway in Germany, the Netherlands and Spain.²⁵

4. THE NEW ENVIRONMENTAL CRIME DIRECTIVE - REASONS FOR REFORM AND THE ACCEPTANCE OF NEW LEGISLATION

Based on the goals set by the TEU²⁶ and TFEU²⁷ for the European Union, the EU is committed to ensuring a high level of environmental protection and improving the quality of the environment. The reasoning behind the acceptance of a “new” ECD was the increasing threat posed by environmental crimes that are undermining the EU’s environmental goals. Also, it is essential to note that environmental crimes are often transboundary in nature and committed internationally, as recognised by the “new” ECD, they “*increasingly extend beyond the borders of the Member States*”.²⁸ The cooperation must lead to more effective detection, investigation, prosecution, and adjudication of environmental crimes. In this regard, the strengthened cooperation of Member States’ authorities is required to combat environmental crimes effectively. Also, the sanctions set by the „old” ECD were not sufficient, so a reform was needed to provide “*effective, proportionate and dissuasive criminal penalties*”.²⁹

The following table lists the main shortcomings of the “old” ECD, along with the solution provided by the “new” ECD for each issue.

Additionally, the “new” ECD addressed some other shortcomings, including the reference to “*specialised regular training [...] judges, prosecutors, police and judicial staff and to competent authorities’ staff involved in criminal proceedings and investigations*”.³⁰ As policing and adjudicating environmental crimes require specialised knowledge, it is crucial to train police officers, prosecutors, and judges who are familiar with the necessary procedures and tactics to combat environmental crimes effectively, as well as to sanction those who commit such crimes.³¹ As environmental crimes are often perceived as victimless or less serious, it is time to recognise the danger they pose to society, the economy, and the natural environment.³² Other new elements of the Directive are the broader legislation

25 See Sziebig, O. J. (2022): Ecocide in EU law – developments to date and possible scenarios - Ökocídium az uniós jogban – eddigi történések és lehetséges szcenáriók. *EU JOG (online)*, pp. 1-12.

26 Treaty on European Union, Article 3(3).

27 Treaty on the Functioning of the European Union, Article 194.

28 Directive (EU) 2024/1203, Preamble para (3).

29 Directive (EU) 2024/1203, Preamble para (4).

30 Directive (EU) 2024/1203, Article 18.

31 Olsen Lundh, C. (2024): The Revised EU Environmental Crime Directive: Changes and Challenges in EU Environmental Criminal Law with Examples from Sweden. *Eucrim*(Issue 2). doi:<https://doi.org/10.30709/eucrim-2024-013>. pp. 167-168.

32 Europol (2015, February 20): *EnviCrimeNet Intelligence Project on Environmental Crime: Report on*

concerning legal persons³³, the detailing of aggravating³⁴ and mitigating³⁵ circumstances. Moreover, every Member State must adopt a national strategy for combating environmental criminal offences by 21 May 2027.³⁶

Table 1. Short comparison of ECDs³⁷

Identified problematic area	Directive 2008/99/EC	Directive 2024/1203/EU
<i>legislative approach</i>	fragmented and heavily reliant on national law ¹	harmonisation of Member States' law by accepting a more specific legislation
<i>penalisation</i>	lack of autonomous environmental crime - indirect and subordinate protection	listing the punishable conduct and introducing autonomous environmental crime
<i>elements of the criminal act</i>	lack of precise definitions regarding the material element	concrete crimes, more precise legislation, including the material elements
<i>intent, negligence</i>	lack of detailed rules relating to the subjective elements of criminal offences	definition of the requisite intent, specifying negligence
<i>transboundary nature of environmental crimes</i>	did not provide for the need for close cooperation between Member State authorities	enhancing cooperation among MSs' authorities and between EU bodies and MSs' authorities
<i>implementation of ecocide</i>	did not recognise the existence of the most serious environmental crimes	including qualified criminal offences and refers explicitly to ecocide

4.1. The category of “qualified offences” in the ECD as a means of ecocide regulation

Although responsibility for environmental damage has a long history, the concept of ecocide can be traced back to the 1970s, specifically to the United States' war methods as part of the Vietnam War Effort that caused severe ecological damage in Vietnam. Ecocide disappeared for a long time as the International Law Commission deleted the autonomous environmental crime from the Draft Convention of the Crimes against Peace and Security of Mankind in 1996. But, ecocide has again emerged through the work of *Polly Higgins* and the *Stop Ecocide Foundation*.³⁸ Later, in the European sphere, ecocide gained significant

Environmental Crime in Europe. (Retrieved on 10 July 2025) from Europol: https://www.europol.europa.eu/cms/sites/default/files/documents/ipcc_report_on_environmental_crime_in_europe_0.pdf. p. 7.

33 Directive (EU) 2024/1203, Article 7.

34 Directive (EU) 2024/1203, Article 8.

35 Directive (EU) 2024/1203, Article 9.

36 Directive (EU) 2024/1203, Article 21.

37 Edited by Authors.

38 On the history of ecocide, see Zsigmond-Sziebig, O. J. (Expected to be published in 2025). *Ecocide - an*

support from the European Union and found its way to the new ECD. The definition of ecocide³⁹ has long been shrouded in uncertainty, as there has been no universally accepted scientific or legal definition. In the most general sense, ecocide refers to large-scale, severe, widespread or long-term environmental destruction. In 2021, an Independent Expert Panel⁴⁰ was established to propose a definition⁴¹ of ecocide that can be incorporated into the Rome Statute of the International Criminal Court.

The support for the implementation of ecocide is evident from the documents accepted by the institutions of the European Union. The new ECD specifically mentions ecocide, but just in the preamble: „*qualified criminal offences can encompass conduct comparable to ecocide*”⁴². The qualified offences must be implemented in the law of the Member States, and the wording of the ECD⁴³ is remarkably similar to the ecocide definition established by the Independent Expert Panel. It's worth mentioning that in some Member States of the European Union, ecocide legislation was already accepted. These MSs include France and Belgium.⁴⁴

5. CONCLUDING REMARKS

Implementing the “new” Environmental Crime Directive could potentially lead to changes in the legislation of Member States concerning environmental crimes. The new Environmental Crime Directive may significantly influence the criminalisation of environmental offences, including penalties. However, we must keep in mind that there are differences between EU Member States regarding ecological protection and environmental harm. Some Member States emphasise detecting environmental crimes more strongly and have already established prosecutors’ offices and other authorities with specialised competence to combat such crimes. Additionally, disparities exist not only in policing but also in the criminalisation of environmental offences across EU Member States. The previous ECD did not result in a high degree of harmonisation in the area of environmental crime, as it relied heavily on Member States’ regulations and administrative legal solutions. Finally, judicial practice concerning environmental offences varies depending on the court of competent jurisdiction, even within the same Member State. In the most optimistic scenario, EU Member States will pay particular attention to implementing the new directive, thereby enabling its objectives to be realised. The successful implementation of this legal instrument would undoubtedly lead to increased focus at the EU level on combating environmental crime

evolving legislative concept in the light of care for creation.

39 The ecocide term is a composition of the words eco (oikos, Greek: ecosystem) and cide (caedere, Latin: destruction).

40 Independent Expert Panel for the Legal Definition of Ecocide.

41 Ecocide: „*unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*”. In: STOP Ecocide Foundation. (2021, June). Independent Expert Panel for the Legal Definition of Ecocide: *Commentary and Core text*. (Retrieved on 6 July 2025) from STOP Ecocide Foundation.

42 Directive (EU) 2024/1203, Preamble para (21).

43 Art. 3. para 3. “*Member States shall ensure that criminal offences relating to conduct listed in paragraph 2 constitute qualified criminal offences if such conduct causes: (a) the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or (b) widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water.*”

44 Ecocide Law (2025): *Ecocide / serious environmental crimes in national jurisdictions*. (Retrieved on 10 July 2025) from Ecocide Law: <https://ecocidelaw.com/existing-ecocide-laws/>.

and to the imposition of harsher penalties. Furthermore, a high level of legal harmonisation would be achieved in this area, which is especially important in the 27-member EU. It is hoped that Member States will seize opportunities for cooperation to combat environmental crime, while continuing to ensure effective collaboration with EU bodies and agencies that have already played a significant role in this effort (e.g., Europol). Nonetheless, the preparation of Member States' strategies, which will undoubtedly reflect their commitment to reducing environmental crime, represents a new element. Effective action against environmental crime is essential to achieving the European Union's environmental and climate goals. The "new" Directive therefore provides an opportunity to promote harmonisation and ensure that Member States can more effectively combat environmental crimes that are a serious threat to human health, nature protection, biodiversity and the economy. Since the implementation period for the "new" Directive coincides with the ratification process of the convention adopted by the Council of Europe, it is worthwhile to examine both processes in relation to the Member States of the European Union. Hopefully, the Member States will ensure the effective implementation of the provisions of the Environmental Crime Directive, and a new „era” of environmental criminal law can start in the European sphere.



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MOGUĆI EFEKTI NOVOG ECD-A NA ZAŠTITU ŽIVOTNE SREDINE KROZ KRIVIČNO PRAVO U DRŽAVAMA ČLANICAMA EVROPSKE UNIJE

Apstrakt:

Nova Direktiva o ekološkom kriminalu (ECD) usvojena je u aprilu 2024. i očekuje se da će države članice Evropske unije implementirati do 2026. godine. Krivičnopravna zaštita životne sredine ima relativno dugu istoriju u evropskom regionu, ali je bila okružena kontroverzama i pravnim raspravama. Direktiva 2024/1203/EU zamenjuje Direktivu o ekološkom kriminalu iz 2008. Potonji zakon se suočavao sa stalnim kritikama od svog prihvatanja. Na „novi“ ECD su uticale primedbe o zaštiti životne sredine kroz krivično pravo i događaji u međunarodnoj sferi, uključujući novonastali koncept ekocida. U prezentaciji i radu autori bi želeli da istraže novine ECD-a kako bi odgovorili na pitanje „*Ima li šta novo pod suncem*“ u eri krivičnopravne zaštite životne sredine sa posebnim osvrtom na evropsku sferu. Štaviše, pristup mora biti kritičan, pošto zaštita životne sredine ima dugu istoriju u Evropskoj uniji; stoga, novi instrumenti treba da uče iz prethodnih zakonskih nedostataka. Prvo, autori će istaći istoriju krivičnog prava životne sredine u Evropskoj uniji i neuspehe prethodnog ECD-a. Dodatno, naglašeni su međunarodni uticajni faktori, sa posebnim osvrtom na ekocid. Na kraju, sumirane su potencijalne promene u zakonodavstvu država članica o ekološkom kriminalu.

Ključne reči: zaštita životne sredine, krivično pravo, direktiva o ekološkom kriminalu, pravo EU

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INTEGRATION AND INCLUSION AS FORMS OF PROTECTION OF THE CORPS OF RIGHTS AND FREEDOMS OF MIGRANTS

Abstract:

The challenges, policies and global impacts that characterize migration movements, as well as their management, are a process that is not at all easy and simple. Migration, as a ubiquitous aspect of human history, is evolving into a phenomenon that has rapid growth, the implications of which are founded on economic, political, environmental and social factors. Its understanding and effective management are imperative in the era of globalization processes.

The paper describes the state of migration movements, with a special focus on the policies that governments, international organizations and non-governmental organizations operating at the international level adopt and implement in the field of integration and inclusion of different categories of migrants. In the further elaboration, the author will address the international regulation, policies and instruments in migration management that the governments of the countries of final destination implement through border control measures, to integration policies and humanitarian approaches. A special aspect of this paper will be the analysis of the approaches of governments and international actors in order to determine the balance between the protection of national interests and the corpus of fundamental rights and freedoms of migrants. In this context, integration as a reversible process, its definition and existence in the legislation in Western European countries, as well as its applicability will be examined.

Keywords: *Migration, migration movements, integration, inclusion of migrants, migration and integration policies of migrants.*

INTRODUCTION

Migration, as a perennial aspect of human existence, is already in an era in which all the processes that take place around this phenomenon are of unprecedented complexity and scale. As migratory movements increase in scale, resulting from various factors such as the search for improved economic prospects, political stability and environmental security, migration management emerges as a critical global challenge¹.

¹ Zamocci, S., and Miller, M.J. (2009). *The Age of Migration: International Population Movements in the Modern World*. Palgrave Macmillan

In the modern way of life, a huge number of factors, including economic disparities, political unrest, climate change and armed conflicts, influence migration and migratory movements across borders. The increase in conflict situations is correlated with the enormous growth of forced migration. It was a segment of refugee crises that represented a mosaic of illegal migration, economic migration and internally displaced persons, which further complicated the situation faced by national governments and international organizations.

Forced migration, including refugees and internally displaced persons, requires a different approach to management. Humanitarian crises require a rapid and coordinated response from States and international migration bodies to provide health care, shelter and basic needs to people who have been forced to flee their countries of origin. Such migration crises have reinforced the need for international cooperation, a strong legal framework and equitable burden-sharing mechanisms to address the challenges of forced migration².

The human rights perspective subsumes non-discrimination, inherent dignity and rights of migrants and asylum seekers, as well as the process of creating policies that are consistent with the ethical imperatives of human rights.

The establishment of effective integration and inclusion policies is of fundamental importance for countries with a large influx of refugees and migrants. The successful integration and inclusion of this category of migrants in a country depends to a large extent on the broad support of public opinion and the recognition of the benefits of diversity in society by its citizens³. Preventing racism, intolerance and discrimination against refugees and migrants is closely linked to the development and adoption of integration strategies and policies at the government level, as well as the involvement of civil society in preventing extremist policies from exploiting these migrants for political validation in times of crisis. By distancing themselves from such political acts of violence, governments can prevent situations that can lead to the undermining of democratic processes, the disregard for human rights, the compromise of social cohesion and the rule of law.

1. INTEGRATION AND SOCIAL INCLUSION OF MIGRANTS AS FACTORS IN THE PROTECTION OF THE HUMAN RIGHTS OF MIGRANTS

Migration as a global phenomenon is part of the way of life of many people at some point in their lives and thus has significant implications for the categories of migrants in their countries of origin, transit and final destination. In this context, its management is essential for the implications it can have in the countries of origin and destination. Namely, it can cause negative repercussions if the governments of the destination countries handle migration policies poorly, or have positive repercussions if the inclusiveness in the social milieu of migrants in these countries is recognizable⁴. The acceptance of integration

2 UNHCR. (2019). *Global trends in forced displacement 2018*, from: <https://reliefweb.int/report/world/unhcr-global-trends-forced-displacement-2018> 0?gad_source=1&gclid=EAIaIqobChMIn6CZileJhAMVsZ2FEMEAAwPDGFEEWL00

3 *Democratization and Autocratization: IPSA 75th Anniversary Conference*: Joana Vidal Lopes, Ph.D., *Integration and Inclusion of Refugees and Migrants: Challenges and New Directions in Democracies*, Lisbon, 11-13 September 2024.

4 Mattia Giampaolo and Aurora Ianni: *Social inclusion of migrants in the EU*, Centro Studi Politica Internazionale (CeSPI), with the coordination of Andrea Stocchiero (Focsiv).

policies and inclusion can improve economic and social conditions in local communities both in the countries of origin and in the countries of final destination of migrants.

The analyses prepared from a geopolitical point of view indicate an increase in ethnic and social conflicts and wars, which in turn will have repercussions on the growth of migration movements. Such a trend, primarily as a result of populist policies and nationalist narratives, will lead to the implementation of strategies and policies of tightening security measures at the borders by the governments of the transition and final destination countries, which will undoubtedly negatively affect the freedoms and rights of citizens. The Mediterranean refugee crisis has raised many questions regarding migration policy, which relate to the gaps in the legislation, policies and mechanisms designed by the European Union. In the process of managing the migration crisis, the Union has shown weaknesses in dealing with the migratory movements of different categories of migrants, who were part of economic and forced migration, who came to the European land and sea borders. The emergence of an increasing number of illiberal regimes in the Union has resulted in the emergence of a trend of anti-migration movements, supported by far-right political parties, recognizable in the countries of Eastern Europe, the United Kingdom, and some of the countries of the European Union⁵. The constant pressure of migrants and refugees from Syria, Afghanistan, Yemen, Libya and Pakistan, as part of the Mediterranean crisis, was the basis for adopting measures aimed at reducing and limiting migration flows, as a result of potential security threats from terrorist acts and transnational crime, especially in the countries of final destination. Such policies and the lack of interest of certain Member States in sharing migrants negatively reflected on the very process of integration and inclusion of refugees, economic migrants and migrants who were forced to leave their countries of origin as a result of military actions or to protect their own lives and the lives of their families.

1.1. Integration Policies

The concept of integration does not have a generally accepted understanding. It is not a clear term. According to the documents of the Council of Europe, the foundation of social integration refers to the protection of human dignity, non-discrimination and participation in the societies of the host countries⁶. According to Resolution 2176 (2017), of the Parliamentary Assembly of the Council of Europe (PACE), integration is seen as an ongoing process, which depends on the constructive tripartite engagement of the government of the country of final destination, the non-governmental sector and refugees, focusing primarily on the responsibilities of the receiving state, rather than on the categories of migrants⁷. Unlike the Parliamentary Assembly, the Committee of Ministers of the Council of Europe places greater focus on integration policies that respect the cultural diversity of society and always avoid stigmatizing migrants and people of immigrant background⁸.

5 *Democratization and Autocratization: IPSA 75th Anniversary Conference*, Joana Vidal Lopes, Ph.D., *Integration and Inclusion of Refugees and Migrants: Challenges and New Directions in Democracies*, Lisbon, 11-13 September 2024.

6 Council of Europe, *White Paper on "Intercultural dialogue: living together as equals in dignity"*, Council of Europe Ministers of Foreign Affairs, Strasbourg, 7 May 2008.

7 See PACE, "Integration of refugees in times of critical pressure: learning from recent experience and examples of best practice", Resolution 2176 (2017), 28 June 2017.

8 Council of Europe Special Representative of the Secretary General on migration and refugees: *Human rights aspects of immigrant and refugee integration policies*, Issue Paper, Council of Europe, March 2019

Integration policy subsumes several components, one of the essential ones being knowledge of the language of the host country in which migrants reside, as well as policies that enable family reunification and permanent residence by migrants and third-country nationals, including access to employment, social benefits and social assistance. It must be emphasized that some of these components may not always be easily achievable due to the measures and mechanisms that the countries of final destination of migrants establish.

Integration policies are not universal, as are their approaches, which are above all variable, and move depending on the polarization between assimilation and multiculturalism⁹. It must be noted that the differences in the segmentation of integration and social cohesion policies also depend on the type, duration or purpose of migration. It is an undeniable fact that integration is a process that contributes to stable and inclusive societies, regardless of whether it is temporary or permanent migration. The absence of policies for the integration and inclusion of migrants will have negative financial repercussions that will far exceed the initial investments to support this process.

Developing effective integration measures undoubtedly requires political, social and financial investments to achieve long-term benefits for all, in particular the positive fiscal contribution of migrants, which results from their integration into the labour market and timely access to education. Promoting integration and social cohesion policies only facilitates access to healthcare, education and employment, ensuring the social and economic inclusion of migrants. The effectiveness of integration policies depends on a whole-of-community approach, as well as on a clear confirmation of expectations and commitments from all parties involved, migrants, the state apparatus at local, regional and national levels of the host country. The aspiration of host countries to make access to basic services available should be correlated with the readiness of local communities to receive migrants, the identification of common values between migrants and citizens of the host country, and the creation of preconditions for the active participation of migrants in the life of the receiving country. The success of the integration of migrants depends on several factors such as the reasons for migration, the length of stay, their socio-economic status, the political climate, as well as the prevailing attitudes and opinions about migrants in the countries of their final destination.

1.2. Social inclusion as a component within the framework of ensuring the human rights of migrants

Migration as a phenomenon brings many challenges, but also opportunities for sustainable development in local communities. Recently, the European economic crisis reflects measures that host countries are taking and are reflected in growing inequality between citizens and migrants, which in turn contribute to the emergence of social tensions and intolerance towards the inclusion of migrants. In this context, the main challenges that European countries need to face are determining policies and measures that will prevent the spread of Islamophobia, ghettoization and social exclusion. It is evident that favoring legal and socio-economic aspects, without neglecting other dimensions, are the most important, because the full integration and inclusion of migrants within the host countries depends on the time that the system allocates to the procedures that recognize legal status, educational degrees, social needs, as well as the time to secure employment. Slow procedures for securing legal status for migrants and the lack of recognition of educational

9 IOM, *Essentials of Migration Management: "Integration of Migrants"* vol. 3.6

diplomas are essential factors for the growth of the informal economy where migrants have to work without employment contracts and with low financial performance for the nature of the work they do.

The process of inclusion involves three dimensions: a) legal or political, b) socio-economic and c) cultural or religious. Migrant inclusion policies usually distinguish between those that aim to “assimilate” migrants through demands for acceptance of certain characteristics of the host society; and policies that focus on promoting non-discrimination and fostering diversity or multiculturalism¹⁰.

In the New York Declaration, States, reaffirming the principles and purposes of the UN Charter, undertook, through respect for international law and international human rights law, to fully protect the corpus of fundamental rights and freedoms of refugees and various categories of migrants, regardless of their status. Such an affirmation was the foundation for the negotiations on the Global Compact for Safe, Regular and Orderly Migration. In that spirit, the United Nations Sustainable Development Goals (SDGs) 16 refer to the creation of policies to promote peaceful and inclusive societies, ensuring access to justice for all and building efficient, accountable and inclusive institutions at all levels. In this regard, it is of great importance to build mechanisms that will prevent forms of violence, which in turn will reflect a sense of safe living, regardless of their ethnic and religious affiliation, status or sexual orientation. In accordance with these goals, states are obliged to build efficient, accountable and inclusive institutions at all levels, measures for good migration management and policy-making, which are founded on social inclusion of all stakeholders, based on the equal dignity and rights provided by the Charter of the United Nations and the Universal Declaration of Human Rights¹¹.

It cannot be overlooked that policymakers and their inclusion strategies implicitly include a deficit discourse, suggesting that the insufficient qualifications of migrants represent one of the obstacles to their social inclusion, which can be remedied by attending educational institutions that will shape their further qualifications¹². Such activities do not represent ambivalence towards the environment, on the contrary they are accepted by migrants as an opportunity to develop a sense of belonging. Other less informal practices essential for their integration, learning and inclusion are the various sports activities that enable encounters between people and are fundamental for developing relationships, which in turn allows for the creation of belonging as a kind of “special community”.

CONCLUSION

Integration policies should facilitate life, family reunification and inclusiveness in the countries of final destination of migrants. In this regard, their aim should be to take measures to affirm the security of migrants and third-country nationals, as well as to restrict migration control measures in the integration policies of the countries of their final destination. The length

10 Mattia Giampaolo and Aurora Ianni: *Social inclusion of migrants in the EU*, Centro Studi Politica Internazionale (CeSPI), with the coordination of Andrea Stocchiero (Focsiv).

11 *Global Coalition on Migration Human Rights and Dignity for All: Ensuring Human Rights of All Migrants, Social Inclusion and Non-Discrimination in the Global Compact*

12 Linda Morrice, Hongxia Shan & Annette Sprung: *Migration, adult education and learning*, *Studies in the Education of Adults*, 49:2, 129-135, DOI: 10.1080/02660830.2018.1470280, <https://doi.org/10.1080/02660830.2018.1470280>

of a person's stay in a country is proportional to the strength of the correlative relationship with that country, which means that destination countries should stimulate integration policies over those oriented towards migration control. What is essential for governments of destination countries is that they should pay greater attention to the accessibility of the services they provide to all citizens regardless of citizenship status, and these relate to the rights to health services, guaranteed access to housing, as well as to a dignified quality of life for immigrants and refugees. It is essential that policies for inclusion in the labor market are realistic, taking into account the specific characteristics of candidates, and that they are designed to encourage participation at all levels of education and skills, with a special focus on gender equality.



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INTEGRACIJA I INKLUZIJA KAO OBLICI ZAŠTITE KORPUSA PRAVA I SLOBODE MIGRANATA

Apstrakt:

Izazovi, politike i globalni uticaji koji karakterišu migracione pokrete i njihovo upravljanje nisu lak ni jednostavan proces. Migracija, kao sveprisutni aspekt ljudske istorije, evoluirala je u brzo rastući fenomen čije su implikacije zasnovane na ekonomskim, političkim, ekološkim i društvenim faktorima. Njeno razumevanje i efikasno upravljanje su imperativ u eri procesa globalizacije.

Rad opisuje stanje migracionih kretanja, sa posebnim osvrtom na politike koje vlade, međunarodne organizacije i nevladine organizacije koje deluju na međunarodnom nivou usvajaju i sprovode u oblasti integracije i inkluzije različitih kategorija migranata. U daljoj razradi, autor će se osvrnuti na međunarodnu regulativu, politike i instrumente u upravljanju migracijama koje vlade zemalja konačnog odredišta sprovode kroz mere kontrole granica, do integracionih politika i humanitarnih pristupa. Poseban aspekt ovog rada biće analiza pristupa vlada i međunarodnih aktera kako bi se utvrdila ravnoteža između zaštite nacionalnih interesa i korpusa osnovnih prava i sloboda migranata. U tom kontekstu, biće razmotrena integracija kao reverzibilan proces, njena definicija i postojanje u zakonodavstvu zapadnoevropskih zemalja, kao i njena primenljivost.

Ključne reči: *Migracija, migraciona kretanja, integracija, inkluzija migranata, politike o migraciji i integraciji migranata.*

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WOMEN AS A MARGINALISED GROUP IN THE REALISATION OF THE RIGHT TO WATER - GENDER INEQUALITIES IN THE CONTEXT OF THE GLOBAL WATER CRISIS

Abstract:

The recognition of the right to water has become increasingly prominent in international human rights discourse over the past two decades. UN General Assembly Resolution 64/292 and UN Human Rights Council resolutions recognise access to water and adequate sanitation as indispensable for human dignity. However, the effective enjoyment of this right shows serious inequalities, especially for marginalised groups such as women and girls. The situation of women in the exercise of their right to water is not only a social issue, but also a fundamental legal one, which faces a number of legal, institutional and structural challenges.

This paper provides a legal analysis of how women's right to water is implemented in the light of international and regional human rights regimes. It focuses on key treaties like the ICESCR and CEDAW and examines institutional barriers, case law and soft law developments. The paper offers *de lege ferenda* proposals, including strengthening legal mechanisms and ensuring women's participation in water governance. Climate change, digitalisation and urbanisation are analysed as factors that exacerbate gender inequality in access to water. This paper aims to support a rights-based approach linking gender equality with the realisation of the right to water.

Keywords: *the right to water, gender inequality, marginalised groups, international human rights, de lege ferenda proposals*

1. THE LEGAL FOUNDATIONS OF THE RIGHT TO WATER

Water is a fundamental human right and essential for realizing all other human rights. Despite growing recognition in international law, access to water remains highly unequal, with women disproportionately affected by scarcity, inadequate infrastructure, and systemic discrimination. While the right to water has been increasingly codified in global legal frameworks, its gendered aspects are often neglected in both interpretation and practice.

The United Nations General Assembly explicitly recognized the right to safe and clean drinking water and sanitation in Resolution 64/292¹, affirming its vital role for

1 UNGA. (2010). Retrieved from Resolution 64/292: The human right to water and sanitation.: <https://>

human dignity and life. The Human Rights Council reinforced this in Resolution 15/9², highlighting state duties to respect, protect, and fulfil this right, especially for vulnerable groups like women and girls. Though not legally binding, these resolutions carry strong normative influence on state practices and human rights law interpretation.

Legal grounding also exists in the International Covenant on Economic, Social and Cultural Rights³, notably Articles 11 and 12, with General Comment No. 15⁴ clarifying that the right to water entails access to sufficient, safe, physically accessible, and affordable water for personal and domestic use. However, enforcement remains limited by the lack of binding mechanisms, fragmented national implementation, and weak gender integration. As a result, despite formal legal recognition, unequal enjoyment of the right to water persists, particularly for women facing systemic barriers worldwide.

1.1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the foundational legal framework for the right to water, though it does not explicitly mention water⁵. General Comment No. 15 (2002) by the Committee on Economic, Social and Cultural Rights interprets Articles 11 and 12—guaranteeing an adequate standard of living and the highest attainable health—as encompassing the right to “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”⁶ This marked a key advancement by framing water as a justiciable right rather than merely a development goal.

The Comment outlines core state obligations, including non-discrimination, participation, and sustainable access. However, as a soft law instrument, it lacks binding legal force, limiting enforceability, especially where the ICESCR is not directly integrated into domestic law. Many states have been slow to implement these principles, and monitoring remains weak. Additionally, the Comment does not specifically address gendered vulnerabilities, reducing its effectiveness in tackling women’s particular challenges in water access.

While General Comment No. 15 has been influential in advocacy and judicial interpretation, its full impact depends on stronger binding mechanisms and gender-sensitive application⁷.

undocs.org/A/RES/64/292

2 UN General Assembly. (2010). *United Nations Digital Library*. Forrás: Appointments to fill vacancies in subsidiary organs and other appointments : appointment of members of the Committee on Contributions : report of the 5th Committee : General Assembly, 65th session: <https://digitallibrary.un.org/record/693515?v=pdf>

3 *United Nations Human Rights*. (1966). Forrás: International Covenant on Economic, Social and Cultural Rights: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

4 De Souza, M. (2002). *United Nations Digital Library*. Forrás: General comment no. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights): <https://digitallibrary.un.org/record/486454?v=pdf>

5 *United Nations Human Rights*. (1966). Forrás: International Covenant on Economic, Social and Cultural Rights: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

6 De Souza, M., 2002.

7 De Souza, M., 2002.

1.2. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) plays a key role in addressing gender inequality in water access, especially for rural women. Article 14(2)(h) explicitly recognizes their right to adequate living conditions, including water supply, linking water access to broader standards of living. Article 15 guarantees women equality before the law and rights related to contracts and property, crucial for empowering women in water and land resource management, where discrimination persists⁸.

However, enforcement is limited: state reports often lack gender-disaggregated data on water and sanitation, hindering effective monitoring and policy development. The Optional Protocol allows individual complaints but remains underutilized due to resource and legal barriers. The CEDAW Committee's General Recommendations, especially No. 34 on rural women's rights, clarify state obligations but are soft law instruments dependent on political will⁹. To better realize women's right to water under CEDAW, stronger accountability, improved gender-specific data collection, and greater inclusion of rural women in water governance are essential.

2. STRUCTURAL AND INSTITUTIONAL BARRIERS TO WOMEN'S ACCESS TO WATER

While international human rights instruments recognise the right to water and related gender equality principles, the realisation of these rights is significantly hindered by persistent structural and institutional barriers¹⁰. These barriers are especially pronounced in developing regions and rural settings, where women's access to water is obstructed by deeply rooted social norms, legal discrimination, and institutional shortcomings.

2.1. Time Poverty and Labour Inequality

Time poverty—the lack of sufficient time for rest, education, or income-generating activities due to unpaid labor—is a major, often invisible, consequence of gender inequality in water access¹¹. Women and girls in the Global South spend an estimated 200 million hours daily collecting water¹². In areas with poor infrastructure, especially in Sub-Saharan Africa and South Asia, water collection trips can take over 30 minutes each and occur multiple times a day. This unpaid labor drastically reduces time for education, employment,

8 UN Women. (2016). Forrás: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth: <https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth>

9 UN Women, 2016.

10 Acevedo-Guerrero, T., Bossenbroek, L., Kulk, S., Leonardelli, I., & Zwarteven, M. (2024). *Routledge Handbook of Gender and Water Governance*. London: Routledge. doi:10.4324/9781003100379

11 Acevedo-Guerrero, T., Bossenbroek, L., Kulk, S., Leonardelli, I., & Zwarteven, M., 2024.

12 World Health Organization. (2021. 09 13). Forrás: Progress on household drinking water, sanitation and hygiene 2000–2020: Five years into the SDGs: <https://www.who.int/publications/i/item/9789240030848>

political participation, and leisure, reinforcing cycles of poverty and gender inequality.

Time poverty particularly harms girls' education, as many are withdrawn from school to assist with water fetching, perpetuating systemic disadvantage and intergenerational poverty. Health risks include injuries, exhaustion, and greater exposure to violence, especially in conflict or remote regions. Because this labor is unpaid and private, it is largely invisible in official statistics and policymaking. Ignoring the gendered burden of water collection perpetuates structural discrimination, undermining rights to health, education, and public participation¹³. Addressing this requires infrastructure investments like community taps, alongside legal and policy reforms recognizing women's hidden labor. Mainstreaming gender in water governance and adopting a rights-based approach to time use are essential for advancing equality¹⁴.

2.2. Legal Pluralism and Gender Bias

Legal pluralism—the coexistence of multiple legal systems within one jurisdiction—creates significant challenges for women's right to water. Customary and religious laws often operate alongside formal statutory law, reflecting cultural diversity but frequently producing conflicting norms that reinforce gender discrimination, especially regarding land tenure and natural resource access¹⁵. In many patrilineal societies, customary norms restrict women's land ownership, making their water rights dependent on male relatives. Even where statutory law guarantees equality, customary practices and community pressure often undermine enforcement. Courts may hesitate to challenge traditional authorities, and women may avoid legal action due to social backlash, causing a gap between formal rights and actual access.

This dual legal system entrenches structural inequality, particularly in rural areas governed by customary institutions. Addressing these issues requires harmonizing statutory and customary laws with international human rights standards, including CEDAW and its General Recommendation No. 34 on rural women's rights¹⁶. Empowering women through legal awareness, aid services, and inclusive land registration is crucial to bridge the gap between legal norms and lived realities.

2.3, Exclusion from Water Governance

Despite women's crucial role in household and community water management, they remain severely underrepresented in formal water governance, occupying less than 10% of leadership roles globally¹⁷. This underrepresentation reflects broader gender exclusion in environmental governance, where male-dominated institutions often marginalize women's

13 OECD. (2022. 04 29). Forrás: Women's leadership in environmental action: https://www.oecd.org/en/publications/women-s-leadership-in-environmental-action_f0038d22-en.html

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perspectives. As a result, water policies frequently overlook women's specific needs, favoring commercial or industrial interests instead. Even when women are included in water committees or consultations, their participation is often tokenistic, hindered by cultural norms, limited literacy, time constraints, and lack of institutional support¹⁸. Women's voices may be dismissed, reinforcing patriarchal governance and obstructing meaningful reform.

International frameworks like Agenda 21, the Dublin Statement, and the SDG 6+ Gender Joint Programme stress inclusive governance, but implementation remains inconsistent, with gender mainstreaming underfunded and poorly institutionalized¹⁹. To achieve gender-equitable water governance, structural reforms are essential—such as gender quotas, leadership training for women, and gender impact assessments—to ensure women not only participate but lead decision-making, dismantling persistent gender bias in water governance.

3. SOFT LAW DEVELOPMENTS AND CASE LAW

While **binding treaties** such as the ICESCR and CEDAW form the legal backbone of the right to water and gender equality, **soft law instruments** and **judicial decisions** play a critical role in shaping interpretations, filling normative gaps, and influencing national policies²⁰. These non-binding but authoritative tools help address the **evolving dimensions** of gender inequality in water access, particularly where formal legal provisions are vague, outdated, or silent²¹.

3.1. UN Resolutions and Reports

United Nations resolutions and special procedures have played a pivotal role in advancing the normative framework of the right to water through a gender perspective. Since 2008, UN Special Rapporteurs on the human rights to safe drinking water and sanitation have documented how water insecurity disproportionately affects women and girls, advocating for gender mainstreaming in laws, policies, and programs²². Their reports emphasize the inseparability of the right to water from health, education, and gender equality, highlighting the inadequate water and sanitation access faced by women—especially in rural and informal urban areas—which perpetuates gender inequality and social exclusion.

18 Agarwal, B. (2001). Participatory Exclusions, Community Forestry, and Gender: An Analysis for South Asia and a Conceptual Framework. *World Development*, 29(10), 1623-1648. doi:10.1016/S0305-750X(01)00066-3

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20 Winkler, I. (2012). *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*. Hart Publishing.

21 IACHR. (2020, 02 06). Retrieved from CASE OF THE INDIGENOUS COMMUNITIES OF THE LHAKA HONHAT (OUR: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf)

22 De Albuquerque, C. (2012). *World Water Council*. Retrieved from On the Right Track - Good Practices in realising the rights to water and sanitation: <https://www.worldwatercouncil.org/en/publications/right-track-good-practices-realising-rights-water-and-sanitation>

The 2022 report to the Human Rights Council, “Gender equality in the realization of the human rights to water and sanitation,” calls for gender-sensitive monitoring, increased funding for gender-targeted programs, and enhanced women’s representation in water governance. It stresses combating structural discrimination and promoting women’s participation as rights-holders and decision-makers. Though not legally binding, these reports carry significant moral authority, influencing legislation and development strategies worldwide, and underline the intersectionality of gender with poverty, disability, and Indigenous status²³.

The Special Rapporteurs have also criticized the lack of sex- and age-disaggregated data in water policies, urging improved gender-responsive planning—a call echoed by UN-Water and the SDG 6+ Gender Joint Programme. By promoting transformative, participatory, and accountable water governance, these UN bodies place women’s empowerment at the center of realizing the right to water²⁴.

3.2. Regional Courts

Regional human rights courts have increasingly recognized the intersection of gender, poverty, and access to natural resources, including water. Although explicit rulings focused solely on women’s right to water remain scarce, landmark cases before the African Court on Human and Peoples’ Rights and the Inter-American Court of Human Rights demonstrate growing judicial awareness of intersectional discrimination and collective rights of marginalized groups.

In **Endorois Welfare Council v. Kenya**²⁵, the African Commission found that the forced removal of the Endorois people from ancestral lands containing vital water sources violated their rights to property, natural resources, and culture under the African Charter²⁶. While not exclusively about women, the case highlighted how displacement disproportionately harms women’s livelihoods and access to water.

Similarly, in **Indigenous Communities of the Lhaka Honhat Association v. Argentina**²⁷, the Inter-American Court ruled that Argentina violated Indigenous communities’ economic, social, and cultural rights, including access to clean water and a healthy environment. The Court emphasized structural discrimination and the particular vulnerability of women and children, setting a precedent for gender-sensitive interpretation of socio-economic rights.

Though these rulings do not yet constitute a fully developed gender-specific jurisprudence on water rights, they reflect an evolving regional approach that links gender with ethnicity, landlessness, and environmental justice. Both courts have also begun

23 Langford, M. (2005). The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems? *International Journal of Water Resources Development*, 21(2). doi:10.1080/07900620500035887

24 Sultana, F. (2018). Water justice: why it matters and how to achieve it. *Water International*, 43(4). doi: 10.1080/02508060.2018.1458272

25 *African Commission on Human Rights and Peoples’ Rights*. (2009, 11 25). Retrieved from Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya - 276/03: <https://achpr.au.int/en/decisions-communications/centre-minority-rights-development-kenya-and-minority-rights-group-27603>

26 IACHR, 2020.

27 IACHR, 2020.

incorporating soft law instruments like CEDAW and UN General Comments, bridging the divide between binding and non-binding norms²⁸. These decisions provide strategic pathways for advancing women's water rights through litigation, especially where national courts face political or institutional constraints. They also warn states that failing to ensure inclusive water access risks violating not only environmental or property rights but also equality and non-discrimination obligations under regional human rights frameworks²⁹.

4. CLIMATE CHANGE, DIGITALISATION AND URBANISATION: EMERGING CHALLENGES

The realisation of women's right to water is increasingly shaped by 21st-century global transformations, particularly climate change, digitalisation, and urbanisation. These interconnected trends have introduced new layers of inequality and institutional challenges that disproportionately affect women—especially those in rural areas, informal settlements, or marginalised communities³⁰. While these challenges are global in nature, their gendered impacts are often under-analysed in policy and legal frameworks, leading to inadequate responses³¹.

4.1. Climate Change and Water Scarcity

Climate change poses one of the most urgent threats to the realization of the human right to water, impacting the availability, quality, and reliability of water resources in ways that disproportionately affect women—especially those in rural, Indigenous, and impoverished communities³². Increasing droughts, floods, and erratic rainfall patterns force women to travel longer distances to collect water, often through unsafe or isolated areas. This heightened spatial and temporal burden exacerbates gender-specific vulnerabilities, including risks of physical injury, sexual violence, and lost educational and economic opportunities. Since water collection duties predominantly fall on women and girls, climate-induced water scarcity further intensifies their unpaid labor³³.

Despite these clear gendered impacts, climate resilience and adaptation plans frequently neglect to incorporate gender perspectives or meaningfully consult affected women during the planning process³⁴. Climate finance mechanisms often prioritize large-scale infrastructure and technological projects without adequately integrating local

28 *United Nations Human Rights*. (1979). Retrieved from Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

29 Gilbert, J. (2006). *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Transnational Publishers. doi:10.1163/ej.9781571053695.1-352

30 *IPCC Sixth Assessment Report*. (2022). Retrieved from Climate Change 2022: Impacts, Adaptation and Vulnerability: <https://www.ipcc.ch/report/ar6/wg2/>

31 Sultana, F., 2018.

32 *IPCC Sixth Assessment Report*, 2022.

33 Sultana, F. (2022). The unbearable heaviness of climate coloniality. *Political Geography*, 99, november. doi:10.1016/j.polgeo.2022.102638

34 *Global Water Partnership*. (2017, august). Retrieved from Gender equality and inclusion in water resources management: <https://www.gwp.org/globalassets/global/about-gwp/publications/gender/gender-action-piece.pdf>

women's knowledge, needs, and rights. This oversight reflects a broader structural challenge in environmental governance: the persistent marginalization of women in decision-making and resource distribution.

International frameworks such as the UNFCCC Gender Action Plan and Sustainable Development Goal 13 (Climate Action) emphasize the critical importance of gender-responsive adaptation strategies. However, implementation is uneven and reporting on gender-sensitive indicators remains inconsistent. To ensure climate policies advance gender equality, states must center women's experiences, promote their leadership in adaptation planning, and guarantee that resilience efforts enhance—rather than restrict—women's access to water. Legal reforms should mandate gender impact assessments for all climate-related infrastructure projects. Without these measures, climate policy risks perpetuating and deepening existing inequalities instead of alleviating them³⁵.

4.2. Digital Divide

The digitalisation of water governance has introduced a range of technologies—such as smart water meters, online billing systems, mobile payment platforms, and remote monitoring tools—designed to improve efficiency, transparency, and service accessibility. While these innovations offer notable benefits, they have also unintentionally widened existing inequalities, particularly for women in rural, low-income, and technologically underserved areas³⁶. In these contexts, women often face systemic barriers to digital inclusion, including limited internet access, low levels of digital literacy, restricted ownership of mobile devices, and constrained financial autonomy. As a result, digital tools that rely on smartphone use, online registration, or electronic transactions frequently exclude women from full participation in water service delivery and governance processes. This “digital divide” constitutes a new layer of structural exclusion, reinforcing pre-existing disparities linked to gender, geography, and socioeconomic status³⁷.

In many rural and peri-urban areas, even where digitalised water systems are technically available, women may be unable to access or manage their user accounts, pay water bills electronically, or report service failures through digital complaint mechanisms³⁸. This exclusion not only undermines individual and household water security but also compromises broader goals of inclusive and equitable water governance. The risks are further magnified as public and private utilities increasingly transition to digital-only service models, disproportionately affecting elderly women, Indigenous women, and those with limited literacy or language access³⁹.

Moreover, digitalisation introduces significant data and design biases. Many digital water platforms are built without incorporating gender-disaggregated data or considering

35 *United Nations Climate Change*. (2025). Retrieved from The Gender Action Plan: <https://unfccc.int/topics/gender/workstreams/the-gender-action-plan>

36 *International Telecommunication Union*. (2024). Retrieved from Measuring digital development: Facts and Figures 2024: <https://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>

37 Leterme, C. (2022). Digital Justice is a Matter of Environmental Justice. Or at least, it Should be. *CETRI's articles*. Retrieved from <https://www.cetri.be/Digital-Justice-is-a-Matter-of?lang=fr>

38 *UNDP*, 2004.

39 *GSMA*. (2024). Retrieved from The Mobile Gender Gap Report 2025: <https://www.gsma.com/r/gender-gap/>

the specific usage patterns, priorities, and constraints of women. Algorithmic tools and digital dashboards used for resource allocation or infrastructure planning often fail to capture or reflect the lived realities of women and girls, leading to governance outcomes that are blind to their needs and perspectives⁴⁰. To address these challenges, it is essential to embed gender equality principles into the design, implementation, and monitoring of digital water governance systems. This includes the adoption of **digital inclusion policies**, provision of **affordable and accessible mobile technologies**, and **capacity-building initiatives** tailored to the needs of women in rural and marginalised communities. Gender audits of digital water platforms and services should also be institutionalised to ensure that technological innovation supports—rather than obstructs—the realisation of the human right to water for all⁴¹.

4.3. Urbanisation and Informal Settlements

Rapid urbanisation in many developing regions has led to the proliferation of informal settlements—densely populated areas often characterized by a lack of formal infrastructure, including inadequate access to safe and reliable water sources. These settlements frequently exist outside the reach of municipal water systems, resulting in residents relying on unsafe, intermittent, or costly water supplies. Within this context, women disproportionately bear the responsibility for securing water for their households. The burden of collecting and managing scarce water resources falls heavily on them, exposing them to numerous risks. Women and girls often travel long distances to access water, facing physical dangers such as harassment, violence, and accidents⁴². Furthermore, the unsanitary conditions common in informal settlements exacerbate health risks associated with inadequate water supply, including waterborne diseases⁴³.

The intersection of gender, poverty, and inadequate infrastructure thus compounds the vulnerability of women in informal urban settlements. This dynamic not only impacts their health and safety but also limits their opportunities for education, employment, and social participation, perpetuating cycles of inequality⁴⁴. Addressing water access in informal settlements requires gender-sensitive policies that recognize and alleviate the unique challenges women face in managing water scarcity in rapidly urbanising environments.

40 Bertram, Z., Carty, T., & Kowalzig, J. (2020, october 20). OXFAM. doi:10.21201/2020.6621

41 United Nations. (2024). Retrieved from Our Common Agenda: <https://www.un.org/en/common-agenda>

42 Mulawa, Z., Pommells, M., Schuster-Wallace, C., & Watt, S. (2018). Gender Violence as a Water, Sanitation, and Hygiene Risk: Uncovering Violence Against Women and Girls as It Pertains to Poor WaSH Access. *Violence Against Women*, 24(15), 1851 - 1862. doi:10.1177/1077801218754410

43 ALNAP. (2008, May 31). Retrieved from Women, Slums and Urbanisation: Examining the Causes and Consequences: <https://reliefweb.int/report/world/women-slums-and-urbanisation-examining-causes-and-consequences>

44 Amnesty International. (2010, July 7). Retrieved from Kenya: Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya: <https://www.amnesty.org/en/documents/afr32/002/2010/en/>

5. DE LEGE FERENDA PROPOSALS

To address existing gaps in the realization of the right to water, it is essential to strengthen legal frameworks by supplementing international treaties with optional protocols that explicitly recognize the gender dimension of water rights, while aligning domestic laws with these obligations to include enforceable gender equality provisions⁴⁵. Moreover, international monitoring bodies should be empowered with effective sanction mechanisms—such as naming-and-shaming or conditional funding—to hold states accountable for non-compliance⁴⁶. Crucially, women's meaningful participation must be ensured at all decision-making levels, from local water committees to global governance platforms, with gender quotas and capacity-building initiatives implemented to overcome barriers and promote equitable representation.

6. CONCLUSION

The full realization of the human right to water is intrinsically linked to dismantling systemic gender inequalities that continue to impede women's and girls' access to this essential resource. This study has examined how gender-based disparities manifest across multiple dimensions of water governance—ranging from international legal standards and regional human rights jurisprudence to climate adaptation strategies, digital transformation, and urban water access in informal settlements. Although international human rights law increasingly acknowledges the right to water—most notably through UN resolutions, Special Rapporteurs, and soft law instruments—implementation remains fragmented, under-enforced, and often symbolic. Moreover, gender is frequently sidelined in both normative development and practical application.

A truly effective, gender-sensitive, rights-based approach to water governance must therefore go beyond formal legal recognition. It must entail comprehensive legal reforms that enshrine gender equality in water-related policies, institutional transformations that mainstream gender into decision-making processes, and inclusive governance mechanisms that ensure the active participation of women—particularly those from marginalised groups such as Indigenous, rural, and low-income communities. Integrating gender-disaggregated data, ensuring equitable digital access, and applying intersectional frameworks in climate and infrastructure planning are critical to addressing the multilayered barriers women face. Only through these combined efforts—across legal, institutional, technological, and societal levels—can the universal promise of safe, sufficient, affordable, and equitable water access become a lived reality for all, and especially for women and girls who have long borne the brunt of water injustice.

45 Langford, M., 2005.

46 Winkler, I., 2012.



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ŽENE KAO MARGINALIZOVANA GRUPA U OSTVARIVANJU PRAVA NA VODU - RODNE NEJEDNAKOSTI U KONTEKSTU GLOBALNE VODNE KRIZE

Apstrakt:

Priznavanje prava na vodu postalo je sve istaknutije u međunarodnom diskursu o ljudskim pravima tokom poslednje dve decenije. Rezolucija Generalne skupštine UN 64/292 i rezolucije Saveta za ljudska prava UN priznaju pristup vodi i adekvatnoj sanitarnoj infrastrukturi kao neophodne za ljudsko dostojanstvo. Međutim, efektivno uživanje u ovom pravu pokazuje ozbiljne nejednakosti, posebno za marginalizovane grupe kao što su žene i devojke. Situacija žena u ostvarivanju njihovog prava na vodu nije samo socijalno pitanje, već i osnovno pravno pitanje, koje se suočava sa nizom pravnih, institucionalnih i strukturnih izazova.

Ovaj rad pruža pravnu analizu načina na koji se pravo žena na vodu sprovodi u svetlu međunarodnih i regionalnih režima ljudskih prava. Fokusira se na ključne sporazume kao što su ICESKR i CEDAV i ispituje institucionalne barijere, sudsku praksu i razvoj mekih zakona. Rad nudi predloge de lege ferenda, uključujući jačanje pravnih mehanizama i obezbeđivanje učešća žena u upravljanju vodama. Klimatske promene, digitalizacija i urbanizacija analiziraju se kao faktori koji pogoršavaju rodnu nejednakost u pristupu vodi. Ovaj rad ima za cilj da podrži pristup zasnovan na pravima koji povezuje rodnu ravnopravnost sa ostvarivanjem prava na vodu.

Ključne reči: *pravo na vodu, rodna nejednakost, marginalizovane grupe, međunarodna ljudska prava, de lege ferenda predlozi*

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GLOBAL PERSPECTIVES ON RIGHTS OF NATURE: SUBSIDIARITY AS A GUIDING COMPASS

Abstract:

Amid the escalating triple planetary crisis—climate change, biodiversity loss, and pollution—legal cultures worldwide reflect evolving human-nature relationships. This paper examines the Rights of Nature as an emerging legal paradigm, analyzing key global case studies through the lens of subsidiarity. It situates the Rights of Nature within broader environmental regulatory frameworks and traces its development across legislative levels, from national constitutions to local ordinances. Through these examples, the paper illustrates how subsidiarity shapes the application of this concept, balancing local autonomy with higher-level governance. Additionally, it evaluates landmark court cases that invoke Rights of Nature in their rulings or reasoning, highlighting their legal significance. The paper also explores the concept's nascent emergence in Europe, identifying early trends and potential implications.

By mapping these cases, the analysis identifies shared characteristics, underscores distinctions, and evaluates subsidiarity's role in shaping effective environmental governance.

Keywords: *Rights of Nature, subsidiarity, environmental law, sustainability*

1. INTRODUCTION

Over the seventy-year history of environmental law, a renewed relationship between humanity and nature has emerged. Not only has the UN emphasized the appreciation of nature's nurturing role, but similar themes are also evident in the social teachings on creation care, such as Pope Francis' encyclical *Laudato Si'*^{1 2}

In 2009, the United Nations General Assembly declared April 22 as International Mother Earth Day through Resolution A/RES/63/278.³ In December 2010, the General Assembly adopted its second resolution on harmony with nature.⁴ Since 2011, the United

1 Pope Francis. (2015). *Laudato si'* encyclical letter On care for our common home. Vatican Press. Retrived: https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html

2 Tahyné Kovács, Á. (2024). A természet jogai jelenségről világi-és egyházi felfogásban. *Pro Futuro*, 14(2).

3 Resolution A/RES/63/278, United Nations General Assembly, 2009.

4 United Nations General Assembly. (2010). Harmony with Nature (Resolution A/RES/65/164). <https://documents.un.org/doc/undoc/gen/n10/522/38/pdf/n1052238.pdf>

Nations has invited scientists, professionals, and stakeholders to participate in an interactive dialogue on International Mother Earth Day, promoting harmony with nature. Despite humanity's universal aspiration for environmental stewardship, failures in environmental protection persist. Legal frameworks have historically shaped the relationship between humanity and nature through environmental protection regulations.

Behind these environmental protection failures, economic profit motives are often evident, underscoring the growing importance of targeted environmental legal regulations.⁵ In accordance with the principle of subsidiarity, consensus among stakeholders is crucial in determining the most effective social regulatory instruments for protecting nature. This consensus is shaped by social processes, traditions, worldviews, historical institutional systems, geographical contexts, and legal family affiliations. In recent decades, three distinct legal regulatory concepts for nature and environmental protection have emerged, reflecting the level of regulatory development and, to varying degrees, influencing legislation beyond mere theoretical considerations.⁶

The dominant regulatory approach, anthropocentrism, views humanity as separate from and superior to nature, valuing living and non-living components of the environment only insofar as they serve human interests.⁷ While anthropocentrism does not inherently harm the environment, the Western thinking rooted in Roman law has been characterized by this perspective from the beginning. A significant evolution in this perspective has been the recognition of the interests of future generations.⁸

A distinct group of regulatory philosophies focuses on protecting and preserving the environment or its components for their own sake. Two primary approaches have emerged: the theory of nature's intrinsic value and a psychological-cosmological perspective, exemplified by Deep Ecology. Within non-anthropocentric frameworks, two branches of environmental ethics stand out: biocentrism and ecocentrism. Biocentrism prioritizes the natural world, viewing all living beings as equally valuable, equating the worth of animal life with that of humans.

This paper does not aim to compare these regulatory approaches. Instead, it highlights a relatively new phenomenon within the third regulatory concept—Rights of Nature—emerging in various parts of the world. Given the study's limited scope, it does not evaluate the phenomenon's effectiveness or its applicability within the European legal context. Among its manifestations, we focus on select local-level cases, as they illustrate the application of the principle of subsidiarity.

2. THE PRINCIPLE OF SUBSIDIARITY

As Gerd Winter emphasised, “[p]rinciples have legal value. By this, they are to be distinguished from political goals on the one side and moral values on the other. Some content of such goals or morals may nevertheless overlap with the content of a principle.

5 Tahyné Kovács, Á. (2023). A jelen és jövő generációk egészségének védelme és a génmódosítás szabályozása: Deregularizáció előtt áll-e az Európai Unió biotechnológiára vonatkozó szabályozása? *Glossa Iuridica*, 10(7), 119.

6 Bándi, Gy. (2022). *Környezetjog*. Budapest: Szent István Társulat az Apostoli Szentzség Kiadója. pp. 10–11.

7 Bányai, O. (2018). A környezetpolitika múltja, jelene, jövője – gondolatok egy könyv alapján. *Pro Futuro*, 218(1), 186.

8 Bándi (2022) 75–83.

Ronald Dworkin, the Anglo-Saxon authority in matters of principles proposes that principles should be understood to only contain individual rights. They should be distinguished from collective goals. Such goals are pursued, he says, not by principles but rather by policies. Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. “Principles are propositions that describe rights; policies are propositions that describe goals.”⁹ Robert Alexy, Dworkin’s German counterpart, opposes this arguing that collective goals too can be given legal force which means that they can have the quality of principles.¹⁰ Dworkin views the quality of legal principles as rooted in the judiciary’s professional wisdom and interpretive judgment.

The Catholic principles of subsidiarity and solidarity, articulated as a framework of natural law in Pope Pius XI’s 1931 encyclical *Quadragesimo Anno*, emphasize that public authority should be built from the grassroots level. Subsidiarity holds that the state’s role is to empower individuals and communities to fulfill social and integrative functions, intervening only when they are unable to do so. Although the Catholic tradition extends subsidiarity to the relationship between government and society. This principle promotes a model of socially controlled, limited power, complemented by decentralization, ensuring that authority and competencies are delegated as close as possible to individuals and their communities.¹¹

The principle of subsidiarity in environmental law stipulates that environmental problems and regulations should be addressed primarily at the lowest appropriate level—local, regional, or national—escalating to higher levels (e.g., EU or international) only when the problem’s nature or impact necessitates it and lower-level measures are insufficient. This principle ensures that decision-making remains as close as possible to affected communities, accounting for local contexts, while enabling coordinated action for global or regional challenges, such as climate change or cross-border pollution. Subsidiarity is particularly prominent in the European Union’s environmental policy, balancing Member States’ autonomy with EU-level regulation.

The principle of subsidiarity was first incorporated into EU primary legislation in 1986 through the Single European Act, which referenced it in the context of environmental policy. In environmental protection, subsidiarity operates across multiple dimensions. It prioritizes local-level action, leveraging knowledge of local conditions for effective implementation, while also necessitating coordination among Member States for transboundary issues, such as cross-border pollution or global warming. Additionally, subsidiarity in EU law allows flexibility in implementation, as directives often set minimum requirements, enabling Member States to adapt measures to local contexts. Article 5 of the Treaty on European Union limits its application in the EU to the division of competences between Member States and the EU.¹²

For over thirty years, the principle of subsidiarity has shaped EU legislation, playing a central role in legal, political, and broader social discourse by defining the conditions under which regulatory authority is exercised.¹³

9 Dworkin, R. (1977). *Taking rights seriously*. Harvard University Press, p.90.

10 Winter, G. (2002). Principles of environmental protection. In Avosetta Group–Meeting (Vol. 22, pp. 1–14), p.1.

11 Pálné Kovács, I. (2017). Helyi önkormányzatok. In A. Jakab & B. Fekete (Eds.), *Internetes Jogtudományi Enciklopédia: Közigazgatási jog* (I. Balázs, Section Ed.). para. 12.

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12 Winter, G. 2002.

13 Koller, B. (2023). A szubszidiaritás értelmezései és alkalmazásának lehetőségei az Európai Unióban.

Although the Rights of Nature movement originated primarily outside Europe, this study examines its alignment with the principle of subsidiarity through five key aspects: (i) the choice of regulatory level, (ii) the codifier's access to information, (iii) enforceability and compliance willingness, (iv) local cooperation, and (v) efficiency as a formulated goal.

3. THE RIGHTS OF NATURE CONCEPT

The Rights of Nature, a global initiative, phenomenon, and regulatory concept, fundamentally rethinks the relationship between humanity and nature, drawing on diverse local social traditions. Some radical proponents view it as an extension of human rights development.¹⁴ Over half a century ago, Christopher D. Stone, a Professor of Law at the University of Southern California, first proposed that natural entities should have legal rights.¹⁵

Although the party representing the valley, which challenged the decision to build the ski resort, lost the case in the notable *Sierra Club v. Morton* (1972), Justice William O. Douglas, in his dissenting opinion, referenced the concept of standing for natural entities, inspired by Christopher D. Stone's work. Stone, in his seminal article "Should Trees Have Standing?" (1972), developed the bioethical foundation for this theory. He argued that to protect nature, trees, rivers, mountains, and other natural formations could be granted legal rights, allowing a designated guardian to represent their interests in court.

The attribution of legal personality to ecosystems has, thus far, been largely symbolic. Beyond its recognition in some legal systems, this concept has opened new avenues for political and legal discourse. According to radical interpretations of the relationship between humans and nature, ecosystems—such as rivers, lakes, and mountains—could be granted rights akin to those of human or natural persons. This assertion is linked to the capacity to bring lawsuits to protect nature. The movement seeks a paradigm shift globally, placing nature at the core of legal and ethical frameworks. In its focus, this perspective aligns with the third group of regulatory philosophies mentioned earlier.

According to the doctrine, an ecosystem may be granted legal personality status, conferring the right to "defend" itself in court against harm, including damages from environmental degradation caused by specific development projects or climate change. The ecosystem is recognized as a "subject of rights," entitled to legal representation by a designated guardian—similar to a trustee—who acts in its name and for its benefit. Under this concept, the guardian is typically an individual or group with expertise in the condition, care, and management of the ecosystem. Additionally, the ecosystem is acknowledged to have the right to exist, flourish, maintain its life cycles, and develop naturally, free from human-induced disturbances.

The rights conferred on nature, as advocated by proponents, aim to ensure the highest level of environmental protection while underscoring the connection to the right to a clean and healthy environment. In many cases, these rights also intersect with the rights

Európai Tükör, 2023(1), 1–20. <https://doi.org/10.32559/et.2023.1.1>.

14 see also: Sheehan, L., Wilson, G., (2015) 'Fighting for our Shared Future: Protecting Both Human Rights and Nature's Rights'. Earth Law Centre, December 2015.

15 Stone, C. D. (1972). Should trees have standing? Toward legal rights for natural objects. *Southern California Law Review*, 45, 450–501.

of Indigenous communities to their habitats and cultural heritage, which may be impacted by environmental degradation. Although efforts to advance the rights of nature specifically target the protection of natural values, they can indirectly contribute to preventing and addressing human rights violations caused by climate change. However, their effectiveness compared to traditional legal instruments remains unproven.

The concept of granting rights to nature is rooted in legal cultures distinct from European legal traditions. In Latin America, where these values are particularly prominent, the relationship between people and nature carries a unique significance, shaped by the region's social, economic, educational, and legal contexts. This phenomenon is often recognized as a mechanism for Indigenous peoples to uphold their rights to the traditional use of natural resources while simultaneously protecting and preserving biodiversity.

4. THE EMERGENCE OF THE RIGHTS OF NATURE CONCEPT IN LEGAL FRAMEWORKS

Before examining the local manifestations of the Rights of Nature concept through the principle of subsidiarity, we will highlight key examples at higher legislative levels. Ecuador's 2008 Constitution was the first in the world to recognize the rights of nature at the constitutional level. These rights were enshrined as the rights of Pachamama (Mother Earth), reflecting Indigenous Kichwa cosmology and emphasizing the intrinsic value of ecosystems.

In 2009, Bolivia introduced environmental legislation that grants every citizen the right to "protect an environment suitable for the development of living beings." Although Bolivia's Constitution, enacted in 2009, did not explicitly codify the Rights of Nature, it laid the groundwork for subsequent legislation, notably the 2010 Law of the Rights of Mother Earth.¹⁶ This law recognizes *Madre Tierra* (Mother Earth) as a living entity with inherent rights, reflecting Indigenous Andean cosmologies and advancing the global Rights of Nature movement.¹⁷ In 2019, Uganda became the first African nation to recognize the Rights of Nature in its National Environment Act (Act 5 of 2019).¹⁸ Part I, Section 4 of the Act declares that "Nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution," empowering individuals to bring legal actions to protect these rights.

Similarly, New Zealand's Te Urewera Act 2014 marked a global milestone by granting legal personhood to Te Urewera, a former national park, recognizing it as a living entity with "all the rights, powers, duties, and liabilities of a legal person." This legislation, rooted in Māori Tūhoe cosmology, establishes a Te Urewera Board to act as its guardian, prioritizing its intrinsic worth and Indigenous cultural values. In Colombia, the Constitutional Court's 2016 ruling recognized the Atrato River, its basin, and tributaries as an entity entitled to protection, conservation, maintenance, and restoration, with guardianship shared by the state and Indigenous communities. These legislative and judicial advancements, alongside Ecuador's 2008 Constitution and Bolivia's 2010 Law of the Rights

16 Ley de Derechos de la Madre Tierra. <https://www.bivica.org/file/view/id/2370>

17 see also: Svampa, M., Stefanoni, P., & Fornillo, B. (2010). *Debatir Bolivia: Perspectivas de un proyecto de descolonización*.

18 THE NATIONAL ENVIRONMENT ACT, 2019, Uganda. <https://nema.go.ug/sites/all/themes/nema/docs/National%20Environment%20Act,%20No.%205%20of%202019.pdf>.

of Mother Earth, exemplify the growing global recognition of the Rights of Nature at higher legislative and judicial levels, often driven by Indigenous philosophies.

5. EMERGENCE OF THE RIGHTS OF NATURE CONCEPT IN LOCAL REGULATIONS

5.1. Local Decree Form

In the United States, the Rights of Nature movement has manifested at the local level, notably in 2010 when the Pittsburgh City Council unanimously passed an ordinance recognizing the rights of nature. This Community Bill of Rights, enacted on November 16, 2010, as part of a ban on shale gas drilling and hydraulic fracturing, declares that “Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish.” It empowers residents to bring legal actions on behalf of ecosystems and prohibits activities that violate these rights, aligning with the principle of subsidiarity by embedding environmental protections in local governance.

In 2019, the city of Toledo, Ohio, passed the Lake Erie Bill of Rights, a municipal ordinance that recognized Lake Erie as a legal entity with inherent rights to “exist, flourish, and naturally evolve.” Enacted on February 26, 2019, through a citizen-led special election, the ordinance empowered Toledo residents and the city to enforce these rights against activities, such as agricultural runoff and industrial pollution, that threaten the lake’s ecosystem. Although the ordinance was invalidated by a federal court in 2020,¹⁹ it remains a significant example of local governance advancing the Rights of Nature in the United States, following the precedent set by Pittsburgh’s 2010 Community Bill of Rights.

In 2019, the Drewes Farms Partnership, a farming operation, filed a lawsuit against the City of Toledo, arguing that the Lake Erie Bill of Rights imposed liability for standard field fertilization practices due to its vague provisions. On February 27, 2020, the U.S. District Court for the Northern District of Ohio ruled in *Drewes Farms Partnership v. City of Toledo* (Case No. 3:19-cv-434) that the ordinance was “invalid in its entirety.” The court found the Lake Erie Bill of Rights to be unconstitutionally vague, as it failed to provide clear standards for enforcement, and determined that it exceeded Toledo’s municipal authority under Ohio law, which preempts local environmental regulations. Efforts to revive the ordinance through Ohio state courts were unsuccessful, as subsequent appeals and related lawsuits failed to overturn the federal ruling.

Although cooperation among community groups, such as Toledoans for Safe Water, and local authorities was achieved, the ordinance’s effectiveness was undermined by these legal and practical challenges. Nevertheless, the Lake Erie Bill of Rights remains a significant example of subsidiarity in action

5.2. Federal Resolution Regulation

In North America, a notable example of the Rights of Nature emerged in 2021 when the Innu Council of Ekuanitshit and the Minganie Regional County Municipality

19 Drewes Farms Partnership v. City of Toledo

in Québec, Canada, granted legal personhood to the Magpie River (Muteshekau Shipu) to protect its ecosystem from proposed hydroelectric and mining activities. This initiative, supported by the Alliance Muteshekau Shipu and the Canadian Observatory on the Rights of Nature, recognized the river's rights to exist, flow, and be free from pollution, reflecting community and Indigenous efforts to preserve its ecological and cultural significance (Municipalité Régionale de Comté de Minganie, 2021).

In February 2021, the Muteshekau-shipu Alliance announced the adoption of two parallel resolutions recognizing the Magpie River (Muteshekau Shipu in the Innu-aimun language) as a legal entity with personhood and inherent rights. The first resolution was passed by the Innu Council of Ekuanitshit on February 16, 2021, followed by a resolution from the Minganie Regional County Municipality (RCM) in Québec's Côte-Nord region on February 23, 2021. These resolutions granted the river nine rights, including the right to exist, flow, evolve naturally, be free from pollution, and be represented in court. The Innu Council of Ekuanitshit, alongside representatives from the Minganie RCM, were designated as the river's legal guardians, bearing primary responsibility for upholding these rights. The Muteshekau-shipu Alliance, comprising the Innu Council of Ekuanitshit, the Minganie RCM, the Canadian Parks and Wilderness Society (CPAWS) Québec, and the Eau Vive Minganie Association, exemplifies robust local cooperation in the legislative process. During the development of these resolutions, extensive ecological and cultural information about the river was gathered, enhancing community support and compliance with the new legal framework. This initiative, driven by Indigenous and local governance, aligns with the principle of subsidiarity and complements other Rights of Nature efforts.

5.3. *The Mar Menor Act*²⁰

In 2022, Spain became one of the first European nations to enact a national law recognizing the Rights of Nature, granting legal personhood to the Mar Menor lagoon and its basin in Murcia, Spain. In 2020, a coalition of non-governmental organizations, including Instituto de Transición Justa and local advocacy groups, drafted a bill asserting that the Mar Menor and its basin have the right to protection, preservation, maintenance, and, where appropriate, restoration." This citizen-led initiative, supported by a popular legislative proposal (*Iniciativa Legislativa Popular*), collected over 600,000 signatures by August 2021 to secure a parliamentary vote. On April 5, 2022, the Spanish Congress of Deputies voted 274 to 53 to approve the draft law, granting the Mar Menor legal personality with rights to exist, be protected, and be restored. On July 13, 2022, the Congress's Committee on Ecological Transition and Demographic Challenge finalized the bill and forwarded it to the Spanish Senate. On September 21, 2022, the Senate ratified the law with 230 votes in favor and 3 against, officially recognizing the Mar Menor and its basin as a legal entity with designated guardians, including community representatives, to enforce its rights. This landmark legislation, driven by local and national cooperation, aligns with the principle of subsidiarity by addressing the Mar Menor's ecological crisis—caused by agricultural runoff, mining, and tourism—at the lowest effective governance level while complementing global Rights of Nature frameworks,

20 The Mar Menor Act (Ley 19/2022, 2022)

Version in force on 3 October 2022 Granting Mar Menor and its basin status of a legal person Act 19/2022, dated 30th September. Retrieved:

https://www.um.es/documents/23559040/35080450/LEY+19_2022+IN+ENGLISH.pdf/2b874650-7475-8530-4aa9-edc1e519370b?version=1.0&t=1667582135802&download=true

The governance framework for the Mar Menor's legal personhood, established by Spain's Law 19/2022, includes a Representative Committee, an Audit Committee, and a Scientific Committee. The Representative Committee comprises three central government members, three regional government members from Murcia, and seven civil society representatives, ensuring a balanced approach to managing the lagoon's rights. The Audit Committee, composed of delegates from Mar Menor communities, monitors compliance with the law. A Scientific Committee provides ecological and technical expertise to support decision-making. Articles 10 and 11 of Law 19/2022 confer legal guardianship and representation of the Mar Menor lagoon and its basin on the public administration, with active involvement from local communities, the Scientific Committee, and the Audit Committee. A key regulatory feature is the authorization of any natural person to enforce the Mar Menor's rights—such as protection, preservation, maintenance, and restoration—on an *actio popularis* basis, allowing citizens to initiate legal actions on behalf of the lagoon. This participatory mechanism, rooted in local cooperation and supported by robust governance, exemplifies the principle of subsidiarity and strengthens the Mar Menor's legal framework within the global Rights of Nature movement.

On August 31, 2023, a court in Cartagena, Spain, marked a significant milestone by applying Law 19/2022. The case investigated hazardous mining waste discharges from the Los Blancos landfill into the lagoon, alleging violations of the Mar Menor's rights to protection, conservation, maintenance, and restoration. Pursuant to Article 6 of Law 19/2022, the court summoned the Committee of Representatives, designated as the lagoon's guardians, to appear as a private prosecutor in the criminal proceedings and to pursue civil action for damages on behalf of the lagoon. The court order invited several NGOs (Greenpeace, ANSE, and SOS Mar Menor) and seven local municipalities to participate, reinforcing the principle of social participation embedded in the law's *actio popularis* mechanism. This case, one of the first in Europe to enforce a Rights of Nature law in court, underscores the Mar Menor's legal framework as a pioneering model.

Under the principle of subsidiarity, which prioritizes decision-making at the most local effective level, the Mar Menor Act demonstrates an ideal regulatory approach to protect the natural element. The Spanish legislature, informed by extensive ecological data on the lagoon's degradation (e.g., eutrophication from agricultural runoff, mining, and tourism) and robust citizen support (over 600,000 signatures for the 2020 *Iniciativa Legislativa Popular*), crafted a clear and participatory legal framework. The involvement of the Committee of Representatives, Audit Committee (Comité de Seguimiento), and Scientific Committee (Comité Científico), alongside the *actio popularis* mechanism, exemplifies strong local cooperation among communities, NGOs, and public authorities. This cooperation enhances the law's potential effectiveness, though enforceability remains contingent on judicial interpretation and government commitment, as seen in the 2023 Los Blancos case. The Mar Menor's governance model, rooted in community-driven advocacy and supported by scientific expertise, aligns with subsidiarity by addressing the lagoon's crisis at the intersection of local and national governance, contributing to the global Rights of Nature movement.

6. CONCLUSION: FEATURES OF SUBSIDIARITY IN LOCAL RIGHTS OF NATURE REGULATIONS

The Rights of Nature concept, as observed in various examples, reveals common features that address environmental challenges in biodiverse regions, particularly those inhabited by indigenous communities. These areas often face significant and ongoing

environmental damage, threatening the livelihoods of indigenous peoples and drawing the attention of authorities. In such cases, legislation emerges that grants special rights to nature, typically at the local level, ensuring relevance and proximity to the affected communities.

The principle of subsidiarity is central, as regulations are crafted at the level closest to the impacted community, fostering cooperation among stakeholders. This approach positions the legislation as a collaborative solution. A designated spokesperson or guardian for nature serves as a mediator among indigenous communities, authorities, and courts, extending beyond traditional litigation roles. In some instances, multiple institutions simultaneously represent the natural ecosystem. A guardian acts in legal proceedings, while another body may advocate for the harmonious coexistence of indigenous peoples with their environment, emphasizing their close-to-nature lifestyle. Additionally, professional bodies sometimes provide scientific expertise to support the guardian or representative entity, as seen in the case of Spain's Mar Menor lagoon. These cases often involve multi-polar conflicts, extending beyond a simple clash of economic and environmental interests. They encompass the political and economic vulnerability of indigenous communities and their sustainable way of life. The scope of nature's rights varies across examples, typically focusing on specific ecosystems such as valleys, river basins, or lagoons. The Rights of Nature framework demonstrates that subsidiarity ensures legislators receive comprehensive information about the ecosystem in question and the affected community's capacity to implement regulations. This was particularly evident in the Mar Menor Act, where local engagement and scientific input facilitated effective environmental protection.



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GLOBALNE PERSPEKTIVE O PRAVIMA PRIRODE: SUPSIDIJARNOST KAO VODEĆI KOMPAS

Apstrakt:

Usred eskalirajuće trostruke planetarne krize — klimatskih promena, gubitka biodiverziteta i zagađenja — pravne kulture širom sveta odražavaju razvoj odnosa između čoveka i prirode. Ovaj rad ispituje Prava prirode kao novi pravni paradigam, analizirajući ključne globalne studije slučaja kroz prizmu supsidijarnosti. Koncept Prava prirode pozicionira unutar širih regulatornih okvira zaštite životne sredine i prati njegov razvoj kroz zakonodavne nivoe, od nacionalnih ustava do lokalnih uredbi. Kroz ove primere, rad ilustruje kako supsidijarnost oblikuje primenu ovog koncepta, balansirajući lokalnu autonomiju sa upravljanjem na višem nivou. Pored toga, ocenjuje značajne sudske slučajeve koji u svojim presudama ili obrazloženjima pozivaju na Prava prirode, ističući njihov pravni značaj. Rad takođe istražuje početno pojavljivanje ovog koncepta u Evropi, identifikujući rane trendove i potencijalne implikacije. Mapiranjem ovih slučajeva, analiza identifikuje zajedničke karakteristike, naglašava razlike i procenjuje ulogu supsidijarnosti u oblikovanju efikasnog ekološkog upravljanja.

***Ključne reči:** Prava prirode, supsidijarnost, ekološko pravo, održivost*

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THE ECtHR JURISPRUDENCE ON “FAKE NEWS”: SEARCHING FOR TRUTH

Abstract:

With the development of the internet and social networks, the dissemination of “fake news” has become much easier and faster than it was in the past. Although this phenomenon is not new, its current effects on democratic political processes and human behavior during some emergencies demonstrate that “fake news” can have a significant impact on public behavior. In view of these considerations, the article will analyze the phenomenon of “fake news” through the lens of Article 10 of the European Convention on Human Rights (ECHR) and the circumstances under which freedom of expression may be limited in instances of “fake news” publication. The first section will consider the definition and the concept of fake news. In addition, the authors will analyze the relevant jurisprudence of the European Court of Human Rights (ECtHR), with special attention devoted to the ECtHR’s landmark decision in *Brzeziński v. Poland*. The goal of this paper is to clarify the role of ECtHR’s approach to fake news, particularly in the context of modern information environments.

Keywords: *fake news, freedom of expression, European Convention on Human Rights*

“A lie can travel halfway around the world while the truth is putting on its shoes.”

Mark Twain

INTRODUCTION

In a democratically governed state, freedom of expression is one of the most significant aspects of the legal system. The significance of freedom of expression should not be limited to the protection of verbal and non-verbal communication; rather, it should be considered in a broader context, as it is a necessary condition for the exercise of other rights

and freedoms.¹ In the digital era, freedom of expression has achieved a completely new dimension, transforming our methods of communication and self-expression in ways that were previously unimaginable.² While the internet has the potential to expand people’s ability to express themselves freely, it also poses risks to other fundamental rights.³

Innovations in media content dissemination models, particularly online, have introduced the concept of “fake news”, which has since become a notable feature in international and national policies and regulations.⁴ With the development of the internet and social networks, the dissemination of “fake news”, disinformation, and misinformation has become much easier and faster than it was in the past. Although this phenomenon is not new, its current effects on democratic political processes and human behavior during some emergencies demonstrate that “fake news” can have a significant impact on public behavior.⁵

In view of the above considerations, this article will analyze the phenomenon of “fake news” through the lens of Article 10 of the European Convention on Human Rights (ECHR) and the circumstances under which freedom of expression may be limited in instances of “fake news” publication. The first section will consider the definition and the concept of “fake news”. In addition, the authors will analyze the relevant jurisprudence of the European Court of Human Rights (ECtHR), with special attention devoted to the ECtHR’s landmark decision in *Brzeziński v. Poland*. The goal of this paper is to clarify the role of ECtHR’s approach to “fake news”, particularly in the context of modern information environments.

2. “FAKE NEWS”: CONCEPTUAL CLARIFICATION

The concept of “fake news” is global in scope and has historical roots extending back centuries.⁶ However, there is still no consensus in the doctrine regarding the meaning of this phenomenon.⁷ According to one approach, “fake news” could be considered as “*spreading outrageous, distorted information to discredit opposition or create divisiveness between opposing groups*”.⁸ This definition is effective as it emphasizes the purpose and impact of “fake news”, accurately differentiates it from mere factual inaccuracies, and

1 Medović, V., Mladenov, M., Galetin, M. (2025). *Primena vrednosti Evropske unije i digitalna transformacija: perspektiva Srbije* [Application of EU values and digital transformation: Serbian perspective], Novi Sad: Univerzitet Privredna akademija u Novom Sadu, p.225.

2 Mladenov, M., Staparski, T. (2024). “Liability of Online Platforms for Content Moderation from the Perspective of the European Court of Human Rights – Challenges and Recent Developments”. *Pravo - Teorija i Praksa*, 41(4), p. 153.

3 See: ECtHR, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, Application No. 33014/05, Judgment of 5 May 2011,

4 Richter, A. (2018). “Fake news and freedom of the media”. *Journal of International Media and Entertainment Law*, 8(1), p.2.

5 Muhvić, D. and Rešetar Čulo, I. (2022). ““Fake News” in Times of Crisis in the Context of Article 10 of the European Convention on Human Rights”. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 43 (1), p.190.

6 Gielow Jacobs, L. (2022). Freedom of speech and regulation of fake news. *The American Journal of Comparative Law*, 70(Supplement_1), i278-i311.

7 See: Tandoc Jr., Edson C. Z. W. L. and Richard Ling. (2018). “Defining “fake news”: A typology of scholarly definitions”. *Digital Journalism* 6(2)(2018), 137-153.

8 Nielsen, G. (2020). Populism, fake news, and the flight from democracy. In *Navigating Fake News, Alternative Facts, and Misinformation in a Post-Truth World* (pp. 238-257). IGI Global.

illustrates its significance in a post-truth context characterized by emotional manipulation and social polarization. However, it appears to concentrate on political motives, specifically the discrediting of opposition. Although this is a principal motivating factor, “fake news” is also generated for monetary profit or social manipulation.

According to another approach, “fake news” is “a type of online disinformation (1), with (2) misleading and/or false statements that may or may not be associated with real events, (3) intentionally created to mislead and/or manipulate a public (4) specific or imagined, (5) through the appearance of a news format with an opportunistic structure (title, image, content) to attract the reader’s attention, in order to obtain more clicks and shares and, therefore, greater advertising revenue and/or ideological gain”.⁹ This definition is quite comprehensive, including both false statements and misleading information, while underlining the dual objectives of financial and ideological gain.

The term “fake news” is also defined in various dictionaries. In the Cambridge Dictionary, this phenomenon is defined as “false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke,”¹⁰ while in Collins English dictionary it is defined as “false, often sensational, information disseminated under the guise of news reporting”¹¹.

Furthermore, misinformation and disinformation are frequently used equally with the term “fake news”. Misinformation is a term that denotes misleading information that is generated or disseminated without the intention of manipulating or harming others. In other words, misinformation is information that is inaccurate but is believed to be true by the individual who is disseminating it. Disinformation is typically employed to describe intentional endeavors to confuse or influence individuals by providing them with fake information. It is a deliberate and flagrant untruth that implies individuals who act maliciously are actively misleading the public. Disinformation is particularly hazardous due to its frequent organization, well-resourced nature, and reinforcement by automated technologies.¹² The primary distinction among these terms lies in their intent and dissemination. Misinformation refers to false information shared without malicious intent, while disinformation involves the intentional dissemination of false information to deceive and cause harm.

For the goal of this paper, the concept of “fake news” is defined as publishing information that is either entirely untrue or that has not been confirmed using the editorial standards and procedures of news media, in a format that appears to be real news, in order to misinform readers.¹³

As a human rights issue, although “fake news” could be considered from the perspective of several human rights, e.g., it can pose a significant threat to the right to life or freedom from discrimination¹⁴, the dilemmas regarding the countermeasures against “fake

9 Baptista, J. P., & Gradim, A. (2022). A Working Definition of Fake News. *Encyclopedia*, 2(1), 632-645.

10 Cambridge Dictionary, “Fake News” Definition, <http://dictionary.cambridge.org/us/dictionary/english/fake-news> (June 7, 2025);

11 Collins Dictionary, “Fake News” Definition, <https://www.collinsdictionary.com/dictionary/english/fake-news> (July 3, 2025)

12 Faizan, N. and Hussain, E. (2024). Conceptual Understanding of Fake News: An Overview. *Issue 2 Int’l J.L Mgmt. & Human.*, 7, 3299.

13 Benedek, W., and Kettemann, M. C. (2020). *Freedom of expression and the internet: Updated and revised 2nd edition*. Council of Europe, p.94.

14 Fake news was used to fuel ethnic violence in certain conflicts. See: Allen, T., & Seaton, J. (Eds.).

news” are centered on the principle of freedom of expression. Therefore, any response to “fake news” must be carefully balanced, in line with international human rights standards that require such restrictions to be necessary, proportionate, and non-discriminatory.

3. JURISPRUDENCE OF THE ECtHR ON “FAKE NEWS”

The term “fake news” is not explicitly defined in the ECHR or in ECtHR case-law. The ECtHR analyzed the concept of “fake news” in the light of Article 10 of the ECHR, which guarantees freedom of expression.¹⁵ The ECtHR supports an expansive interpretation of the concept of expression while employing a balancing approach in its methodology to establish certain exceptions beyond the fundamental aspects of this human right.¹⁶ In its jurisprudence, the ECtHR has specified the positive obligations of States regarding the protection of freedom of expression. The positive obligations require that the States establish an effective mechanism for the protection of authors and journalists. This mechanism is intended to foster a conducive environment for the participation of all parties involved in public debate, allowing them to express their opinions and ideas without fear, even if they are in opposition to those defended by the official authorities or an important part of public opinion, or if they are irritating or shocking to the latter.¹⁷

The ECtHR interpretation of Article 10 of the ECHR extends beyond its literal meaning; freedom of expression encompasses not only the right to hold and share information but also the reception of ideas through various forms of communication. The framework includes: the freedom to produce, exhibit, and distribute artworks; the liberty to conduct public artistic performances; access to relevant public information; the freedom to display images, icons, and symbols of religious or political significance; the preservation of cultural heritage, broadcasting, and satirical expression; and protection against self-incrimination.¹⁸

Article 10 of the ECHR does not provide absolute protection for freedom of expression. It permits Contracting States to intervene in the exercise of this right, based upon the limits meeting the criteria outlined in paragraph 2, that are prescribed by law,

(1999). *The media of conflict: War reporting and representations of ethnic violence*. Zed Books.

15 “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 005).

16 See: Macovei, M. (2004). A guide to the implementation of Article 10 of the European Convention on Human Rights. Human rights handbooks, (2), Council of Europe.

17 Council of Europe, 2022, Guide to Article 10 of the European Convention on Human Rights– Freedom of expression, <https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6>, (June 9, 2025), p.12.

18 Sardo, A. (2020). Categories, balancing, and fake news: The jurisprudence of the European Court of Human Rights. *Canadian Journal of Law & Jurisprudence*, 33(2), 437, 438.

have a legitimate aim, and are necessary in a democratic society.¹⁹ Furthermore, when referring to the press, the restrictions specified in the Second Paragraph of Article 10 must be interpreted strictly.²⁰

The ECtHR introduced the term “fake news” in its *Brzeziński v. Poland* judgment.²¹ The ECtHR unanimously determined that Article 10 of the ECHR was violated in relation to the applicant’s right to freedom of expression as a politician during the election period. The case specifically addresses the provision in Poland’s election legislation that permits the court to evaluate, within 24 hours, the publication of untrue information and to prohibit its further dissemination.

The case emerged before the 2006 local elections in Poland and concerned Mr Zenon Brzeziński, a candidate for local government in southern Poland. In a leaflet urging the public to vote for his electoral party, Brzeziński criticized the administration of the municipality. The complaints mostly focused on the mayor and the local council members. Brzeziński stated that the local council members had reached an agreement to exploit their positions. The mayor and a local politician included in the brochure initiated legal action against Brzeziński, seeking a court order to prohibit the distribution of the brochure and compel its author to amend the incorrect content and issue a public apology. The Court ordered Brzeziński to suspend future distribution of the booklet and required him to print an apology in two local newspapers, stating that he regrets having distributed the aforementioned false content, as it might have misled public opinion. The Court mandated Brzeziński to donate a certain amount to charity, together with associated charges. The Katowice Court of Appeal finally confirmed the decision of the Regional Court.²²

Brzeziński submitted an application to the ECtHR in 2007, claiming the violation of his right to freedom of expression. The ECtHR found that the interference with the freedom of expression was ‘prescribed by law’ and aimed at the legitimate objective of ‘protecting the reputation or rights of others,’ with the key question being whether the restriction was ‘necessary in a democratic society.’

The ECtHR observed that the campaign booklet was released within a local election campaign, aimed at local government and elected officials, and addressed a matter of significant public interest: the management of local government. Moreover, the Court emphasized that Article 10 allows for minimal restrictions on public interest expression. It noted that elected officials are subject to broader limits regarding acceptable criticism. Additionally, since Brzeziński was addressing the public as an election candidate, the government’s ability to impose restrictions on such expression was significantly limited.²³ The ECtHR reviewed the decisions of the national courts and noted, in particularly critical terms, that Brzeziński’s statements were immediately classified as untrue by these courts. Furthermore, it observed that the justifications of the national courts did not indicate

19 Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*, op.cit.

20 See: Bychawska-Siniarska, D. (2017). Protecting the right to freedom of expression under the European convention on human rights: A handbook for legal practitioners. Council of Europe, 87-90.

21 ECtHR, *Brzeziński v. Poland*, Application no. 47542/07, Judgment of 25 July 2019.

22 Fathaigh, O., R. (2019). *Brzeziński v. Poland: Fine over ‘false’ information during election campaign violated Article 10*, Strasbourg Observers, <https://strasbourgobservers.com/2019/08/08/brzezinski-v-poland-fine-over-false-information-during-election-campaign-violated-article-10/> (June 20, 2025).

23 Voorhoof, D. (2019). European Court of Human Rights: *Brzezinski v. Poland*. IRIS - Legal Observations of the European Audiovisual Observatory, (8), 1-2.

an examination of whether the contested remarks had a valid factual basis. The ECtHR determined that Brzeziński was clearly engaged in a public discourse on a significant matter, and it found itself unable to endorse the domestic courts' perspective that the applicant needed to prove the truth of his claims. Furthermore, it stated that by adopting this stance, the domestic courts effectively deprived Brzeziński of the guarantees provided by Article 10. The ECtHR determined that the language in the booklet did not constitute 'vulgar or insulting' speech, but rather fell within the bounds of 'exaggeration and provocation' typical of the 'ordinary tone' found in political debate at the local level. The ECtHR concluded that the justifications provided by the Polish courts for the rulings against Brzeziński lacked any pressing necessity. Finally, the ECtHR reviewed the sanctions imposed. The Court determined that the cumulative application of these sanctions would likely exert a chilling effect on individuals participating in local political discourse. The ECtHR reached a unanimous decision that Brzeziński's free expression had been disproportionately interfered with, constituting a violation of Article 10.²⁴

Brzeziński is the first ECtHR ruling that includes the phrase “fake news”. Neither the respondent state nor the applicant used the term in their submissions. Even though this case was met with criticism due to the term controversy, it established the key standards with regard to this issue.

Although the phrase “fake news” is a recent addition to the ECtHR terminology, several significant ECtHR rulings concerning freedom of expression have established principles that are pertinent to the Court's approach to this phenomenon in contemporary contexts.

In *Delfi AS v. Estonia*, the ECtHR determined that an online news portal might be held liable for defamatory remarks made by its users.²⁵ The Court determined that Delfi, as a commercial news entity that controlled its content and benefited from reader interaction, had the obligation to implement steps to avoid or eliminate harmful remarks. This decision is significant to the issue of “fake news”, as it established the concept that internet platforms are not merely passive transmitters of information. Conversely, they may possess a duty of caution, particularly as commercial companies, which might encompass moderating disinformation to safeguard the rights of others.

In the recent judgment *Novaya Gazeta and 161 Others v. Russia*, the ECtHR addressed the Russian government's use of “fake news” legislation to suppress opposition.²⁶ The term “fake news” in this instance was not developed by the Court as a novel legal concept, but was employed since it was the precise terminology already in the Russian internal legislation under scrutiny. The ECtHR determined that these restrictions were an abuse of authority and an excessive limitation on freedom of expression. The ECtHR determined that employing “fake news” as a justification to suppress media organizations and punish journalists constituted an unlawful method of suppressing criticism of governmental acts. This case is significantly relevant to the overarching issue of fake news: it underscores that, although deception poses a challenge, legislation intended to address it can also jeopardize press freedom and democratic dialogue if employed to restrict reporting and punish journalists for legitimate activities.

24 Ibid.

25 ECtHR, *Delfi AS v. Estonia*, App. No. 64569/09, Grand Chamber, Judgment of 16 June 2015.

26 ECtHR, *Novaya Gazeta and 161 Others v. Russia*, App. No. 11884/22 and 161 others, Judgment of 11 February 2025.

The *Novaya Gazeta* ruling served as the foundation for the later *Borovinskikh and Others v. Russia* decision.²⁷ In *Borovinskikh*, the ECtHR explicitly examined Russia's implementation of "fake news" and "discrediting the military" legislation as a form of censorship that violated Article 10. The ECtHR determined that Russian legislation criminalizing information that opposes the official state narrative of the military represented a "systemic and widespread pattern of reporting restrictions" aimed at suppressing criticism. The Court determined that this was not a valid method to address a threat to national security, but instead a concerted attempt to suppress critics. The ruling also criticized the national courts for failing to reconcile the conflicting interests involved, including the significant public interest in a major armed conflict and claims of war crimes. This case serves as a strong precedent against states that implement broadly and vaguely defined "fake news" regulations that restrict freedom of expression, particularly regarding issues of political and public significance.

The preceding analysis indicates that, despite the diverse terminology employed by states, including "false information," "disinformation," and "misinformation," statements that could ultimately be classified as "fake news," in accordance with the previously provided definition, fundamentally fall under the protection of Article 10(1) of the ECHR. Nonetheless, like other forms of communication, "fake news" is governed by the limitations outlined principally in Article 10(2) of the ECHR, in line with the discussed principles.

4. CONCLUSION

The significance of reliable informational resources for the protection of human rights is emphasized by the potential for "fake news" to compromise an accurate understanding of freedom of expression. Building on the importance of reliable information, the analysis of relevant case law of the ECtHR illustrates the Court's complex and developing stance on managing "fake news" under Article 10 of the ECHR. Each case presents a unique context—political speech by a candidate, third-party remarks on a commercial news platform, and state-sanctioned suppression of war reporting. These cases collectively highlight the fundamental tension between protecting freedom of expression and limiting the dissemination of harmful or false information. The analyzed judgments indicate that certain limitations on expression are acceptable, particularly for safeguarding the reputation of individuals or preventing violence. However, such restrictions must not create a "chilling effect" on public discourse or function as a mechanism for the state to suppress opposing views.

The deliberate dissemination of "fake news" is not a novel phenomenon; however, the digital era has significantly increased its scope and enhanced its impact, posing a pressing threat to human rights. It seems that this contemporary form of disinformation is committed to the active undermining of the fundamental pillars of democratic society, rather than merely inaccurately informing. "Fake news" fosters a conducive environment for the violation of rights by gradually eroding public trust in institutions, journalism, and the fundamental concept of verifiable truth. At the same time, it has the potential to be used to justify censorship as well as restrict freedom of expression.

Consequently, combating "fake news" is not merely a matter of revising the facts; it represents a crucial aspect of the protection of human dignity and the fundamental principles that are enshrined in international human rights law. A collective dedication to

27 ECtHR, *Borovinskikh and Others v. Russia*, App. No. 50074/18 and 25 others, Judgment of 12 June 2025.

media literacy, accountability, and the tenacious defense of a shared, fact-based reality is essential for the future of human rights in an exponentially digitalized world.



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PRAKSA EVROPSKOG SUDA ZA LJUDSKA PRAVA O „LAŽNIM VESTIMA“: U POTRAZI ZA ISTINOM

Sažetak:

Usled razvoja interneta i društvenih mreža, širenje „lažnih vesti“ postalo je mnogo lakše i brže nego što je to bilo u prošlosti. Iako ovaj fenomen nije nov, njegovi trenutni efekti na demokratske političke procese i ljudsko ponašanje tokom određenih vanrednih situacija pokazuju da „lažne vesti“ mogu imati značajan uticaj na ponašanje javnosti. U svetlu navedenih činjenica, predmet analize u radu predstavljaće fenomen „lažnih vesti“ kroz objektiv člana 10 Evropske konvencije o ljudskim pravima (EKLJP) i okolnosti pod kojima sloboda izražavanja može biti ograničena u slučajevima objavljivanja predmetnih vesti. Prvi deo rada će razmotriti definiciju i koncept „lažnih vesti“. Pored toga, autori će analizirati relevantnu sudsku praksu Evropskog suda za ljudska prava (ESLJP), pri čemu će posebna pažnja biti posvećena značajnoj odluci ESLJP u predmetu *Brzeziński* protiv Poljske. Cilj ovog rada je da razjasni pristup ESLJP predmetnom fenomenu, posebno u kontekstu savremenog informacionog okruženja.

Ključne reči: „lažne vesti“, sloboda izražavanja, Evropska konvencija o ljudskim pravima

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LAW, ECONOMY AND DIGITALIZATION: BENEFITS AND DETRIMENTS OF THE USE OF TECHNOLOGY IN ZAMBIA

Abstract:

The paper discusses the benefits and detriments of Zambia's digital economy through the medium of technology in relation to strides made in the law in the digitalization of the economy. Zambia like the regional and global community at large, has embraced various mediums of information and communication technology in many aspects of peoples' daily lives ranging from education, work, agriculture, electronic commerce, social media and the use of electronic government services such as payment of taxes, registration of businesses, access to social security benefits, obtaining land ownership documents, motor vehicle and driver licensing, acquiring citizenship identity documents, immigration permits and visa services, investment permits and licenses among other services. Digitalization of the Zambian economy is a driver of both economic and socio-economic growth achievable through government's unwavering long-term commitment in leveraging technologies for the overall upward thrust of the country's economy. Thus, it is against this backbone that necessary state actors have put in place relevant policies and laws aimed at regulating and enhancing the use of the digital economy through technology. However, the ills of technology cannot be completely ignored. While the digital economy is a benefit for a third-world country like Zambia, this paper reveals a worrying trend of persistent and grappling ills or detriments such as cybercrimes, unreliable internet infrastructure and connectivity, high data costs, high digital divide and youth decay which threaten the greater good of achieving a meaningful digital economy.

Keywords: *Zambia, development, economy, law, technology.*

INTRODUCTION

Zambia's digital economy is a relatively novel and thrilling phenomenon. Over the years, the country has coped with the traditional and conventional way of doing business, which has proven to be costly, cumbersome, laborious, beaurocratic and time-consuming ultimately resulting in poor client satisfaction.

Key policy and legislative reforms and milestones in achieving digitalization of Zambia's economy between 2006 and 2010

The role of government in creating an enabling environment for a digitalized economy, cannot be over-emphasized. In fact, (Konde, 2004) put it more aptly when he stated the vital part played by governments in national development in that, "The ability

of nations to generate and use advanced knowledge for industrial competitiveness is partly determined by the relationship between government, industry and research institutions as well as policies and regulations that govern the generation, transfer and commercialisation of new knowledge”.¹

Thus, the Zambian government has made significant strides in appreciating the crucial role and function of information and communication technology in fronting and thrusting national development.² In that vein, it has been at the forefront of spearheading initiatives, policies, and legislation which have culminated into key and notable milestones discussed in the subsequent portions of this article.

A number of policies and legislative reforms over the last decade, have been enacted and notable among the policies, is the National Information and Communications Technology policy. The first of this kind was created in 2006 in order to achieve the Fifth National Development Plan for the period 2006 to 2010. Among other objectives of the policy and of particular relevance to this article, was to:

1. Support the creation of satisfactory and operative sector legislation and regulatory framework. This objective was premised on the fact that the legal and regulatory framework governing the Zambian ICT sector at the time, was viewed as inadequate by
2. stakeholders in the sector in addressing concerns mainly because it was drawn without a clear sector policy in place; thus, creating room for assumption on key policy issues as well as lack of clear direction on roles and responsibilities. Therefore, the 2006 policy sought to birth revised legislation in order to cure this particular challenge.
3. Ensure coordinated and effective use of ICTs as an instrument for accelerated social and economic development. This objective was formulated on the basis of the wide digital divide and hence the development divide existing between the developed and developing countries largely due to economic discrepancies stemming from technology utilisation including ICTs. Despite the fact that developing countries are still focused on resource-based economies, ICTs have become economic drivers in developed countries. It was thus identified in this policy, that Zambia too could benefit from this lesson to break the chain of poverty.³
4. The aforementioned objectives of the National Information and Communications Technology policy 2006 were thus attained through the enactment of the following key pieces of legislation:
 - a) The Information and Communications Technology Act No. 15 of 2009 which came into force on 28th August 2009 and is still in operation to date. The objective of the Act is to among other things, re-name the Communications

1 Konde, V. (2004) Internet development in Zambia: a triple helix of government-university-partners International journal of technology management : IJTM. - Geneva-Aeroport : Inderscience Enterprises Ltd, ISSN 0267-5730, ZDB-ID 55978-7. - Vol. 27.2004, 5, p. 440-451.

2imba, A. (2025) Navigating the Digital Landscape: 60 Years of ICT Evolution in Zambia - Progress, Challenges, and Opportunities for National Development. ZAMBIA AT 60: Invigorating Innovation for Sustainable Development (pp.172 - 195) Edition: 1 Chapter: 9 Publisher: Mission Press, Ndola, Zambia.

3 National Information and Communications Technology Policy 2006.

Authority of Zambia (CAZ) as the Zambia Information and Communication Technology Authority (ZICTA) and continue its existence through the latter; to make provision for the regulation of the information and communication technology sector in Zambia; to enable accessibility to information and communication

technologies; to protect the rights and interests of information and communication providers and consumers.* technology service

- b) The Electronic and Communications Transactions Act No. 21 of 2009, which also came into force on 28th August 2009. The Act was the first of its kind dealing with electronic communications and transactions in Zambia (e-commerce), information security, cybercrimes and data protection. In term of its objectives, it therefore sought to develop a safe, secure and effective environment for the consumer, business sector and the Government to conduct and use electronic communications; promote legal reliability and guarantee, as well as boost investment and innovation, in the electronic communications industry; facilitate the creation of secure communication systems and networks; establish the Central Monitoring and Coordination Centre and define its functions. However, this particular piece of legislation fell short in quite a number of ways and was eventually repealed and replaced by the Electronic and Communications Transactions Act No. 4 of 2021.⁴

KEY POLICY AND LEGISLATIVE REFORMS AND MILESTONES IN ACHIEVING DIGITALIZATION OF ZAMBIA'S ECONOMY BETWEEN 2010 AND 2025.

Stemming from the weaknesses of the now repealed Electronic and Communications Transactions Act No. 21 of 2009, the Zambian government saw it fit to formulate the National Cyber Security Policy of 2021. The policy sets out the wide-ranging objective of addressing cyber security and elasticity. As a result of this, three key pieces of legislation were birthed by the policy. These are the Cyber Security and Cyber Crimes (CSCC) Act No. 2 of 2021, the Electronic Communications and Transactions Act No. 4 of 2021 and the Data Protection Act No.3 of 2021.⁵ These are discussed below:

1. The Electronic Communications and Transactions Act No. 4 of 2021

The Act in its objectives, sought to provide a safe and operative atmosphere for electronic transactions; promote secure electronic signatures; enable the electronic filing of documents by public authorities; provide for the use, security, enablement and regulation of electronic communications and transactions; promote legal certainty and confidence, and encourage investment and novelty in relation to electronic transactions.⁶

4 Electronic and Communications Transactions Act No. 21 of 2009.

* Information and Communications Technology Act No. 15 of 2009.

5 National Information and Communications Technology Policy 2023 *op. cit.* p.14.

6 Electronic Communications and Transactions Act No. 4 of 2021.

2. Electronic Government Act No. 41 of 2021

This Act aims to enhance the administration and advancement of electronic Government services and procedures; establish the Electronic Government Division and provide for its powers and functions; enable accessibility to electronic Government services in order to enhance service delivery.⁷

3. Cyber Security and Cyber Crimes Act No. 2 of 2021

The Act was a legislative response to the weaknesses of the Electronic and Communications Transactions Act No. 21 of 2009 and among other aims, it intended to enhance and widen the laws pertaining to cybersecurity in Zambia; provide for the protection of persons against cyber-crime; provide for child online protection; enable identification, assertion and fortification of critical information infrastructure; provide for the collection of and safeguarding of evidence of cyber related crime; and provide for the admission in criminal matters, of electronic evidence.⁸

4. Data Protection Act No.3 of 2021

In response to the lack of provision for data protection principles in the repealed Electronic and Communications Transactions Act No. 21 of 2009, this Act aims to provide an operative scheme for the usage and fortification of personal data; control the gathering, usage, dissemination, repository and refining of personal data; the certification of data controllers and licencing of data auditors; provide for the duties of data controllers and data processors and provide for the rights of data subjects.⁹

5. Cyber Crime Act No.4 of 2025

The Act was passed as a legislative response to the inadequacies of its predecessor, the Cyber Security and Cyber Crimes Act No. 2 of 2021 which had a limited scope of cyber-crimes. The objectives of the 2025 Act, are to make provision for offences relating to computers and computer systems; make provision for the protection of persons against cyber-crimes in a more heightened manner; and make provision for an enhanced and robust child online protection framework.

6. Cyber Security Act No.3 of 2025

Like the Cyber Crime Act discussed above, this Act, too was passed as a legislative response to the inadequacies of its predecessor, the Cyber Security and Cyber Crimes Act No. 2 of 2021 which had a limited scope of cyber security laws. The Act therefore aims to make provision for cyber security in the Republic; legally constitute and enhance the operations and functions of the Zambia Cyber Incident Response Team and the sectoral cyber incident response teams; and augment the description, fortification and registration of critical information and critical information infrastructure.

7. National Information and Communications Technology Policy 2023

In 2023, Zambia embarked on a robust campaign and venture of revising the 2006 ICT policy which has been viewed to be inadequate over the years, stemming from emerging

7 Electronic Government Act No. 41 of 2021.

8 Cyber Security and Cyber Crimes Act No. 2 of 2021

9 Data Protection Act No.3 of 2021

issues in the ICT sector in the wake of various technological advancements such as artificial intelligence, big data, machine learning and robotics, and nanotechnology. The 2023 policy augments the strides made by the 2006 policy, by focusing on the robust digitalization of the Zambian economy riding on the vision; “An integrated ICT ecosystem for Zambia’s digital economy”.¹⁰

ACCELERATED GROWTH OF ZAMBIA’S DIGITAL ECONOMY

Zambia like many countries around the world, was hard hit by the Covid-19 pandemic between the period 2019 and 2021. It was during this particular period, that the country experienced an exponential growth and adoption of information communication technology tools by citizens to conduct business and ease other activities in their daily endeavours. In fact, (Amankwah- Amoah, Khan et al 2021) argue that the Covid-19 pandemic significantly transformed the global *modus operandi* of human way of life and business models in particular, through the implementation of state measures of national lockdowns, social distancing and restricted social human interactions, thus accelerating the expansion of digital economies around the world.¹¹

In view of the foregoing, one of the major objectives of the National Information and Communications Technology Policy 2023 is “to promote the development and utilisation of electronic-services in both public and private sectors”. A discussion of how this objective has been achieved, is highlighted below:

THE DIGITAL ECONOMY ACCESSIBLE THROUGH THE ELECTRONIC GOVERNMENT PLATFORM

Through the enactment of the Electronic Government Act No. 41 of 2021 which came into effect on 7th January 2022, the dedicated electronic government division (Smart Zambia Institute), derives its legal mandate to smoothen the access to electronic government services in order to enhance service delivery in relation to transactions and processes between government institutions, departments and agencies; transactions between governments and businesses; as well as transactions between citizens and the government.¹² In that vein, the following e-government services in Zambia’s digital economy, can conveniently be accessed via the e-service bus called ZamPortal:

Individuals and business entities alike, can easily access and obtain a number of online services via the ZamPortal, ranging from driver license acquisition and renewal services; motor vehicle clearance; road tax motor vehicle licensing; road safety fitness inspection application; e-visas; immigration employment, investor and study permits; electronic tax payment services; the introduction of various e-health programmes such as SmartCare for the management of patient records in public hospitals; company and business registration services and more recently, the online registration of trademarks. Other accessible services include agricultural permits; mining licensing; land and survey

10 National Information and Communications Technology Policy 2023 *op. cit.* p.15

11 Amankwah-Amoah, J., et al (2020). COVID-19 and Business Failures: The Paradoxes of Experience, Scale and Scope for Theory and Practice. *European Management Journal*. DOI: 10.1016/j.emj.2020.09.002., p.1

12 Our Mandate (Retrieved on 1st July 2025) from: https://www.szi.gov.zm/?page_id=169.

services; competition and consumer protection services; national parks and wildlife services; firearm certificates; groundwater drilling licenses; guest accommodation and other tourism services; environmental management services; and the registration of clubs, societies and associations among numerous other services.¹³

THE DIGITAL ECONOMY ACCESSIBLE THROUGH PRIVATE ELECTRONIC PLATFORMS

Zambian citizens, visitors and residents, have hoped onto the bandwagon of utilising various mediums of information communication technology tools and applications, in order to flawlessly and conveniently ease many aspects of their daily lives, ranging from education, work, agriculture, electronic commerce, social media, electronic hailing taxi services; courier delivery services; the use of digital financial services provided on banking platforms; mobile money payment channels provided by mobile service providers among others. In the education sector, the advent of the covid-19 pandemic obligated both private and public schools and learning institutions to employ digital platforms and applications to ensure the continuous and seamless remote learning environment in the wake of lockdown measures instituted by government.

Due to the heightened measures on the restriction of movements and public gatherings, the use of digital platforms such as Yango, were exponentially utilised by citizens and businesses alike for courier delivery and e-hailing taxi services. A trend which has been normalised as a *modus operandum* post the covid-19 pandemic era.

Social media, has rapidly transformed into an electronic commerce marketplace for both formal and informal entrepreneurs with both groups jostling for clients and customers to patronize their businesses. This trend too, was heightened during the covid-19 pandemic and has largely become the usual way of conducting e-commerce in Zambia.

Like traditional banks and other financial institutions which have evolved in the digital financial space, mobile service providers have also over the last five years, diversified their business portfolio to include the provision of digital financial services through mobile money applications for the large unbanked population.¹⁴ Clients and businesses are now able to invoke real time digital financial transactions in the form of either money transfers or payment for goods and services at the click of a button or swipe of a phone screen.

BENEFITS OF ZAMBIA'S DIGITALIZED ECONOMY

Overall, the benefits of Zambia's digital economy through the medium of mobile phones and digital applications in the private sector, are numerous to tabulate. Efficiency in service delivery, job creation, a reduction in the cost of services, enhanced and increased use of electronic commerce platforms such as online stores for the purchase goods and services are some of the notable benefits worth highlighting.

13 ZamServices <https://eservices.gov.zm/#/service-directory> (Retrieved on Accessed 1st July 2025) from 9th July 2025.

14 Iluba, E., & Phiri, J. (2021). The FinTech evolution and its effect on traditional banking in Africa—a case of Zambia. *Open Journal of Business and Management*, 9(02), p.838.

As for services delivered through the electronic government (ZamPortal), this has resulted in an efficient, virtual, paperless and seamless mode of service delivery. Ultimately resulting in an increased revenue base for government and culminating into economic development in a broader perspective.¹⁵

Notably, the Zambian government in underscoring and appreciating the contribution (albeit meagre), that the digital economy makes towards the country's gross domestic product. It recently announced plans to amend and update the Independent Broadcasting Act 2002, which partially regulates social media activities, in order to introduce the monetizing of social media for content creators and influencers. This plan, if implemented successfully, will enable social media content creators and influencers earn a decent living from their work and also enable the country to earn much needed revenue through taxes collected from the monetization of social media.¹⁶

DETRIMENTS OF ZAMBIA'S DIGITALIZED ECONOMY

Notwithstanding the benefits underscored above, Zambia's digital economy has faced several challenges and hurdles even in its infancy.

Firstly, in spite of the advancements made thus far, the current infrastructure has remained unsatisfactorily dispersed, derelict and of inferior grade which is insufficient to support the application of new technologies such as Block Chain, Internet of Things (IOT), Machine Learning (ML), Big Data, and Artificial Intelligence (AI).

Secondly, Internet connectivity is a persistent challenge as it has remained elementary for cutting-edge technology applications such as WhatsApp, X, Youtube, Tik-Tok, e-learning platforms and other advanced applications.¹⁷

Thirdly, according to the 2022 national survey on access and usage of information and communications technology in Zambia, the statistics collected show a very worrying low uptake of ICT which has an overall negative impact on the digital economy. For instance, according to the survey, household access to basic commodities like electricity stand at a meagre 34.1%. While household computer and other ICT device ownership stands at 9.5%. Internet access stands at 33.4% as subscribers continuously face challenges with accessing data and internet services in both urban and rural areas, with outages being the norm. Furthermore, not all Zambians can afford a smart phone and other similar smart ICT gadgets, being the most suitable tools to seamlessly and conveniently access the digital economy.¹⁸

Fourthly, the gradual but steady uptake and usage of technology by subscribers to access the digital economy has inevitably stimulated cyber criminals to innovative

15 The 2021 E-Government Division Annual Report highlighted that the Government, through the Government Service Bus, collected a total amount of ZMW632.15m as non-tax revenue from payments for various public e- government services.

16 A glimpse into Social Media Monetization in Zambia [Opinion] (Retrieved 1st July, 2025) from: <https://jpalegal.com/en/a-glimpse-into-social-media-monetization-in-zambia/#::~:~:text=On%20the%2022nd%2>.

17 National ICT Policy 2023 *op. cit.* p.20.

18 The 2022 National survey on access and usage of ICT in Zambia (Retrieved on 9th July, 2025) from: zamstats.gov.zm/wp-content/uploads/2025/02/National-ICT-Survey-2022.pdf.

sophisticated cyber related crimes, scams and incidents, thus exposing the general citizenry to cyber related risks and ultimately posing a potential threat to the economic and financial sustainability of the entire economy. Between January and December, 2021, alone, the Zambia Computer Incident Response Team (ZM-CIRT) recorded a snowballing number of financial cyber-attacks, ranging from mobile money reversal scams, social media account hijacking and fake online product promotions and investment schemes. This therefore resulted in an estimated financial loss of over K200 million (approximately \$8 million).¹⁹

Fifthly, in relation to the Zambian government's announcements to review the law and introduce the monetization of social media activities by content creators and influencers, such plans and political will, appear to have abruptly stalled. This then translates into the continued meagre contribution of the digital economy towards the country's gross domestic product.

In conclusion, Zambia has made strides at modernising the country's ICT infrastructure and technology, in order to exponentially leverage the country's digital economy. That notwithstanding, more remains to be done and achieved in the wake of the numerous challenges countering the full exploitation of particularly emerging technologies in order to increase the digital economy's contribution towards the country's gross domestic product. It is thus recommended that both the legal and regulatory frameworks be extensively reviewed and strengthened in order for the now seemingly lean benefits to eventually outweigh the afore-mentioned detriments. It is also recommended that the Zambian government resumes its initial plans to review the relevant law aimed at introducing the monetization of social media activities.



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PRAVO, EKONOMIJA I DIGITALIZACIJA: PREDNOSTI I NEDOSTACI UPOTREBE TEHNOLOGIJE U ZAMBIJI

Apstrakt:

Rad razmatra koristi i štete digitalne ekonomije Zambije putem tehnologije u vezi sa postignutim napretkom prava u procesu digitalizacije ekonomije. Zambija, poput regionalne i globalne zajednice u celini, prihvatila je različite oblike informacionih i komunikacionih tehnologija u mnogim aspektima svakodnevnog života ljudi, počev od obrazovanja, rada, poljoprivrede, elektronske trgovine, društvenih mreža i korišćenja elektronskih usluga javne uprave kao što su plaćanje poreza, registracija firmi, pristup

19 Information Brief On Cyber Security And Cybercrime Trends In Zambia: Constructed from Statistical Trends on Cyber Cases of Concern by Zambia Information and Communications Technology Authority (ZICTA) (Retrieved on 9th July, 2025) from: https://www.parliament.gov.zm/sites/default/files/images/publication_docs/Info%20Brief_Brochure_Cyber%20Trends%20in%20Zambia.pdf.

pravima iz socijalnog osiguranja, pribavljanje dokumenata o vlasništvu nad zemljištem, izdavanje dozvola i licenci za motorna vozila i vozače, pribavljanje ličnih dokumenata o državljanstvu, dozvola za imigraciju i viza, investicionih dozvola i licenci, kao i drugih usluga. Digitalizacija zambijske ekonomije predstavlja pokretač kako ekonomskog tako i socioekonomskog rasta, koji se može postići kroz nepokolebljivu dugoročnu posvećenost vlade korišćenju tehnologija za ukupan uzlazni razvoj privrede zemlje. Shodno tome, upravo na toj osnovi nadležni državni akteri uspostavili su odgovarajuće politike i zakone usmerene na regulisanje i unapređenje korišćenja digitalne ekonomije putem tehnologije. Međutim, negativne strane tehnologije ne mogu se u potpunosti zanemariti. Iako digitalna ekonomija predstavlja korist za zemlju trećeg sveta poput Zambije, ovaj rad otkriva zabrinjavajući trend trajnih i ozbiljnih problema ili šteta kao što su sajberkriminal, nepouzdana internet infrastruktura i povezanost, visoki troškovi podataka, veliki digitalni jaz i propadanje omladine, koji ugrožavaju ostvarivanje šireg društvenog dobra kroz razvoj značajne digitalne ekonomije.

Ključne reči: *Zambija, razvoj, privreda, zakon, tehnologije.*

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THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

Abstract:

The Committee of Ministers of the Council of Europe endorsed the establishment of a Special Tribunal for the crime of aggression against Ukraine at a meeting held in Luxembourg on May 14, 2025. In accordance with the decision of Committee of Ministers the Special Tribunal is to be established within the framework of the Council of Europe, in accordance with an international agreement between the Council of Europe and Ukraine, the Statute of the Tribunal, and an Extended Partial Agreement governing the modalities of support models to such a Tribunal, its financing, and other administrative aspects. The Special Tribunal will have the mandate to prosecute high military and political leaders for the crime of aggression against Ukraine. The international crime of aggression refers to the decision to use armed forces against another state, in violation of the UN Charter. The need to establish a Special Tribunal for the crime of aggression is justified by the fact that the International Criminal Court does not have jurisdiction to prosecute such an international crime. The Special Tribunal was formally established on June 25, 2025, by an international agreement between Ukraine and the Council of Europe. An integral part of this agreement is the Statute of the Special Tribunal, which is contained in a separate annex. Considering that the Special Tribunal is being established within the Council of Europe, the question arises regarding the relationship of that tribunal with International Criminal Court and the member states of the Council of Europe. Will the member states of the Council of Europe, including Serbia, participate in the work of the Special Tribunal and will they have obligations to cooperate with that tribunal, and what will those obligations pertain to? These are just some of the questions that the author will address in this paper in an attempt to determine the international legal implications of the establishment of the Special Tribunal for the crime of aggression within the framework Council of Europe.

Key words: *The Special Tribunal for Crime of Aggression, Ukraine, Council of Europe, Committee of Ministers.*

1. INTRODUCTION

On June 25, 2025 Ukraine and the Council of Europe signed the Agreement on the establishment of a Special Tribunal for the Crime of Aggression against Ukraine. Agreement between Ukraine and Council of Europe was signed in accordance with the

decision of Committee of Ministers of Council of Europe adopted on May 14, 2025 at the meeting held in Luxembourg. The Special tribunal will operate within the framework of the Council of Europe with the mandate to prosecute senior political and military officials for the crime of aggression against Ukraine. This crime refers to the decision to use armed force against other state, in violation of the UN Charter. The need to establish a Special Tribunal for the crime of aggression is justified by the fact that the International Criminal Court (ICC) does not have jurisdiction to prosecute such an international crime. Ukraine ratified the Rome Statute with 2010 ICC Kampala Amendments that added the crime of aggression to jurisdiction of ICC in 2024. It became a full member of the ICC on January 1 2025. However Russia is not member of the ICC and ICC cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court's jurisdiction over that crime.¹

The fact that the tribunal was established within the framework of a regional organization, the Council of Europe, raises many significant questions regarding its jurisdiction and functioning. First and foremost, considering that Russia and Belarus, from whose territories aggression against Ukraine was carried out, are not members of the Council of Europe, and that Russia was expelled from this organization on March 16, 2022, following the aggression against Ukraine. The next important question is whether the establishment of the Special Tribunal entails international cooperation obligations with this tribunal for all member states of the Council of Europe. This question is particularly significant for Serbia, which has not joined the European Union sanctions against Russia and continues to maintain political and economic ties with that country. Furthermore, given that the institutions of the European Union (the European Commission and the European Parliament) are among the main initiators of the establishment of the Special Tribunal, the question arises whether cooperation with this tribunal will represent one of the obligations on Serbia's path to EU membership. Namely, international agreements to which all or most member states are parties represent a part of the EU *acquis*. This especially applies to agreements adopted within the Council of Europe or agreements concluded by this organization. Candidate countries are expected to accede to such agreements before the moment of joining the European Union. These are just some of the questions that the author will attempt to answer in this paper.

2. ESTABLISHMENT OF THE SPECIAL TRIBUNAL FOR CRIME OF AGGRESSION AGAINST UKRAINE

The idea of establishing a Special Tribunal arose shortly after the Russian aggression against Ukraine on February 24, 2022. At the proposal of the European Commission, the Council of the EU and the European Parliament on May 30, 2022 adopted the Regulation 2022/838 reinforcing the mandate of European Union Agency for Criminal Justice Cooperation (Eurojust) mandate to collect and preserve the evidence of war crimes including the crime of aggression.² With support of the European Commission, in June 2023, the International Centre for the Prosecution of the Crime of Aggression against Ukraine

1 Butchard P. (2024) *Conflict in Ukraine: A Special Tribunal on the Crime of Aggression*, House of Commons Library, p. 10.

2 Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022, amending Regulation (EU) 2018/1727 as regards preservation, analysis and storage at Eurojust of evidence relating to the genocide, crimes against humanity, war crimes and related criminal offences, Official Journal of the EU, L148/1, 31.5.2022.

(ICPA) started its operations in the Hague. Embedded in Eurojust the ICPA provides a coordination structure to support and enhance ongoing and future investigations into the crime of aggression and contribute to the exchange and analysis of evidence gathered since the start of the Russian aggression. In November 2023, the European Commission presented different options to the Member States of the EU to ensure accountability for the crime aggression against Ukraine. In January 2023, the first meeting of the Core Group consisting of around 40 states on the establishment of a Special Tribunal took place, with the objective of determining the the most appropriate model of Tribunal for the prosecution of Russian leaders for the crime of aggression. On February 4, 2025, senior legal experts of the European Commission, the European External Action Service, the Council of Europe, Ukraine and 37 States laid down the legal foundations for the establishment of a Special Tribunal for the Crime of Aggression against Ukraine. The participants also set out the key elements of the draft Statute³, the core legal text that will govern the functioning of the Special Tribunal. At the meeting in Lvov on May 9, 2025 ministers of foreign affairs and representatives of the Core Group issued the joint statement welcoming the completion of technical work on the draft legal instruments necessary to establish within the Council of Europe a Special tribunal for the Crime of Aggression against Ukraine. On May 13, 2025 Ukraine formally submitted an official request to the Council of Europe to establish the Special Tribunal. Following day the Committee of Ministers of the Council of Europe at session in Luxembourg endorsed the request of Ukraine and adopted the decision acknowledging that the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the framework of the Council of Europe was a priority issue for the Committee of Ministers and the whole Council of Europe. In this context, Committee of Ministers invited the Secretary General of the Council of Europe to steer the process for the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the Council of Europe. Finally, on June 25, 2025 the President of Ukraine and the Secretary General of the Council of Europe signed the Agreement on the establishment of a Special Tribunal for the Crime of Aggression against Ukraine (Agreement), including the Statute of the Special Tribunal for the Crime of Aggression against Ukraine (Statute).³ The day before, the Council of Europe's Committee of Ministers, composed of representatives of its 46 member states authorised Secretary General to sign the agreement.

3. ORGANISATION AND JURISDICTION OF THE SPECIAL TRIBUNAL

The Special tribunal is established by the international agreement between the Council of Europe and Ukraine. According to the preamble of the agreement creation of the Special Tribunal, “as a collaborative effort, is the most suitable solution to determine criminal accountability in the case of those individuals who bear the greatest responsibility for the crime of aggression against Ukraine and to avoid duplication of prosecutions at national level against the same individuals”. The parties of the Agreement recalls several international legal acts as a legal foundation for the establishment of the Special tribunal. The resolutions of the UN General Assembly. Notably its Resolution A/RES/ES-11/6 of February 23, 2023, emphasising the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine through appropriate, fair and independent investigations and prosecutions at the national or international level, and ensure justice for all victims and the prevention of future crimes and Resolution A/RES/79/284 of 16 April 2025, acknowledging the contribution of the Council of Europe to

3 Committee of Ministers of the Council of Europe, 1532nd meeting, June 18 and 24 2025, Consequences of the aggression of the Russian Federation against Ukraine.

the work of the Core Group towards the establishment of a special tribunal for the crime of aggression against Ukraine, and its willingness to examine possible options to provide expert and technical support for the establishment and, as appropriate, operation of such a special tribunal. Agreement also recalls the Charter of the International Military Tribunal of 8 August 1945, whose Article 6.a established individual criminal responsibility for crimes against peace. It also emphasizes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

In accordance with Article 1 of the Agreement the Special tribunal is established to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine. It shall have its seat in one of the States that has joined the Enlarged Partial Agreement, subject to the conclusion of a host State agreement. However, the Special Tribunal may sit away from its seat when it considers it necessary for the efficient exercise of its functions or otherwise desirable.⁴

The Special Tribunal will be financed and managed by the Members and Associate Members of the Enlarged Partial Agreement set up for that purpose. The Management Committee of the Special Tribunal will be established within the institutional framework of the Council of Europe through an Enlarged Partial Agreement to finance the Special Tribunal and to carry out the administrative and managerial functions. The modalities and criteria for membership of the Management Committee will be determined by the Enlarged Partial Agreement.⁵ The tribunal will be financed by a group of supportive states, going beyond the membership of the Council of Europe, through the Enlarged Partial Agreement.⁶

It is expected that the Enlarged Partial Agreement will be modeled upon the existing Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine adopted by the Committee of Ministers of the Council of Europe on May 12 2023. and amended on September 27 2023. That agreement recognizes two categories of participants. According to Article 4 of the Enlarged Partial Agreement on the Register of Damage, any member or observer State of the Council of Europe and the European Union, as well as any other State that has voted in favour of the United Nations General Assembly Resolution A/RES/ES-11/5 of 14 November 2022 “Furtherance of remedy and reparation for aggression against Ukraine”, may join the Register as a Participant by notification addressed to the Secretary General of the Council of Europe. In addition, any member or observer State of the Council of Europe and the European Union, as well as any other State that has voted in favour of the abovementioned United Nations General Assembly Resolution may join the Register as an Associate Member by notification addressed to the Secretary General of the Council of Europe. Associate Members are encouraged to provide voluntary contributions to the Register in accordance with Article 10. Associate Members may, at any time, become Participants by notification addressed to the Secretary General of the Council of Europe.

Each member and associate member of the Management Committee of the Special tribunal will co-operate, within the framework of co-operation agreements or other arrangements and within the limits of their national legislation and their international obligations, with the Special Tribunal for the purpose of enabling it to fulfill its mandate.⁷

4 Article 2 of the Agreement.

5 Article 5 of the Agreement.

6 Article 6 of the Agreement.

7 Article 7 of the Agreement.

In accordance with the Article 48(3) of the Statute, the Special Tribunal may request the assistance and co-operation from members and associate members of the Management Committee as is necessary for the investigation and prosecution of persons for the crime of aggression against Ukraine. In addition, the Special Tribunal may enter into co-operation agreements or arrangements with members and associate members of the Management Committee for the crime of aggression against Ukraine. Such co-operation agreements or arrangements may, as necessary and appropriate, cover matters such as arrest, surrender, transfer or detention of persons; the questioning of suspected or accused persons; the service of documents, including judicial documents; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the provision of records and documents, including official records and documents; the protection of witnesses and the preservation of evidence; or any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Special Tribunal. The Special Tribunal may also invite any third State to provide assistance on the basis of an agreement or arrangement with such State, an *ad hoc* arrangement, or any other appropriate basis.⁸

The Special Tribunal shall consist of the Chambers, the Office of the Prosecutor and the Registry. The Chambers shall be composed of different formations:

- one judge as a Pre-Trial Judge;
- three judges in the Trial Chamber; and
- five judges in the Appeals Chamber.⁹

The judges of the Special Tribunal shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions and shall not seek or act on instructions from any government or any other source. No two judges may be nationals of the same State.

Upon the recommendation of an independent advisory panel, the Management Committee will elect the judges by secret ballot by an absolute majority for a nine-year period. This advisory panel, whose members shall be appointed by the Management Committee, shall consist of seven eminent members of the highest national courts, former judges of international criminal courts and tribunals and other lawyers of high moral character with substantial experience in international law, including international criminal law. In its composition, the advisory panel shall strive to achieve a geographical and gender balance.¹⁰ The same procedure applies to the appointment of the Prosecutor.¹¹

The Special Tribunal shall have the mandate to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine. Such jurisdiction is based on the territorial jurisdiction of Ukraine.¹² That means Ukraine has delegated its own jurisdiction to an international tribunal established by the Council of

8 Article 48(5) of the Statute.

9 Article 7 of the Statute.

10 Article 8 of the Statute.

11 Article 9 of the Statute.

12 Article 1 of the Statute.

Europe to prosecute crime of aggression. According to the Article 2 of the Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. An “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. For the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall take into account United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974 and all relevant United Nations General Assembly resolutions with respect to Ukraine. For those reason the crime of aggression is considered a “leadership crime,” meaning it concerns those in positions of power who made or facilitated the decision to go to war.

The Special tribunal will be the first international criminal court that will prosecute political and military leaders individuals for the crime of aggression since the Nuremberg trials.¹³ The crime of aggression is considered a “leadership crime,” meaning it concerns those in positions of power who made or facilitated the decision to go to war. Therefore Special tribunal will focus on senior Russian political and military leaders who are responsible for planning, preparing, initiating, or executing the crime of aggression against Ukraine. However, Belarusian or North Korean individuals could also potentially be prosecuted if evidence shows they played a significant role in the crime of aggression against Ukraine.¹⁴ Given that proceedings before the tribunal will be conducted against the highest political and military leaders, the question arises of the immunity that those individuals may enjoy under international law. With that regard the Statute of the Special tribunal is clear on this matter: “the official position of any accused person at the time of the alleged commission of a crime, whether as head of State or government, a member of a government or parliament, an elected representative or a government official, shall not relieve such person of criminal responsibility nor mitigate punishment”.¹⁵

4. SERBIA AND THE SPECIAL TRIBUNAL

At the meeting of the Committee of Ministers of the Council of Europe on May 14 in Luxembourg, Serbia distanced itself from the decision to establish a special tribunal. Serbian Minister of foreign affairs Đurć said He added that Serbia supported the principle of territorial integrity and sovereignty of Ukraine and emphasized that at the same time it distanced itself from some other decisions, in accordance with its interests.

Considering this, it is unlikely that Serbia will accede to the agreement and participate in the work of the Special Tribunal in any capacity. This means that Serbia will not has legal obligation to cooperate with this tribunal, since such an obligation exists only for members and associate members of the Management Committee. On the other hand,

13 O zločinu protiv mira (zločin protiv agresije) videti više kod Ignjatović A, Kokolj M. i Đurić A, (2009), *Međunarodno krivično pravo*, Novi Sad: Univerzitet Privredna akademija u Novom Sadu, p. 156.

14 Council of Europe, *Frequently asked questions – Special Tribunal for the Crime of Aggression against Ukraine*, (Retrieved on July 7 2025) from: Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine - Portal.

15 Article 4 of the Statute.

Serbia is a member of the Council of Europe, so it will be expected not to undermine the work of the Special Tribunal and to refrain from assisting accused political and military officials in evading justice.

However, Serbia is a candidate for membership in the European Union, and the European Union initiated the establishment of the Special Tribunal. The EU Member states will be members of the Management Committee. Serbia, as a candidate for EU membership, is expected to progressively align its foreign policy with the Union's foreign and security policy. It is also expected that by the time it joins the Union, it will harmonize its legislation with the EU *acquis*. International agreements concluded by European Union or by its Member states are part of the EU *acquis*.¹⁶ Especially when it comes to international agreements concluded by or within the Council of Europe with which the European Union has special relations and shares the same membership. Therefore, there is no doubt that the Enlarged partial agreement will constitute part of the EU *acquis*. Serbia will be expected to accede to this agreement and cooperate with the Special Tribunal. It should be noted that the European Union considers Russia's aggression against Ukraine the greatest threat to peace and security in Europe.

Therefore, it is unlikely that the European Union will admit a state that has a neutral stance towards Russian aggression in Ukraine. One possible solution to this problem is for Serbia to conclude a special agreement with the Special Tribunal in accordance with Article 48(5) of the Statute, which would regulate the modalities of cooperation with the Special tribunal. In this way, Serbia would avoid membership in the committee and establish limited cooperation with the tribunal that would allow it to continue on the path to EU membership.

5. CONCLUSION

The establishment of a Special Tribunal for the crime of aggression against Ukraine represents a new step in the development of international criminal law. For the first time, after World War II and the Nuremberg trial, the Special Court will prosecute the highest political and military officials for the crime of aggression. However, the establishment of the Special Tribunal is not without controversy. Considering that the International Criminal Court does not have jurisdiction to try Russian officials for the crime of aggression, it has been decided that the Special Court will be established within the Council of Europe in accordance with a special international agreement concluded between the Council of Europe and Ukraine. The jurisdiction of the Special Tribunal is based on the territorial jurisdiction of Ukraine. In fact, by international agreement Ukraine delegated its jurisdiction to the Special tribunal by the international agreement concluded with the Council of Europe.

The Special tribunal will be managed and financed by the Management Committee in accordance with the Enlarged Partial Agreement. Only the members and associate members of the Management Committee will be legally obliged to provide assistance and to cooperate with the Special Tribunal. Serbia distanced itself from the establishment of the Special Tribunal. At this moment, the chances that Serbia will become a member of the Management Committee are slim. This means that Serbia will not be obligated to cooperate with this tribunal. However, Serbia is a candidate for membership

16 Medović V. (2018), *Evropska unija – pravo i institucije*, Novi Sad: Univerzitet Privredna akademija u Novom Sadu, pp. 160-162.

in the European Union. Therefore the issue of cooperation with the Special Tribunal will inevitably arise at some point. It should not be forgotten that the tribunal was established at the initiative of the European Union and the majority of its member states. Consequently, in near future Serbia will have to find an appropriate modality of cooperation with the Special Tribunal in order to continue the process of European integration.



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SPECIJALNI TRIBUNAL ZA ZLOČIN AGRESIJE PROTIV UKRAJINE

Apstrakt:

Komitet ministara Saveta Evrope je na sednici održanoj 14. maja 2025. godine podržao osnivanje Specijalnog tribunala za zločin agresije protiv Ukrajine. U skladu sa odlukom Komiteta ministara Specijalni tribunal bi trebalo da bude osnovan u okviru Saveta Evrope, u skladu sa međunarodnim ugovorom između Saveta Evrope i Ukrajine, Statutom Tribunala i Proširenim delimičnim sporazumom koji bi regulisali modele podrške ovom tribunalu, njegovo finansiranje i drugih administrativnih pitanja u vezi sa njegovim radom. Specijalni tribunal bi bio nadležan za suđenje visokim vojnim i političkim liderima za zločin agresije protiv Ukrajine. Međunarodni zločin protiv agresije se odnosi na donošenje odluke o upotrebi oružanih snaga protiv druge države, u suprotnosti sa Poveljom UN. Potreba za osnivanjem Specijalnog tribunala za zločin agresije je obrazložena činjenicom da Međunarodni krivični sud nije nadležan za suđenje za takvo međunarodno krivično delo. Specijalni tribunal je formalno osnovan 25. juna 2025. godine međunarodnim sporazumom između Ukrajine i Saveta Evrope. Sastavni deo tog sporazuma je Statut Specijalnog tribunala koji je sadržan u posebnoj aneksu. Imajući u vidu da se Specijalni tribunal osniva u okviru Saveta Evrope postavlja se pitanje odnosa tog tribunala sa članicama Saveta Evrope. Da li će članice Saveta Evrope, uključujući i Srbiju, učestvovati u radu Specijalnog tribunala i da li će imati obaveze da sarađuju sa tim tribunalom i na šta će se te obaveze odnositi. Ovo su samo neka pitanja kojima će se baviti autor u ovom radu u pokušaju da utvrdi međunarodne pravne posledice osnivanja Specijalnog tribunala za zločin agresije u okviru Saveta Evrope.

Ključne reči: *Specijalni tribunal za zločin agresije, Ukrajina, Savet Evrope, Komitet ministara.*

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MINORITY RIGHTS IN ALBANIA: A COMPARATIVE STUDY OF UN AND EU LEGAL FRAMEWORKS

Summary:

Protection of minority rights is essential for promoting equality, social integration, and peace within diverse societies. Albania, characterized by its ethnic and cultural diversity, has established a specific legal framework aimed at safeguarding minority rights. However, despite these legal provisions, significant challenges remain in their effective implementation. This paper addresses the research question to what extent does Albania's legal framework for minority rights protection align with international standards, particularly those of the United Nations (UN) and European Union (EU), and what gaps exist between legislation and practice. The research employs a mixed methodological approach, combining doctrinal legal analysis, comparative study, and case study examination. It focuses on two main objectives: first, to identify discrepancies between Albania's minority rights laws and their actual enforcement; second, to assess Albania's legal protections in comparison with international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, UN declarations, and the EU Charter of Fundamental Rights. Through comparative analysis, the paper evaluates the coherence between national laws and international norms, highlighting practical challenges as well as relevant rulings from the European Court of Human Rights. Ultimately, the research seeks to provide actionable recommendations aimed at bridging the gap between legal frameworks and practice, thereby improving the protection of minority rights in Albania through better alignment with international standards and more effective policy implementation.

Keywords: *Minority Rights; Albania; United Nations; Legal Framework; European Union*

1. INTRODUCTION

Minority groups are essential to fostering cultural diversity, social inclusion, and democratic equality. The Office of the High Commissioner for Human Rights (OHCHR) defines a minority as “any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language” (OHCHR, n.d.). Minority rights are generally categorized into four key areas: the right to exist, the right to identity, protection from discrimination, and the right to participation. These rights are fundamental to preserving equality, freedom, and democratic governance. Ensuring the protection of minority communities contributes significantly to a country’s political stability, social peace, and respect for human dignity¹. In Albania, a country marked by ethnic and cultural diversity, the protection of minority rights is a national priority—particularly in the context of EU integration. The Albanian legal framework, including the Constitution and supporting legislation, recognizes nine official minority groups: Greek, Macedonian, Aromanian (Vlach), Montenegrin, Roma, Egyptian, Bosnian, Serbian, and Bulgarian. These rights are further reinforced through Albania’s commitment to international frameworks such as the Universal Declaration of Human Rights and International Convention on the Elimination of All Forms of Racial Discrimination². As an EU candidate, Albania is actively aligning its laws with Chapter 23 of the EU acquis, which addresses fundamental rights and minority protections³. To align with European Union (EU) standards on minority protection, Albania continues to amend its legal framework to ensure equal access to rights and opportunities for all citizens, regardless of ethnicity or religion. However, despite notable legal reforms, Albania still faces challenges in the implementation of cultural, linguistic, economic, social, and political rights for minority groups. These communities, including Roma, Egyptian, and others, often experience systemic discrimination and marginalization. The gap between legal norms and practice results in inconsistencies that hinder the full integration of minorities into the country’s social, political, and economic life⁴.

This paper explores the extent to which Albania’s legal framework aligns with international standards, particularly those established by the United Nations (UN) and the EU. It examines key instruments such as the Universal Declaration of Human Rights⁵, the Charter of Fundamental Rights of the European Union⁶ and the International Covenant on Civil and Political Rights⁷. A comparative analysis is conducted to evaluate Albanian legislation—especially Law No. 96/2017—against these international standards. The objective is to identify gaps between legal provisions and their implementation and to offer policy recommendations that harmonize national legislation with global human rights obligations. From the methodological point of view this paper adopts a multi-method legal research framework, primarily using doctrinal (black-letter) analysis to examine Albanian and international legal instruments governing minority rights. It further incorporates comparative legal analysis to evaluate the alignment between Albania’s domestic laws and key international standards set by the United Nations and the European Union, such as the *International Covenant on Civil and Political Rights* and the *Charter of Fundamental*

1 Council of Europe, 1995.

2 United Nations, 1948; 1965.

3 European Commission, 2022.

4 Council of Europe, 2023; OSCE/ODIHR, 2020.

5 United Nations, 1948.

6 European Union, 2012.

7 United Nations, 1966.

*Rights of the European Union*⁸. To bridge the gap between legal theory and practice, the research also applies case study analysis, drawing on rulings from both Albanian courts and the European Court of Human Rights (ECtHR). Although this research does not employ empirical methods such as interviews or surveys—an acknowledged limitation—it offers critical insight into how legal protections for minorities are implemented in judicial decisions, providing a comprehensive assessment of Albania's conformity with international obligations.

2. LEGAL ANALYSIS

2.1. United Nations International Standards and Legal Instruments regarding Minority

After World War II (1939–1945), the international community prioritized peace, security, and cooperation. To achieve these goals, the United Nations (UN) was established in October 1945, replacing the League of Nations, which had failed to prevent global conflict. The UN Charter, signed by 50 nations at the San Francisco Conference, laid the foundation for what is now the world's largest international organization, with 193 member states⁹. The UN has developed a comprehensive framework of legal standards to promote human rights, including the protection of minorities. These standards emphasize non-discrimination, cultural preservation, participation, equality, good governance, and peaceful coexistence¹⁰. The UN Charter requires states to resolve disputes peacefully, refrain from the use of force, and cooperate in maintaining international peace—conditions essential for safeguarding minority rights. Furthermore, the Sustainable Development Goals (SDGs), adopted in 2015, reinforce global commitments to equality and inclusive development by 2030¹¹. Key UN instruments include the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966), and the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992). These legal instruments establish the foundation for member states to respect, protect, and fulfill minority rights across political, social, and cultural domains¹².

2.1.1. UN Monitoring Mechanisms

The UN's legal framework for minority rights is reinforced by monitoring mechanisms and specialized agencies. The UNDP and the Office of the High Commissioner for Human Rights (OHCHR) play key roles in supporting minority protection¹³. The Human Rights Committee oversees implementation of the *International Covenant on Civil and Political Rights* (ICCPR), ensuring states respect civil and political rights, including non-discrimination, freedom of expression, and political participation¹⁴. Similarly, the Committee on the Elimination of Racial Discrimination (CERD) monitors compliance

8 United Nations, 1966; European Union, 2012.

9 United Nations, n.d.-a.

10 United Nations, n.d.-b.

11 United Nations, n.d.-c.

12 United Nations, n.d.-b.

13 UNDP, n.d.; OHCHR, n.d.-a.

14 OHCHR, n.d.-b.

with the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), reviews state reports, and addresses complaints related to racial discrimination¹⁵. In addition, the UN Special Rapporteur on Minority Issues monitors global minority rights, raises awareness of challenges, and provides recommendations to governments and international organizations¹⁶. Collectively, these mechanisms aim to uphold human rights and strengthen minority protections worldwide.

2.2. Minority Rights Protection in the European Union

Following the devastation of World War II, six European states—Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands—founded the European Economic Community (EEC) to foster peace through economic integration. Over time, this evolved into the European Union (EU), with human rights, democracy, and minority protection becoming central values¹⁷. Foundational treaties, including the Treaty of Rome (1957), Treaty of Maastricht (1992), Treaty of Amsterdam (1997), and Treaty of Lisbon (2007), progressively integrated human rights standards into the EU's legal framework. The Charter of Fundamental Rights of the European Union (2000), now legally binding, explicitly prohibits discrimination and affirms cultural and linguistic diversity¹⁸.

The EU's primary legislation, or treaties, provides the constitutional basis for minority rights protection. Notably, Article 2 of the Treaty on European Union establishes respect for human dignity, equality, democracy, and minority rights as Union values, while Article 49 requires candidate states to comply with these standards¹⁹. Although the EU lacks direct legislative competence over cultural and linguistic minority rights, Member States are bound by broader human rights provisions under both EU and Council of Europe instruments, such as the European Convention on Human Rights (ECHR)²⁰. The European Court of Human Rights has played a key role in protecting minorities by interpreting provisions on non-discrimination and freedoms of religion and expression. Secondary legislation also supports minority rights through anti-discrimination measures. The Race Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) prohibit discrimination in employment, education, housing, and social protection²¹. These directives extend protections across Member States, requiring equal treatment irrespective of ethnic origin or belief.

For candidate countries, the Copenhagen Criteria (1993)²² established accession conditions, including stable democratic institutions, rule of law, human rights, and explicit protection of minorities²³. This framework has influenced reforms in Central and Eastern European countries, where minority rights protections—such as language rights and educational access—were strengthened prior to accession. Today, candidate countries, including Albania, must demonstrate compliance with these requirements to progress in

15 OHCHR, n.d.-c.

16 OHCHR, n.d.-d.

17 European Union [EU], n.d.-a.

18 EU, n.d.-b.

19 EU, n.d.-a.

20 Council of Europe, n.d.

21 EU, n.d.-c.

22 European Council. (1993). European Council in Copenhagen – Conclusions of the Presidency.

23 European Council, 1993.

EU membership negotiations. The EU also supports minority rights through institutions such as the European Union Agency for Fundamental Rights (FRA), which provides data, legal advice, and monitoring mechanisms to improve protections across Member States and candidate states²⁴. Collectively, EU primary and secondary legislation, monitoring bodies, and accession criteria constitute a robust framework for minority rights protection, despite the absence of a single, binding minority rights instrument.

2.3. Albanian Legal Framework

2.3.1. Minority Rights in Albania: Historical Context

Albania, a parliamentary republic in the Western Balkans, has undergone profound political and social transformations. Following nearly 450 years under Ottoman rule and five decades of communist isolation, the country transitioned to democracy in the early 1990s²⁵. Despite progress, this transition remains incomplete, and the legacy of past regimes continues to shape minority rights. Demographic shifts have further complicated the issue. The 2023 census reported Albania's population at 2,186,917, reflecting a sharp decline from 2,821,977 in 2011 due to emigration, low birth rates, and an aging population. Ethnic Albanians make up 99.4% of the population, while minorities—including Greeks, Roma, Egyptians, Macedonians, and others—constitute only 0.6%²⁶.

Historically, minority rights in Albania were shaped by regime changes. Under the Ottoman Empire, rights were tied to religion rather than ethnicity, leaving little recognition of cultural or linguistic diversity²⁷. After independence in 1912, Albania joined the League of Nations in 1920 and adopted the 1921 Declaration, which prioritized international obligations for minority protection over domestic laws²⁸. The communist era (1946–1991), however, marked a severe regression: political and religious freedoms were suppressed, Albania was declared the first atheist state in 1967, and minority identities were assimilated under nationalist policies²⁹. The democratic transition after 1991 brought substantial reforms. The 1998 Constitution, adopted by referendum, guarantees human rights and explicitly protects minorities³⁰. While Albania has made significant progress—joining NATO and opening EU accession negotiations—challenges in fully protecting minority rights remain central to its democratic consolidation and European integration³¹.

2.3.2. Constitutional and Legislative Protections of Minority Rights in Albania

The Albanian Constitution guarantees equality and non-discrimination while safeguarding the rights of national minorities in alignment with international human rights

24 EU, n.d.-d.

25 De Waal, 2005.

26 INSTAT, 2023.

27 Clayer, 2017.

28 League of Nations, 1921.

29 Vickers, 1999.

30 The constitution of the Republic of Albania, 1998.

31 European Commission, 2023.

standards³². Several articles explicitly protect these communities. Article 18 prohibits unjust discrimination based on ethnicity, language, religion, or other grounds. Article 20 ensures that minorities may preserve and develop their cultural, religious, and linguistic identity, as well as organize collectively to protect their interests. Article 24 guarantees freedom of conscience and religion, while Article 45 provides equal political participation rights, and Article 57 secures the right to education, including in minority languages.

Beyond the Constitution, domestic legislation further enforces minority protections. The Anti-Discrimination Law (Law No. 10221/2010) prohibits discrimination based on race, ethnicity, language, or similar grounds and created the Commissioner for Protection from Discrimination as an independent enforcement body³³. The Law on Audio-Visual Media (No. 97/2013) requires public and private broadcasters to provide programming in minority languages, ensuring cultural preservation and representation in the media. The most significant reform came with the Law on the Protection of National Minorities (No. 96/2017), which officially recognized nine national minorities and abolished the previous unequal distinction between “national” and “linguistic” minorities³⁴. This law was seen as a milestone in harmonizing Albanian legislation with European standards. Furthermore, amendments to the Law on Pre-University Education (2021) introduced protections for linguistic and cultural identity in curricula, teacher training, and access to education for vulnerable groups such as Roma and Egyptian students³⁵.

International commitments reinforce Albania’s domestic framework. Treaties such as the International Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities, and the European Convention on Human Rights have been ratified, making them directly applicable under Article 122 of the Constitution³⁶. While progress is recognized, reports by the European Commission (2019, 2022) note that the adoption of secondary legislation remains pending, which continues to limit the effective implementation of minority protections. Nevertheless, Albania’s legal framework demonstrates a significant effort toward building an inclusive system in line with European integration requirements.

3. CASE LAW ANALYSIS

The effective enforcement of minority rights is indispensable, as legal provisions hold little value without practical implementation. Courts play a crucial role in resolving disputes concerning minority protections, yet judicial remedies alone often prove insufficient to guarantee substantive equality. The jurisprudence of the European Court of Human Rights (ECtHR) offers valuable insight into both the advances made and the challenges that persist in safeguarding minority rights across Europe.

32 The constitution of the Republic of Albania, 1998/2020.

33 European Commission, 2018.

34 European Commission, 2019.

35 European Commission, 2022.

36 Council of Europe, 1999; United Nations, 1991.

3.1. D.H. and Others v. the Czech Republic

In **D.H. and Others v. the Czech Republic** (2007)³⁷, the ECtHR examined the systemic placement of Roma children in special schools, constituting indirect racial discrimination. The Court found a violation of Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education) of the European Convention on Human Rights (ECHR). This was the first judgment where the ECtHR recognized indirect discrimination, emphasizing that discriminatory intent is irrelevant when practices produce discriminatory effects³⁸. The ruling prompted education reforms in the Czech Republic, although implementation challenges remain³⁹.

3.2. X and Others v. Albania

In **X and Others v. Albania** (2021)⁴⁰, the ECtHR addressed the disproportionate concentration of Roma and Egyptian students in one elementary school in Korça. The Court held that Albania violated Article 1 of Protocol No. 12 (general prohibition of discrimination) by failing to implement effective desegregation measures, despite recommendations from national institutions⁴¹. The judgment reaffirmed states' positive obligation to ensure inclusive education and to actively prevent systemic segregation. Albania's case highlights the broader issue of weak enforcement mechanisms, which create significant gaps between formal commitments under international treaties—such as the ICCPR and the Framework Convention for the Protection of National Minorities (FCNM)—and their practical application.

3.3. Broader Jurisprudential Developments

The challenges faced by Albania and the Czech Republic reflect wider patterns across Council of Europe member states. Since **Kokkinakis v. Greece** (1993), where the ECtHR found a violation of Article 9 (freedom of religion), the Court has progressively developed a body of jurisprudence addressing the rights of minorities and vulnerable groups.⁴² Key cases have shaped standards on the recognition of religious groups (*Canea Catholic Church v. Greece* 1997⁴³; *Genov v. Bulgaria*, 2013⁴⁴), property restitution (*Lupeni Greek Catholic Parish v. Romania*, 2016⁴⁵), access to education (*Mansur Yalcin v. Turkey*,

37 European Court of Human Rights. (2007). *D.H. and Others v. the Czech Republic* (Application no. 57325/00). Judgment of 13 November 2007.

38 Brems, 2008.

39 Amnesty International, 2015.

40 European Court of Human Rights, 2021. *X and Others v. Albania* (Application no. 73548/17). Judgment of 31 May 2021.

41 European Court of Human Rights, 2021.

42 European Court of Human Rights (ECtHR), 1993. *Kokkinakis v. Greece* (Application no. 14307/88).

43 European Court of Human Rights (ECtHR), 1997. *Canea Catholic Church v. Greece* (Application no. 25528/94).

44 European Court of Human Rights (ECtHR), 2013. *Genov v. Bulgaria* (Application no. 40524/08).

45 European Court of Human Rights (ECtHR), 2016. *Lupeni Greek Catholic Parish v. Romania* (Application no. 76943/11).

2014⁴⁶), and registration of religious groups (*Krupko and Others v. Russia*, 2014⁴⁷). The Court has also grappled with the tension between secularism and religious identity, as seen in cases upholding restrictions (*Şahin v. Turkey*, 2005⁴⁸; *S.A.S. v. France*, 2014⁴⁹) and others affirming protection of individual religious expression (*Lautsi v. Italy*, 2011⁵⁰; *Eweida v. UK*, 2013⁵¹). This evolving jurisprudence demonstrates the Court's contextual approach, balancing national traditions with the overarching principle of non-discrimination.

3.4. Synthesis

The examined case law illustrates that, despite comprehensive legal frameworks, minority rights—particularly in education—remain susceptible to systemic violations. The ECtHR plays an indispensable role in providing redress where national systems fall short, thereby setting important precedents for minority protection. However, persistent barriers such as limited access to justice, financial constraints, and weak enforcement mechanisms continue to hinder the full realization of minority rights in Europe⁵². The Court's jurisprudence thus underscores both the progress achieved and the ongoing need for stronger domestic mechanisms to ensure genuine equality.

CONCLUSIONS

This paper examined the UN, EU, and Albanian legal frameworks for the protection of minority rights, focusing on the extent to which Albania's framework aligns with international standards and the gaps between law and practice. While Albania has advanced significantly—particularly through the Law No. 96/2017 on the Protection of National Minorities—implementation gaps remain evident in education, language rights, political participation, data collection, and access to justice. Marginalized groups such as Roma, Egyptians, and unrecognized minorities continue to face systemic barriers, often seeking remedies before the ECtHR, where Albania has been found in violation of its obligations. Bridging these gaps requires not only legislative reform but also political will, institutional strengthening, and community engagement, in line with UN and Council of Europe recommendations. Similar shortcomings are observed across EU and UN member states, as reflected in ECtHR jurisprudence, confirming that legal recognition alone does not guarantee effective protection.

This research contributes to understanding the strengths and weaknesses of Albania's legal framework, highlighting areas where greater alignment with UN standards and EU directives is needed. Such reforms are critical not only for minority protection but also for advancing Albania's EU accession process, particularly under Chapter 23 of the acquis.

46 European Court of Human Rights (ECtHR), 2014. *Mansur Yalcin v. Turkey* (Application no. 21163/11).

47 European Court of Human Rights (ECtHR), 2016. *Krupko and Others v. Russia* (Application no. 26587/07).

48 European Court of Human Rights (ECtHR), 2005. *Şahin v. Turkey* (Application no. 44774/98).

49 European Court of Human Rights (ECtHR), 2014. *S.A.S. v. France* (Application no. 43835/11).

50 European Court of Human Rights (ECtHR), 2011. *Lautsi v. Italy* (Application no. 30814/06).

51 European Court of Human Rights (ECtHR), 2013. *Eweida v. United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10, 36516/10).

52 Henrard, 2010.

The study is limited by scarce data on Albanian court rulings concerning minority rights; however, the ECtHR case law analyzed provides valuable insight into practical enforcement challenges. Future research should expand this analysis, examining in detail the interplay between Albanian courts, the ECtHR, and EU law. In conclusion, while Albania has taken important steps toward harmonization with UN and EU standards, ensuring the effective protection of minorities requires sustained efforts to translate legal commitments into practical guarantees of justice and equality.



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ZAŠTITA PRAVA MANJINA U ALBANIJI: KOMPARATIVNA ANALIZA PRAVNOG OKVIRA UJEDINJENIH NACIJA I EVROPSKE UNIJE

Apstrakt:

Zaštita prava manjina je neophodna za unapređenje jednakosti, socijalne integracije i mira u različitim društvima. Albanija, koju karakteriše etnička i kulturna raznolikost, uspostavila je specifičan pravni okvir usmeren na zaštitu prava manjina. Međutim, uprkos ovim zakonskim odredbama, ostaju značajni izazovi u njihovoj efikasnoj primeni. Ovaj rad se bavi pitanjem u kojoj meri je pravni okvir Albanije za zaštitu prava manjina usklađen sa međunarodnim standardima, posebno standardima Ujedinjenih nacija (UN) i Evropske unije (EU), i koje praznine postoje između zakonodavstva i prakse. Istraživanje koristi mešoviti metodološki pristup, kombinujući doktrinarnu pravnu analizu, uporednu analizu i studiju slučaja. Fokusira se na dva glavna cilja: prvo, identifikovanje zakona Albanije o pravima manjina i njihove stvarne primene; drugo, poređenje pravne zaštite u Albaniji sa međunarodnim instrumentima kao što su Međunarodna konvencija o ukidanju svih oblika rasne diskriminacije, deklaracija UN i Povelja EU o osnovnim pravima. Kroz uporednu analizu, rad procenjuje koherentnost između nacionalnih zakona i međunarodnih normi, ističući praktične izazove, kao i relevantne presude Evropskog suda za ljudska prava. Konačno, istraživanje ima za cilj da pruži praktične preporuke usmerene na premošćavanje jaza između pravnih okvira i prakse, čime se poboljšava zaštita prava manjina u Albaniji kroz bolje usklađivanje sa međunarodnim standardima i efikasniju implementaciju politika.

Ključne reči: *Prava manjina; Albanija; Ujedinjene nacije; Pravni okvir; Evropska unija*

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EUROPEAN TRAVEL INFORMATION AND AUTHORISATION SYSTEM (ETIAS)- MASS PROTECTION OR MASS CONTROL?¹

Abstract:

Significant and frequent population fluctuations have prompted the European Union (EU) to address migration challenges since 2015 by implementing information technology systems utilising artificial intelligence (AI). Schengen Area member states aim to enhance security, prevent unauthorised migration, and protect public health by mitigating risks associated with visa-exempt third-country nationals. To operationalise these objectives, the European Commission proposed the European Travel Information and Authorisation System (ETIAS) in 2016, which was adopted in 2018. ETIAS is designed to issue travel authorisations for visa-exempt third-country nationals and to collect relevant information on travelers prior to their arrival at the external borders of the Schengen Area. The collection, processing, storage, and, in certain cases, sharing of special categories of personal data for ETIAS travel authorisation purposes have raised concerns regarding the underlying intentions of the EU. This paper examines the features and practical implications of ETIAS, offering a new perspective on EU border management. It evaluates the system's effectiveness in enhancing security through migration control at the external borders of the Schengen Area and questions whether ETIAS achieves its stated objectives or, instead, infringes on the human rights of visa-exempt third-country nationals, particularly their rights to privacy and data protection, in pursuit of broader surveillance and mass control goals.

Keywords: ETIAS, right to private life, data protection, security, mass control

*Roses are red,
Violets are blue,
I care about my privacy
And what about the EU?*

1 Paragraphs 1,3, and 4 are by Tamara Staparski; paragraph 2 is by Valentina Ranaldi

1. INTRODUCTION

Moving, strolling, travelling, and calling—all of these share a common element: a sense of freedom. The freedom to change location, to experience new emotions, to see new sights, and to engage with diverse cultures, individuals, and religions. Freedom to feel alive. Moshe Dayan² once said, „*Freedom is the oxygen of the soul.*“³ And every human being has the right to breathe deeply.

Movement – a voluntary and free physical action. However, when combined with changes in space and location according to modern rules and restrictions, can it still be considered free? Will future travel continue to nourish the body and soul, provide the freedom to relocate for studying, personal and professional development, and remain a common aspect of business that involves international cooperation, or will the price for crossing borders be too high to pay? And is that future still years away or just a few heartbeats?

In the last two decades, the flow of individuals has increased drastically within European borders. Because of its cultural, historical, and architectural attractions, some European cities are experiencing an overabundance of tourists eager to absorb the unique beauty and charm they offer. Many of them frequently lack awareness of cultural divergences, social standards, and local customs, which can lead to concerns and discomfort among local citizens. Nevertheless, the residents of these places constantly voice their profound displeasure with the influx of tourists from around the globe, attempting to maintain the tranquillity as well as the local landmarks and culture through various “struggle” tactics. Conversely, prolonged multi-year migration crises resulting from the substantial exodus of individuals from their homes and endangered regions in pursuit of safety and improved living conditions are inducing significant changes in the host nations. Rather than assimilation, the substantial influx of immigrants results in their customs and behavioural norms prevailing over time, which progressively engenders a disregard for local regulations, laws, and social standards. Considering that individual migration can hide ulterior motives, such as entering Europe to execute terrorist attacks that result in severe repercussions and significant losses, the security of EU citizens emerges as an essential priority for EU Member States. Under the umbrella of security protection, with a focus on migration control and terrorism prevention, states, including European Union (EU) Member States, utilise modern technology at border controls that collect, process, and store data. According to the Communication from the Commission to the European Parliament and the Council, in 2015, over 200 million regular border crossings occurred at the EU’s external borders, meaning that more than 50 million non-EU nationals entered the Schengen area.⁴ However, the same year also saw a migration crisis driven by political instability in Syria and other regions, leading to the unlawful crossing of Europe’s external borders by nearly 1.8 million people.⁵ This highlighted the need for migration assessment and improved security measures, which the EU resolved to address by implementing new

2 An Israeli military leader and politician.

3 SUCCESS, (2 August, 2025). Retrieved from: <https://www.success.com/22-inspiring-quotes-about-freedom/FR>

4 Communication from the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security, Brussels, 6.4.2016. COM(2016) 205 final. Brussels: European Commission (2 August, 2025), p. 2. Retrieved from: https://www.eulisa.europa.eu/sites/default/files/documents/communication_on_stronger_and_smart_borders_20160406_en.pdf

5 Ibid

technical solutions through the development of the European Travel Information and Authorisation System (ETIAS).

However, a wide range of human rights protected by international law may be affected by border control and counter-terrorism technology and methods, with the most relevant in this situation being freedom of movement, the right to seek asylum, equality and non-discrimination, and the right to privacy and data protection⁶. So, the question arises: does the ETIAS serve as a mechanism for the EU to enhance the security of its citizens through detailed and technologically sophisticated controls, or is it a facade that conceals a comprehensive effort to monitor visa-exempt third-country nationals (hereinafter: TCNs) by infringing upon their privacy through the collection, processing, and storage of sensitive personal data?

2. THE CONCEPT OF ETIAS

The terrorist attack in the USA on September 11, 2001, spurred the EU to contemplate improved security measures and to initiate the development of the idea of „smart“ borders.⁷ Subsequent global events and the 2015 migrant crisis led the EU to tighten restrictions on its external borders for individuals exempt from entry visas. By utilising current technology to regulate the immigration of non-EU residents, the EU would increase the security and peace of mind that its citizens rightfully deserve. During his tenure as President of the European Commission, in his 2016 State of the Union address⁸, Jean-Claude Juncker stated that “We need to know who is crossing our borders. By November, we will propose an automated system to determine who will be allowed to travel to Europe. This way we will know who is travelling to Europe before they even get here”.⁹ As promised, on 16 November 2016, the European Commission adopted a proposal to establish ETIAS (hereinafter: the Proposal).¹⁰ It included, *inter alia*, an overview of ETIAS, the rationale behind its implementation, a detailed examination of the application and issuance process, controls at the external Schengen border crossings, the technical features of the system, financial aspects, Europol’s role, the legal framework supporting the system’s introduction, and its impact on fundamental human rights.¹¹ The primary role of the system is to proactively evaluate potential security concerns, epidemiological risks, and

6 Border management and human rights, *Collection, processing and sharing of personal data and the use of new technologies in the counter-terrorism and freedom of movement context*. Warsaw: OSCE Office for Democratic Institutions and Human Rights (ODIHR), pp. 9-11 (2 August, 2025). Retrieved from: <https://www.osce.org/odihr/499777>

7 Duić, D., Rošić, M. (2021). Interoperability between the EU information systems – from an idea to the realisation. *Polic. sigur. (Zagreb)*, 31(2), p. 123.

8 The September annual State of the Union address by the President of the European Commission to the European Parliament, in which he presents the accomplishments of the past year, as well as plans and objectives for the upcoming one.

9 Security Union: Commission proposes a European Travel Information and Authorisation System, European Commission (2 August, 2025). Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_16_3674

10 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, Brussels, 16.11.2016, COM(2016) 731 final, 2016/0357 (COD).

11 Ibid

unlawful immigration linked to the entry of non-EU visa-exempt residents through the implementation of travel authorisation and automated procedures.¹²

After nearly two years of consensus between the European Parliament and the Council on its essential elements, the European Commission adopted the Regulations¹³ (hereinafter: the Regulation (EU) 2018/1240) establishing ETIAS as a legally binding act on 12 September 2018. According to it, by evaluating visitors before they arrive at external border crossing points, ETIAS should help maintain a high degree of security, deter illegal immigration, and safeguard public health.¹⁴ Due to the necessity for current technology solutions that are not uniformly accessible to all Member States within the same timeframe, the introduction of ETIAS has been delayed multiple times. Its latest implementation is scheduled to commence in the last quarter of 2026¹⁵, accompanied by a 6-month transitional period to facilitate travellers' adaptation to its introduction.¹⁶ Nationals from over 55 visa-exempt countries will need to obtain an ETIAS travel authorisation for short-term visits of up to 90 days within the EU, which will remain valid for up to three years or until the expiration of the travel document used to secure the authorisation.¹⁷ A notable innovation in contemporary travel within EU borders is the information that travellers will submit in their ETIAS application. Specifically, the application won't be taken into consideration if it doesn't include information listed in the Article 17 of the Regulation (EU) 2018/1240, such as details on the applicant's personal information,¹⁸ present occupation and its level of education, travel document, the country of initial planned stay and the address of traveller's destination, as well as prior trips to conflict areas, convictions for criminal offences and details regarding a ruling by an authorised entity mandating the applicant's departure from the territory of a state.¹⁹ However, obtaining an ETIAS travel authorisation does not automatically entail crossing the border, but is conditional on meeting the entry requirements outlined in Article 6 of the Regulation (EU) 2016/399²⁰. In a broader context, ETIAS, along with the Entry/Exit System (EES)²¹, which precedes it, forms a modern IT framework for regulating future entries at the external borders of the Schengen area. While these are two distinct IT systems, the ETIAS travel authorisation will be irrelevant without the EES, which will start operating on October 12, 2025.²² In this manner, the European

12 Csatlós, E. (2025). Blending digitalization and enhanced security: Exploring the role of ETIAS in migration control and its administrative structure. *Hungarian Journal of Legal Studies*, 65 (2024) 3, p. 324.

13 European Parliament and of the Council (2018). Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226. Official Journal of the European Union, L 236

14 Ibid, p. 2

15 European Union, Official ETIAS Website (4 August, 2025). Retrieved from: <https://travel-europe.europa.eu/etias>

16 ETIAS Info Pack, Public Version, June-July 2024, FRONTEX (4 August, 2025). Retrieved from: <https://www.scribd.com/document/879683099/ETIAS-Info-Pack-May-2024-Public-NBF-20240527>

17 Ibid, p. 3

18 Applicant's full name, surname, date and place of birth, citizenship, residential address, parents' given names, email address, and telephone number

19 European Union, Official ETIAS Website, *op. cit.*

20 European Parliament and of the Council (2016). Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). Official Journal of the European Union, L 77.

21 An automated IT system for registering non-EU nationals traveling for short stays upon each crossing of the external borders of 29 European countries.

22 European Union, Entry/Exit System (4 August, 2025). Retrieved from: <https://travel-europe.eu>.

Union has introduced an additional innovation in the collection, processing, and storage of personal data. In particular, travellers must provide facial images and fingerprints each time they cross borders into the Schengen area to comply with the EES.²³ Given the extensive data that will be collected, processed, and stored in the databases of the EES and ETIAS information systems, along with the sensitive nature of this information, a question arises: Is the purpose of this control solely to protect the security of the external borders and the internal territory of the Schengen area, or does the monitoring of non-EU visa-exempt residents' movements reflect underlying motives related to future EU decisions?

3. CRITICISMS AND (UN)JUSTIFIED APPREHENSION

The COVID-19 pandemic has served as a significant social experiment aimed at global control of individual movements, all under the banner of public health protection. Fearing an unknown disease and experiencing anxiety over the “lockdown” imposed to prevent its spread, people eagerly awaited the “opening” of international borders and the return of “freedom” of movement. However, many did not consider the costs associated with this newfound “freedom” and readily provided their private and personal data to obtain permission to cross the border, without questioning or considering who was collecting, storing, processing, and using that data and for what purposes. This situation was an excellent indicator for tacitly accepting new conditions for future travel, including the implementation of the EES and the ETIAS.

Although promoted as an advanced system that will accelerate and simplify border crossing procedures while enhancing the EU security policy, ETIAS is sparking various disputes and differing opinions among the public and scholars.

By promoting ETIAS and informing the general public about its features and new procedures, the European Commission has emphasised ETIAS's potential impact on numerous human rights protected by international treaties, in particular the right to dignity, the right to liberty and security, the right to asylum and protection in the event of removal, expulsion or extradition, the right to non-discrimination, respect for private and family life, the protection of personal data, the rights of the child and the right to an effective remedy.²⁴ As highlighted, the range of fundamental rights threatened by ETIAS is extensive; however, this paper will specifically focus on the right to private life and data protection.

Articles 7 and 8 of the Charter of Fundamental Rights of the European Union²⁵ (hereinafter: the Charter), together with the General Data Protection Regulation (GDPR)²⁶, underscore the paramount importance of privacy and data protection rights. These legal

europa.eu/ees

23 Ibid

24 Jeandesboz, J., et al. (2017). *European Travel Information and Authorisation System (ETIAS): Border management, fundamental rights and data protection*. European Parliament, Directorate General for International Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, p. 41.

25 Charter of Fundamental Rights of the European Union (2012), Official Journal of the European Union, C 326

26 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016), Official Journal of the European Union, L 119

frameworks firmly establish that safeguarding individual privacy and data is not just a priority, but a fundamental obligation of the EU. However, considering the nature of the data that will be collected from non-EU visa-exempt residents, along with the fact that private contractors develop the AI and the algorithms used to collect, store, and process this data, there are significant concerns regarding privacy and data protection. Furthermore, the new EU legislation related to ETIAS raises questions about the extent to which the principles of privacy protection and data security are genuinely upheld in the EU's interest.

3.1. Interference in the right to private life and data protection

For ETIAS to fulfil its objective of profiling visa-exempt TCNs, it must “communicate” with other EU centralised systems designed to control these travellers by collecting and processing their private data. It is precisely the interoperability of EU information systems - the Schengen Information System II (SIS II), Visa Information System (VIS), European Dactyloscopy (Eurodac), Entry/Exit System (EES), European Criminal Records Information System for third-country nationals (ECRIS-TCN), the European Search Portal (ESP), a Biometric Matching Service (BMS), a Common Identity Repository (CIR) and a Multiple Identity Detector (MID)²⁷ - that allows ETIAS to detect potentially “dangerous” travellers who could pose a threat to EU security. Inversely, the ETIAS will comprise an extensive information system, including the ETIAS Information System (developed by eu-LISA), the ETIAS Central Unit (established within the European Border and Coast Guard Agency—Frontex), and the ETIAS National Units (established within a designated competent authority in each Member State).²⁸ It is precisely the interoperability, tripartite structure of ETIAS, and the nature of the data that will be collected that raised concerns for data protection and the right to private life.

Principle of proportionality and necessity. As noted in recitals 29 and 41 of the Regulation (EU) 2018/1240, the intended purpose of ETIAS affects the right to data privacy protected by Article 8 of the Charter; but compliance with the Charter relies on whether this interference is justified according to the provisions of Article 52(1) of the Charter, particularly the principle of strict necessity.²⁹ In his Opinion on the Proposal from 2017³⁰, EDPS³¹ emphasizes that „the lack of a data protection impact assessment, which is a fundamental prerequisite, does not make it possible to fully assess the necessity and proportionality of ETIAS as it is currently proposed”. A recent instance illustrating the violation of the strict

27 Vavoula, N. (2020). Interoperability of EU Information Systems: The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?. *European Public Law*, ISSN 1354-3725, p. 132.

28 EDPS Opinion on the ETIAS DPIA (Case 2021-0640), European Data Protection Supervisor (5 August, 2025). Retrieved from: https://www.edps.europa.eu/data-protection/our-work/publications/supervisory-opinions/etias-data-protection-impact-assessment_en

29 Brouwer, E., Zandstra, T. (2022). Fundamental Rights at the Digital Border: ETIAS, the Right to Data Protection, and the CJEU's PNR judgment (August 5, 2025). Retrieved from: <https://verfassungsblog.de/digital-border/>

30 EDPS Opinion on the Proposal for a European Travel Information and Authorisation System (ETIAS), 3/2017, European Data Protection Supervisor (5 August, 2025). Retrieved from: https://www.edps.europa.eu/data-protection/our-work/publications/opinions/european-travel-information-and-authorisation-system_en

31 European Data Protection Supervisor

necessity principle through artificial intelligence (AI) at border crossings is the judgment³² of the European Court of Justice (CJEU) on the PNR Directive³³. Namely, the Ligue des droits humains (LDH)³⁴ filed an action before the Constitutional Court of Belgium in 2017, challenging the law adopted on 25 December 2016, which regulated the processing of passenger data. This law incorporates, among other things, the PNR Directive, which governs the collection and processing of air passenger data, into Belgian national legislation. Before issuing its judgment, the Constitutional Court of Belgium referred the matter to the CJEU for an appropriate opinion, questioning, *inter alia*, the requirement of the necessity of the PNR (passenger name record) system for the collecting, transfer, processing and storage of PNR data, as well as the justification for the retention period of such data. The CJEU found that the PNR Directive significantly interferes with the right to private life and data protection enshrined in Articles 7 and 8 of the Charter, as it endeavours to „introduce a surveillance regime that is continuous, untargeted and systematic, including the automated assessment of the personal data of everyone using air transport services“. The CJEU further emphasized that for Member States to legally justify restrictions on the rights to private life and data protection, as guaranteed by the Charter, they must demonstrate that the necessity of interfering with these rights is proportionate to the importance of the general interest objective that the restrictions aim to achieve. Regarding the use of private data collected from passengers, the CJEU stressed that Member States must clearly define a specific and restricted purpose for this data collection.³⁵

If we apply these CJEU's positions to ETIAS, the general nature and category of data collected from all travellers from visa-exempt third countries, without a clear objective reason, do not align with the principle of strict necessity. Conversely, the Regulation (EU) 2018/1240 does not clearly describe the purpose of collecting various types of data listed in Article 12 from visa-exempt non-EU travellers.³⁶ For instance, data such as the name of the applicant's parent, their level of education, current employment, including the IP address of the device used to submit the ETIAS authorisation application, do not contribute to assessing whether the individual poses a potential security threat to the EU, either physically or in terms of health. Since the Regulation (EU) 2018/1240 failed to justify the strict necessity of collecting the aforementioned data, it can therefore be concluded that this constituted a violation of the right to private life and data protection as guaranteed by the Charter.

Storage and access to personal data. In its 2017 Opinion, the EDPS emphasised that establishing the ETIAS through the Proposal will provide a substantial amount of personal data to various public authorities, which will significantly impact the legal protection of personal data. Specifically, Regulation (EU) 2018/1240 assigns the development and technical management of the ETIAS system to eu-LISA, which, in carrying out these responsibilities, is required to respect the principles of privacy by design and by default at all times. Furthermore, eu-LISA is responsible for managing the information security of the ETIAS Central System as a controller. Meanwhile, Frontex is regarded as the controller for

32 *Ligue des droits humains ASBL v Conseil des ministres*, CASE C-817/19, Judgment of the Court of Justice of the European Union (Grand Chamber) of 21 June 2022

33 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (2016), Official Journal of the European Union, L 119

34 Non-profit human rights association

35 Brouwer, E., Zandstra, T., *op. cit.*

36 *Ibid.*

processing personal data within the ETIAS Central System, whereas the ETIAS National Unit of each Member State is considered the controller regarding the processing of personal data in the ETIAS Central System by that Member State.³⁷

Now, private contractors develop artificial intelligence (AI) systems using machine learning (ML) algorithms. They rely on proprietary datasets protected as trade secrets, and the algorithms themselves are similarly safeguarded. Since the eu-LISA utilises AI in three of its systems (SIS II, VIS, and Eurodac), it effectively acts as a mere observer, as it does not intervene in the development, testing, or deployment of AI within its domain.³⁸ Because ETIAS is an AI-based IT system designed for profiling individuals, eu-LISA is likely to serve primarily as an observer rather than a manager. This means that access to the private data collected from visa-exempt TCNs will also be granted to private companies involved in developing the AI used by ETIAS. Furthermore, immigration authorities, border guards, law enforcement agencies³⁹, and others can access this data, and it may even be shared with third countries if necessary. Consequently, the security and protection of private data for visa-exempt TCN passengers is only theoretical.

Moreover, a review of the CJEU's PNR Directive judgment indicates that it limits the use of AI technology in self-learning systems for improved passenger assessment based on established criteria.⁴⁰ Consequently, the European Court of Justice's views on the implementation and practical use of the ETIAS are still to be clarified.

Data retention. Article 54 of the Regulation (EU) 2018/1240 addresses data retention by mandating the storage of ETIAS travel authorisation applications in the ETIAS Central System. According to paragraph 1 of this Article, data collected from visa-exempt TCNs is retained in the Central System until the travel authorisation expires, which occurs after three years, or for five years following the last decision to refuse, annul, or revoke the authorisation, as specified by the Regulation (EU) 2018/1240. However, paragraph 2 goes further. It allows personal data to be retained for an additional three years beyond the authorisation's expiry, provided the person gives express and signed consent. The Regulation (EU) 2018/1240 justifies this extension to help facilitate the issuance of a new authorisation. Nonetheless, the GDPR requires that personal data be retained only for the minimum period necessary to fulfil its intended purpose. The data collected from visa-exempt TCNs is only relevant when the ETIAS travel authorisation is issued, and it may change at any point during the authorisation's validity. For example, a person might update their education or employment status. As a result, the data retention period established by the Regulation lacks a clear purpose. Since the data is gathered solely to issue the ETIAS travel authorisation, keeping it in the ETIAS Central System after the authorisation is granted no longer meets its original purpose.

Another issue here is related to the nationality of the traveler applying for an ETIAS travel authorisation. Namely, as we mentioned earlier, citizens of more than 55 visa-free countries will have to obtain a travel authorisation through the ETIAS system. Considering the geographical distances, citizens living in European countries that are not members of the EU or the Schengen area are, in reality, more closely tied to the countries that belong to

37 EDPS Opinion on the ETIAS DPIA (Case 2021-0640), op. cit., p. 2

38 Velasco Rico, C. I., Laukyte, M. (2024). ETIAS system and new proposals to advance the use of AI in public services. *Computer Law & Security Review*, Vol. 54. p. 1.

39 EDPS Opinion on the Proposal for a European Travel Information and Authorisation System (ETIAS), 3/2017, op. cit., p. 3.

40 Brouwer, E., Zandstra, T., op. cit.

the Schengen area due to health, personal, business, educational, and other circumstances. This means that after the expiration of one issued authorisation, after three years, they will immediately have to apply for another. This is automatically reflected in the length of retention of their data, which will, in practice, be lifelong, and the three-year period specified in the Regulation will be entirely irrelevant for these applicants. In this way, all EU standards related to the retention of personal data, as well as its protection, will be violated in practice.

4. CONCLUSION

On 16 November 2016, the European Commission announced on its official website the significant initiative of the European Security Union⁴¹, which came into effect on that day with the adoption of the Proposal for the implementation of ETIAS. The European Commission described ETIAS as an automated system designed to perform prior checks while fully respecting fundamental rights and personal data protection. However, this statement from the European Commission had a notable oversight, as it was not evidentially supported. Notably, the Proposal was adopted without a preceding human rights impact assessment. In its 2017 Opinion, the EDPS advised the European Commission on the necessity of conducting a comprehensive impact assessment of the Proposal regarding the right to privacy and the right to data protection. This development constitutes the first significant limitation on these rights of visa-exempt TCNs, indicating that the European Commission did not adequately assess the Proposal's impact on them. On 13 May 2020, the EDPS provided initial guidance to the eu-LISA for the ETIAS Data Protection Impact Assessment (DPIA). Following these and previous instructions, eu-LISA submitted the final DPIA document for EDPS review on 17 June 2021. However, since Regulation (EU) 2018/1240 was adopted on 12 September 2018 without a privacy and data protection impact assessment, it represents a second and final limitation imposed by the European Commission on the rights of visa-exempt TCNs.

The objectives of introducing ETIAS include, *inter alia*, contributing to the protection of public health. Article 4(c) of the Regulation (EU) 2018/1240 specifies that ETIAS will assist in assessing the epidemiological risk posed by applicants prior to their arrival at border crossing points. However, the data categories outlined in Article 17 of Regulation (EU) 2018/1240 indicate that information regarding the health status of applicants will not be included in the application process. This exclusion may be attributed to two primary factors: the personal and confidential nature of individual health information, and the potential violation of the applicant's right to privacy that would result from collecting such data. FRONTEX also notes in its 2024 Info Pack that medical documents are not needed to apply for ETIAS. This raises a clear question: if health data is not collected or processed, except for visa-exempt TCNs, how will ETIAS help protect the health of EU citizens?

Given the nature of the data collected from visa-exempt TCNs and the lack of clear justification for collecting most of this information, it is evident that much of the data cannot be used to identify individuals who pose a threat to the security or health of the EU. Furthermore, the collection and retention of certain categories of data may infringe upon applicants' rights to privacy and data protection. These factors suggest that the primary objective of introducing the ETIAS may extend beyond security concerns, potentially enabling increased monitoring and profiling of visa-exempt TCNs through

41 An overarching policy objective aimed at enhancing security throughout the EU.

technological means. The stated aim of protecting security and health may therefore serve as a justification for broader data collection practices. Such developments raise concerns regarding the potential erosion of human rights and the expansion of surveillance over visa-exempt TCNs.

*Roses are red,
Violets are blue,
I crave my privacy
And what about you?*



Tamara Staparski, mast. krim

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EVROPSKI SISTEM ZA INFORMACIJE O PUTOVANJIMA I ODOBRENJE PUTOVANJE (ETIAS)-MASOVNA ZAŠTITA ILI MASOVNA KONTROLA?

Apstrakt:

Značajne i česte fluktuacije ljudi podstakle su Evropsku uniju (EU) da se od 2015. godine bavi izazovima migracije implementacijom informaciono-tehnoloških sistema koji koriste veštačku inteligenciju (VI). Zemlje članice Šengenskog prostora imaju za cilj da poboljšaju bezbednost, spreče neovlašćene migracije i zaštite javno zdravlje ublažavanjem rizika povezanih sa državljanima trećih zemalja koji su izuzeti od viza. Da bi se ovi ciljevi operacionalizovali, Evropska komisija je 2016. godine predložila Evropski sistem za informacije o putovanjima i odobrenje putovanja (ETIAS), koji je usvojen 2018. godine. ETIAS je osmišljen da izda ovlašćenja za putovanja državljanima trećih zemalja koji su izuzeti od vize i da prikuplja relevantne informacije o putnicima pre njihovog dolaska na spoljne granice Šengenskog prostora. Prikupljanje, obrada, skladištenje i, u određenim slučajevima, deljenje posebnih kategorija ličnih podataka u svrhu ovlašćenja za putovanja u okviru ETIAS-a izazvali su zabrinutost u vezi sa osnovnim namerama EU. Ovaj rad ispituje karakteristike i praktične implikacije ETIAS-a, nudeći novu perspektivu na upravljanje granicama EU. Procenjuje se efikasnost sistema u poboljšanju bezbednosti kroz kontrolu migracija na spoljnim granicama Šengenskog prostora i postavlja se pitanje da li ETIAS postiže svoje navedene ciljeve ili, umesto toga, krši ljudska prava državljana trećih zemalja izuzetih od vize, posebno njihova prava na privatnost i zaštitu podataka, u cilju ostvarivanja širih ciljeva nadzora i masovne kontrole.

Ključne reči: ETIAS, pravo na privatni život, zaštita podataka, bezbednost, masovna kontrola

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JUSTICE IN CYBER CONFLICTS: THE ROLE OF THE UN SECURITY COUNCIL IN ENSURING ACCOUNTABILITY FOR VIOLATIONS OF IHL

Abstract:

Given their ability to seriously threaten the civilian population and vital infrastructure, cyber-attacks pose an increasing threat to global security. Although international humanitarian law (IHL) offers a basis for protecting civilians and limiting conflict, its applicability in cyberspace remains insufficiently defined. This paper explores the function of the United Nations Security Council (UNSC) in guaranteeing accountability for violations of IHL in cyber operations. Through a qualitative analysis of the institutional and legal tools that the UN Security Council can use (resolutions, sanctions, *ad hoc* court procedures, etc.), as well as an examination of relevant incidents of cyber-attacks with serious humanitarian implications, the paper highlights important issues, including those on jurisdiction, sovereignty and political limitations in the application of international law. The goal of the paper is to review the possibilities of the Security Council, in cooperation with other UN bodies, to overcome these challenges, to ensure effective attribution of responsibility for cyber incidents and thereby improve the international system of protection and justice for victims. The paper concludes that such opportunities not only exist, but also that strengthening the authority of the Security Council has a very important role in building a fair mechanism for determining responsibility in cyber conflicts, with the aim of protecting IHL standards and ensuring justice for victims.

Keywords: *international law, cyber security, attribution of responsibility, UN mechanisms, civil infrastructure*

1. INTRODUCTION

In contemporary international relations cyber space appears more and more frequently as a new area of conflict where legal norms, technical capabilities and political ambitions enter into a complex interplay. Of particular concern are cases in which cyber-attacks produce consequences that go beyond the scope of technical destabilization and enter the realm of serious humanitarian consequences: disruption of hospital operations, sabotage of energy infrastructure, or targeted destruction of communication systems during tensions or in armed conflict. In this context, one question arises: can the United Nations Security Council (UNSC) act as an institutional guarantor of international humanitarian law (IHL) in the digital sphere, and if yes, then how?

The aim of this paper is to examine the capacities, legal mechanisms and political limitations of the UN Security Council in determining responsibility for cyber-attacks

that produce humanitarian consequences. Starting from the basic norms of international law and relying on the analysis of institutional practices and available documentation (resolutions, reports of working groups, judicial practice, etc.), the paper uses a qualitative methodology of analysis of normative and institutional documents, focusing on cases that have precedent or illustrative character.

From the analytical point of view, the work tries to show how the formal structure of responsibility, which implies decision-making in the UN Security Council based on Chapter VII of the UN Charter, is increasingly giving way to informal institutional channels, regional initiatives and the so-called convergent practices. Although such responses often seem fragmented and legally non-binding, their increasing frequency and normative orientation point to the potential of building a new regime of international responsibility in the cyber domain.

Structurally, the work consists of three sections, with introductory and final part. The second section discusses the normative framework of international humanitarian law in the context of cyber operations, with special reference to the problem of demarcation between permitted and prohibited use of cyber means according to the rules of armed conflict. The third section analyses the institutional capacity and political limitations of the UN Security Council as a potential guarantor of accountability. The fourth section is focused on alternative institutional mechanisms and pragmatic responses that occur outside the formal scope of the UN Security Council yet can contribute to the protection of the civilian population in the digital context. The conclusion synthesizes the findings and returns them to the normative horizon of protection and justice.

2. IHL IN CYBER CONTEXT: NORMS AT THE INTERSECTION OF PHYSICAL AND DIGITAL

International humanitarian law (IHL), as a legal framework that governs behaviour during armed conflicts, is based on a number of fundamental principles: distinction, proportionality, military necessity, humanity, prohibition of unnecessary suffering and limitation of means and methods of warfare. These principles, although developed in the context of conventional conflicts, have universal weight – they apply to all forms of warfare, including those that take place in cyberspace.¹

The principle of distinction requires that a clear distinction be made at all times between military objectives and civilian objects. In the digital domain, that boundary is often blurred: infrastructure, such as electricity distribution, hospitals or communication networks, has a dual function. An attack on such systems, even when directed at military facilities, can produce disproportionate damage to civilians.²

1 ICRC. (2023, March 7). *Towards common understandings: the application of established IHL principles to cyber operations*. (2025, June 5) Retrieved from: <https://blogs.icrc.org/law-and-policy/2023/03/07/towards-common-understandings-the-application-of-established-ihl-principles-to-cyber-operations/>

2 Farid, F. S. (2023–2024). The principles of distinction and proportionality in international humanitarian law. *Hull Law Review*, 1, 9–14, pp. 9–11. Retrieved from: <https://www.hlr.wordpress.hull.ac.uk/wp-content/uploads/2024/09/Hull-Law-Review-Vol-1-2023-24-Farah-Principles-of-Distinction-and-Proportionality.pdf>

Proportionality dictates that attacks whose expected civilian losses are disproportionate to the expected military advantage be avoided. In cyber operations, however, predicting the consequences is difficult: a digital attack on the energy system can cause chain effects – from shutting down hospitals to jeopardizing water supplies – further complicating the assessment of proportionality.³

Military necessity permits the use of only those means necessary to achieve a legitimate military objective. However, even when an attack is technically feasible and militarily useful, it must be consistent with humanitarian constraints. This principle cannot be used as a justification for measures prohibited by other rules of IHL.⁴

Humanity and the prohibition of unnecessary suffering further limit the use of means that cause excessive or unavoidable suffering, even when directed against legitimate military objectives. In the cyber context, this could include, for example, attacks that cause long-term psychological consequences for civilians, or that prevent access to basic services such as healthcare.⁵

Tallinn Manual 2.0, as the most comprehensive attempt to systematize international law in the cyber domain, confirms that IHL applies to cyber operations during armed conflicts. However, the expert group that worked on this document acknowledges that many questions remain open – including when a cyber-attack meets the threshold of an “attack” in the sense of IHL, and how damage is assessed in the digital environment.⁶

In practice, digital operations targeting civilian infrastructure show that the line between cyber incidents and actions that produce effects comparable to armed conflicts is becoming increasingly blurred. Cyber-attacks on systems vital to health, safety, and dignity of civilians – such as hospitals, water supplies, or energy grids – can create consequences that are humanitarian in nature, even in the absence of physical force. Nevertheless, the international legal community has not developed a unified response to this type of jeopardy: it remains uncertain whether such operations meet the threshold of application of international humanitarian law, and the mechanisms for attributing responsibility remain fragmented and operationally weak.^{7, 8}

Thus, although IHL formally covers cyber operations that take place in the context of armed conflicts, its application in the digital space remains based on interpretation, without a solid institutional support that would enable consistent application and sanctioning of violations.

3 *Ibid.*, pp. 11–13.

4 ICRC. (2022). *The Principles of Humanity and Necessity*. (2025, June 5) Retrieved from: https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/02_humanity_and_necessity-0.pdf

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6 Schmitt, M. (Ed.). (2017). *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Cambridge University Press.

7 ICRC, 2023, *op. cit.*

8 United Nations, 2021, *op. cit.*

3. UN SECURITY COUNCIL: INSTITUTIONAL POTENTIAL AND POLITICAL LIMITATIONS

The UN Security Council, as a body primarily responsible for preservation of international peace and security, has formal competences that, even theoretically, could include cyber-attacks with serious humanitarian consequences. The UN Charter⁹ anticipates the possibility of reacting in cases of “threats to the peace, violations of the peace and acts of aggression” (Article 39) and in such situations reaction could include political statements, economic sanctions, and even the use of force (Article 42). However, cyberspace and its specific dynamics raise a number of questions regarding the practical applicability of these mechanisms.

Formally, the UN Security Council is not excluded from acting in the digital domain. Nothing in the UN Charter limits its jurisdiction to physical areas or conventional weapons. In theory, a massive cyber-attack that paralyzes the health care system, disables critical infrastructure networks, or produces prolonged insecurity for the civilian population could qualify as a “threat to the peace” and thereby trigger Chapter VII mechanisms. However, in practice, the UN Security Council’s responses to such incidents have been lacking – not only due to normative vagueness, but also due to deep political divisions within the body itself.

As the previous attempts to formalize digital security within the UN have shown, the issue of cyber conflict is rapidly transitioning from legal to geopolitical level. The permanent members of the UN Security Council, who have the right of veto, are also some of the main actors in the cyber domain, which further relativizes the possibility of joint action. There is no consensus even on the definition of a cyber-attack that would require a collective response, let alone on the specific measures that the UNSC could undertake in order to determine responsibility, which further complicates the institutional application of international law norms pertaining to the digital domain.¹⁰

In a formal sense, the UN Security Council has the capacity to adopt binding resolutions, establish investigative mechanisms, introduce targeted sanctions and, in exceptional cases, support the establishment of ad hoc tribunals. However, its effectiveness in this domain in practice depends primarily on the political will of the permanent members, and not on legal powers. Without minimal political consensus, institutional potential remains unused, and so responsibility for cyber-attacks with humanitarian consequences continues to be displaced from the domain of justice and float somewhere between technical attribution and political silence.

9 United Nations. (1945). *Charter of the United Nations and Statute of the International Court of Justice*. (2025, June 7) Retrieved from: <https://www.un.org/en/about-us/un-charter/full-text>

10 Madubuike-Ekwe, J. N. (2021). *Cyberattack and the Use of Force in International Law*. *Beijing Law Review*, 12, 631–649, pp. 634–637. (2025, June 7) Retrieved from: <https://www.scrip.org/journal/paperinformation.aspx?paperid=109577>

4. ALTERNATIVE APPROACHES AND PRAGMATISM OF INSTITUTIONAL RESPONSIBILITY

Under the circumstances where the UN Security Council is demonstrating a limited ability to act in the event of serious cyber incidents, alternative institutional and normative models for interpretation and application of the rules of international humanitarian law are increasingly attracting attention. Instead of a formal threshold for a collective reaction, partial responses that combine elements of a legal, political and technical approach appear often more and more.¹¹

One type of such development is relying on specialized agencies and mechanisms within the UN system, such as UNIDIR, or the ICRC, which do not have the binding force of UN Security Council decisions, but contribute to building normative clarity through the so-called “law through practice”. By expressing their positions on the principles of distinction, proportionality, protection of the civil infrastructure and attribution of conduct in cyberspace, these actors form an expert consensus that becomes relevant even in the absence of political unity.

The second direction is represented by initiatives coming from the states themselves and regional organizations – such as the “Paris Call for Trust and Security in Cyberspace”¹² or the OSCE’s trust-building measures.¹³ Although they lack legal binding, they allow for a somewhat coordinated action and serve as platforms through which different expectations regarding responsibility in cyberspace are articulated. In this sense, they are more of an indicator of will than an instrument of action, but it is precisely therein that their potential lies.

In the third, pragmatic layer, an increasing role is played by transnational professional networks, which, though not introducing norms, provide infrastructure for rapid recognition, attribution and response to digital incidents with humanitarian implications.¹⁴ They function below the threshold of formal responsibility, but can have a significant influence on the behaviour of states through reputational mechanisms.

To summarize, the absence of a centralized response does not mean the absence of institutional dynamics. On the contrary, the fragmentation of mechanisms opens up space for normative adaptation in which relevance comes not only from legal obligation, but also from convergent practice.¹⁵ Although this does not guarantee the protection of victims in

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12 République française. (2018). *Paris Call for Trust and Security in Cyberspace*. Ministry for Europe and Foreign Affairs. (2025, June 10) Retrieved from: https://www.diplomatie.gouv.fr/IMG/pdf/paris_call_cyber_cle443433-1.pdf

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15 Convergent practice means a process in which different international actors – especially states and expert institutions – develop similar patterns of behavior, normative attitudes or operational approaches in

the moment of crisis, it at least allows building foundations for more responsible behaviour of actors – and provides instruments to open space in the digital domain for future legal regulation, instead of waiting for its late arrival.

5. CONCLUSION

In the absence of a clear institutional response and formal international consensus, the legal regime for the use of force in cyberspace remains fragmented – both conceptually and operationally. The boundary between the use of cyber means as a hostile act, use of force and armed attack still depends on interpretive models, while concepts such as distinction, proportionality, special protection and even neutrality suffer the burden of technical indeterminacy. In such a landscape, the UN Security Council has been acting less and less as the final interpretive authority, while a number of parallel practices has been appearing more and more – from regional initiatives and “calls for trust”, to professional networks with reputational capacity and informal modes of cooperation.

What appears to be a weakness in the international legal sense – absence of formal obligation, diffusion of actors, normative flexibility – in the political-operational sense can represent exactly what enables institutional adaptation and response in real time. This, paradoxically, creates a space in which emerging law is not the result of an elite agreement, but the result of the cumulative practice of actors who have not formally agreed, but act, speak and react similarly enough to ultimately shape the expected standard of behaviour.

Therefore, instead of looking for an unequivocal answer that will not come, perhaps we should take seriously exactly what seems transitional, temporary, and even informal. In cyberspace, law is written less and assumed more. Precisely because of this, any effort toward institutional accountability, however fragmented, remains important not because of the structures themselves, but because of those who these structures must protect: civilians.

a certain area, although without a formal agreement or binding instrument. Such practice does not produce law in the technical sense, but it can contribute to shaping the expected standards of behavior and guide the interpretation of existing norms. See: Green, A. (2021). *The Precarious Rationality of International Law: Critiquing the International Rule of Recognition*. *German Law Journal*, 22(8), 1613–1634, pp. 1615–1617. (2025, June 10) Retrieved from: <https://www.cambridge.org/core/journals/german-law-journal/article/precious-rationality-of-international-law-critiquing-the-international-rule-of-recognition/A6BB982F76A98C9366B91F63AC2250B7>



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PRAVDA U SAJBER SUKOBIMA: ULOGA SAVETA BEZBEDNOSTI UN U OBEZBEĐIVANJU ODGOVORNOSTI ZA KRŠENJA MHP

Apstrakt:

S obzirom na njihovu sposobnost da ozbiljno ugroze civilno stanovništvo i vitalnu infrastrukturu, sajber napadi predstavljaju sve veću pretnju svetskoj bezbednosti. Iako međunarodno humanitarno pravo (MHP) nudi osnovu za zaštitu civila i ograničavanje sukoba, njegova primenljivost u sajber prostoru ostaje nedovoljno definisana. U ovom radu se istražuje funkcija Saveta bezbednosti Ujedinjenih nacija (SB UN) u garantovanju odgovornosti za kršenja MHP u sajber operacijama. Kvalitativnom analizom institucionalnih i pravnih alata koje Savet bezbednosti UN može da koristi (rezolucije, sankcije, *ad hoc* sudske procedure i dr.), kao i ispitivanjem relevantnih incidenata sajber napada sa ozbiljnim humanitarnim implikacijama, u radu se ističu važna pitanja, uključujući ona o nadležnostima, suverenitetu i političkim ograničenjima u primeni međunarodnog prava. Cilj rada je da sagleda mogućnosti Saveta bezbednosti, uz saradnju sa drugim telima UN, za prevazilaženje ovih izazova, radi obezbeđenja efikasnog pripisivanja odgovornosti za sajber incidente i time poboljšanja međunarodnog sistema zaštite i ostvarivanja pravde za žrtve. U radu se zaključuje da takve mogućnosti ne samo da postoje, već i da jačanje autoriteta Saveta bezbednosti ima veoma važnu ulogu u izgradnji pravednog mehanizma utvrđivanja odgovornosti u sajber sukobima, a u cilju zaštite standarda MHP i obezbeđivanja pravde za žrtve.

Ključne reči: međunarodno pravo, sajber bezbednost, pripisivanje odgovornosti, UN mehanizmi, civilna infrastruktura

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PERSONALITY TRAITS OF GIRLS WITH DELINQUENT BEHAVIOR

Abstract:

Background. The issues of preventing and correcting illegal behavior require the creation of effective approaches and tools for working with scientifically sound goals of psychological and pedagogical influence. At the moment, studies representing significant differences in the assessment of the target of prevention in girls and boys are scarce. **Objectives.** The aim of the study is to determine the risks of developing a destructive personality in a girl with delinquent behavior in order to identify targets for prevention and correction. **Study Participants.** Pupils of special closed-type educational institutions (Russian Federation), of which: group "Girls": N=60, Mage=15,25; group "Boys": N=75, Mage=15,2. **Methods.** A psychodiagnostic battery of 8 methods developed on the basis of six components of the life position of a teenager with delinquent behavior (Bonkalo S.V., 2012). Statistical criteria: descriptive statistics, Kolmogorov-Smirnov criteria, Mann-Whitney criteria, Spearman correlation coefficient; closeness of connection was established according to the Chaddock criterion. **Results.** The data on the presence of 11 significant differences (out of 58 studied features) in the personality structure of boys and girls were obtained. The set of results allowed identifying the main risks of the formation of girls' destructive life position, describing the personality profile of special closed-type educational institutions girl-pupil. **Conclusions.** The identified risks (low level of resilience,

risk of impaired need for control, low self-esteem combined with high global self-esteem) should become the basis for the development by specialized specialists of correctional and preventive programs, the target beneficiaries of which are exclusively female juvenile offenders.

Keywords: *life position model, childhood socio-psychological risks, delinquent behavior, adolescents*

INTRODUCTION

Many years ago, within the framework of the strategy of actions in the interests of children for the period 2012-2017 (Russian Federation), the need to transform approaches to justice and prevention of social risks in the context of childhood was identified. In particular, attention was focused on conducting scientific research in the field of psychology of deviant behavior, as well as on the development of methods of influence alternative to punishment for minors who have committed offenses. According to the data of the Ministry of Education of the Russian Federation as of June 2025, there are 15 special educational and correctional institutions of a closed type (hereinafter – SECI CT) operating in the country, located in various regions. These institutions house approximately 700 minors, mainly young men aged 11 to 18 years, demonstrating deviant and delinquent behavior. Placement in SECI CT is carried out on the basis of a court decision. The main objective of the activities of the SECI CT is to ensure comprehensive psychological, medical and social rehabilitation of children and adolescents with deviant behavior. General education and vocational training are also provided within the framework of these institutions.

Despite the measures taken by the state to prevent juvenile delinquency, the need for specialized organizations aimed at providing assistance to children with special conditions of upbringing and education remains unmet. The activities of both open and closed SECIs remain relevant.

As practice shows, in recent years, SECI s have been introducing updated programs of socio-psychological support and education, including both traditional and innovative methods that have proven their effectiveness. In this context, the results of scientific research that contribute to the development of targeted educational programs that take into account, for example, the gender characteristics of the child, are of particular importance.

RESEARCH PROGRAM

Statement of the problem

The life position study, designated in this study as its object, is a complex interdisciplinary problem with deep historical roots. In the context of psychological sciences, this direction did not immediately receive full development. Initially, the study of the life position of an individual was carried out within the framework of a pedagogical approach, which is confirmed by the works of such researchers as A. Pavilenis, O. Nguyen Shi Dung, I.K. Ten, V.E. Gurin, T.V. Popova, V.P. Bederkhanova and others. The multifaceted nature of the phenomenon of life position determined its preliminary study at the philosophical level. In particular, such philosophers as V.E. Frankl, E. Fromm, E. Mounier, K.A. Albukhanova-

Slavskaya, who analyzed the development of man and civilization from the point of view of his positioning in society, made a significant contribution to the study of this issue.

At the socio-psychological level, the problems of determining a person's place in society and his positioning were studied by such scientists as B.G. Ananyev, V.N. Markin, A.V. Mudrik, A.S. Kon and others. Internal modes of personality positioning at the psychological level were described in the works of V.N. Myasishchev, A.N. Leontiev, V.I. Slobodchikov, S.L. Rubinstein and other researchers. The phenomenon of the life position of adolescents with delinquent behavior was fundamentally studied in the dissertation work of S.V. Bonkalo, which made it possible to expand scientific understanding of this aspect. The psychology of deviant, including delinquent, behavior also has a solid scientific basis, represented by research in various scientific fields, such as medicine, jurisprudence, sociology, pedagogy and psychology. In the field of psychological sciences, this area was studied by I.S. Kon, V.N. Kudryavtsev, A.R. Ratinov, A.A. Rean and other scientists. An invaluable contribution to the development of pedagogical approaches to working with delinquent adolescents was made by A.S. Makarenko, V.F. Morgun, M.I. Rozhkov, K.V. Sedykh and other researchers.

A separate direction, connected with the peculiarities of pathological reactions of minors with deviant behavior, was developed by A.E. Lichko, E.N. Kondrat, V.A. Guryeva, Ya.I. Gilinsky, V.D. Mendelevich and other scientists. In foreign literature, considerable attention was also paid to the problems of delinquent behavior, which is confirmed by the works of such authors as A. Eichhorn, R. Burgess, A. Cohen, C. Lombroso, G. Sullivan and others. Despite the deep and extensive study of the problems of deviance, including asociality, antisociality and delinquency, there is a clear lack of fundamental research at the level of developing theories and models concerning the destructive life position of minors in SECI.

The conducted analysis of theoretical works allowed us to outline the following area of problems:

1. There is insufficient theoretical and empirical development of the phenomenon of the life position of adolescents with delinquent behavior within the framework of psychological sciences. According to the target search on the resource "Dissercat.ru", about 10,000 studies were found for the request "life position", of which no more than 13% relate to psychological sciences. Most of the studies were carried out in the field of pedagogical sciences, and works on philosophy, sociology, history, biology and literature are also presented.
2. There is an obvious shortage of psychological studies devoted to the life position of minors with deviant and delinquent behavior who are in a difficult life situation. No more than 20 dissertations and doctoral studies devoted to this topic were identified (for the Russian Federation - authors' note).
3. Russian scientific works do not consider the issue of diversification of educational, correctional and (re)socializing programs in SECI CT depending on the gender of the pupils. The recommendations proposed for implementation in the socio-psychological and educational work of SECI CT are of a general, gender-undifferentiated nature. Thus, it can be stated that there are significant gaps in the theoretical and empirical study of the phenomenon of the life position of delinquent adolescents in SECI CT, as well as in the development of differentiated programs for their education and correction.

RESEARCH APPARATUS

Objectives. The aim of the study is to determine the risks of developing a destructive personality in a girl with delinquent behavior in order to identify targets for prevention and correction.

The object of the study is the life position of minors with delinquent behavior. **The subject of the study** is the personality profile of pupils of special closed-type educational institutions, compiled on the basis of the life position model.

Research hypothesis: socio-psychological features of the life position of adolescents with delinquent behavior have significant differences in boys and girls. In other words, the main hypothesis of the study is based on the assumption of the presence of significant differences in the structure of the life position of girls and boys in special closed-type educational institutions.

The methodology of the empirical study was based on the model of life position of adolescents with delinquent behavior by S.V. Bonkalo (see model components in Table 1)¹ [1].

Study Participants. Pupils of special closed-type educational institutions (Russian Federation), of which: group "Girls": N=60, $M_{age} - 15,25$; group "Boys": N=75, $M_{age} - 15,2$. Methods.

Research methods and techniques

Theoretical: Analysis, synthesis, systematization, induction, deduction.

Empirical: A fact-finding experiment in comparison groups, including the use of a psychodiagnostic method (self-reporting methods), a survey method (to obtain sociodemographic data).

The following psychodiagnostic methods were used to study the hypotheses put forward in this work (Table 1):

1 Bonkalo, S. V. (2012). Model' formirovaniya zhiznennoy pozitsii delinkventnykh podrostkov [Model of life position formation in delinquent adolescents]. Chelovecheskiy kapital, 1 (37), 135–137.

Table 1. Psychodiagnostic research methods in relation to the components of the life position of a delinquent teenager (according to Bonkalo S.V., 2012) [1]

Model component	Methodology for component studying	Characteristics under study
Behavioral	“The Vitality Test” (short version) ¹ .	Involvement; Control; Risk taking
Emotional	“Self-attitude questionnaire” ² .	An integral indicator of the feeling “for” or “against” oneself. “Self-esteem; Autosympathy; expectation of a positive attitude from others; Self-interest. Self-confidence; Attitude of others; self-acceptance; self-management; Self-blame; Self-interest; Self-understanding”.
Axiological	“Ostracism Experience Scale” (adolescent, youth), OES-AY ³ .	“Ignoring; Exclusion; Rejection”.
	Ostracism Threatened Needs Scale (Adolescent, Youth), OTNS-AY ⁴ .	“The need to belong; The need for self-esteem (level of self-esteem); The need for control; The need for a meaningful existence”.
Acmeological	“Style of behavior self-regulation questionnaire - SBSR-2020” ⁵ .	“General level of self-regulation. Goal planning; Modeling significant conditions for achieving goals; Programming actions; Evaluating results; Flexibility; Reliability; Persistence”.
Existential	“The Test of Meaningful Life Orientations” ⁶ .	“General indicator of meaningfulness of life. Goals; Process; Result; Locus of control – Self; Locus of control – Life”.
Cognitive	Methodology for diagnosing dispositions of violent extremism ⁷ .	Integral indicator (inclination). “The cult of force; Acceptability of aggression; Intolerance; Conventional coercion; Social pessimism; Mysticism; Destructiveness and cynicism; Protest activity; Normative nihilism; Anti-intraception; Conformism”.
	“Strategies for Coping with Stressful Situations” by S. Hobfoll (SACS) (adapted by N.E. Vodopyanova, E.S. Starchenkova, 2009) ⁸ .	“Assertive actions; Entering into social contact; Seeking social support; Cautious actions; Impulsive actions; Avoidance; Indirect actions; Antisocial actions; Aggressive actions”.

Mathematical and statistical:

In order to obtain reliable results in this study, the following criteria for quantitative data processing were used: - for a general description of the characteristics of the sample (by comparison groups) - the descriptive statistics method; - to identify differences between two independent samples (comparison groups) - the U Mann-Whitney criterion; - to check the normality of distribution - the Kolmogorov-Smirnov criterion; - to study the tightness of the correlation links of the studied features - the Spearman correlation coefficient; the tightness of the relationship was established using the Chaddock criterion.

RESULTS

The main hypothesis of the study was tested on the basis of multilevel empirical analysis. To test the hypothesis H2 (additional), in which we assume that socio-psychological components in the structure of the life position of pupils of special closed-type educational institutions of both sexes have significant differences, we used the Mann-Whitney U criterion to identify differences between two independent samples (the subgroup "Boys" and the subgroup "Girls"). Testing for normality of distribution using the Kolmogorov-Smirnov criterion showed that both samples were not distributed normally. In this regard, the Mann-Whitney U criterion was determined, and later - the nonparametric Spearman rank correlation coefficient.

Significant differences were recorded only in 11 of the 58 measured characteristics, i.e. in the following components of life position: Акмеологический (Гибкость $p=0,018$), Когнитивный (Культ силы $p=0,002$, Интолерантность $p=0,000$, Конформизм $p=0,003$, Вступление в социальный контакт $p=0,000$, Поиск социальной поддержки

- 1 Osin, E.N., Rasskazova, E.I. (2013). Kratkaya versiya testa zhiznjestojkosti: psihometricheskie harakteristiki i primeneniye v organizacionnom kontekste [A short version of the hardiness test: psychometric characteristics and application in an organizational context]. Bulletin of Moscow University. Series 14. Psychology, 2, 147–165. (in Russ.).
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$p=0,000$, Осторожные действия $p=0,031$), Эмоциональный (Самоинтерес $p=0,020$, Самопринятие $p=0,002$, Самоинтерес_субшкала $p=0,034$), Поведенческий (Контроль $p=0,044$).

The next step in testing the main hypothesis was to study the additional hypothesis H3 about the presence of correlation links at the same level in the comparison groups has different substantive and quantitative characteristics. When analyzing the obtained data on 58 features (8 methods), we used the nonparametric Spearman criterion. The normality of the sample distribution was described above. This criterion evaluates the tightness (strength) and direction of the correlation link between two features. Due to the large number of paired comparisons (1682), we analyze only “high” and “very high” correlations in terms of strength, i.e. > 0.7 (according to Chaddock). The correlation analysis in the group of girls showed slightly different results compared to the group of boys. The indicators with a large number of links include not only the “general indicator of meaningfulness of life” and “resilience”, but also “global self-attitude”. In other words, girls have not two (as boys have), but three correlation cores that attract the greatest number of peripheral features.

Moreover, two negative relationships are observed: between the “Need for self-esteem” (violation of this need) and “Self-esteem” (-0.739) and between “Autosympathy” and “Self-blame” (-0.878). This means that the more the need for self-esteem is violated, the lower the level of self-esteem; and the higher the autosympathy, the lower the self-blame and vice versa.

It is important to note that, unlike the group of boys, the group of girls has more strong correlations associated with the “Self-Relationships” questionnaire, in particular the scales “Global self-esteem”, “Self-esteem”, “Autosympathy”, “Self-acceptance”, “Self-blame”.

The above results of confirming additional hypotheses give grounds to assert the fact of confirmation of the main hypothesis. Thus, it seems possible to present a “personality portrait” of pupils of special closed-type educational institutions, which reveals significant differences by gender. Girls have significant characteristics in the model of their life position, different from boys, namely: in the acmeological, cognitive, emotional and behavioral components. In the part concerning the existential and axiological components of the life position, significant differences between the sexes were not recorded.

To describe the profile of a pupil of the special closed-type educational institutions, the method of average values was used. The results of the weighted average values in the studied sample ($N = 60$) are presented in Figure 1.

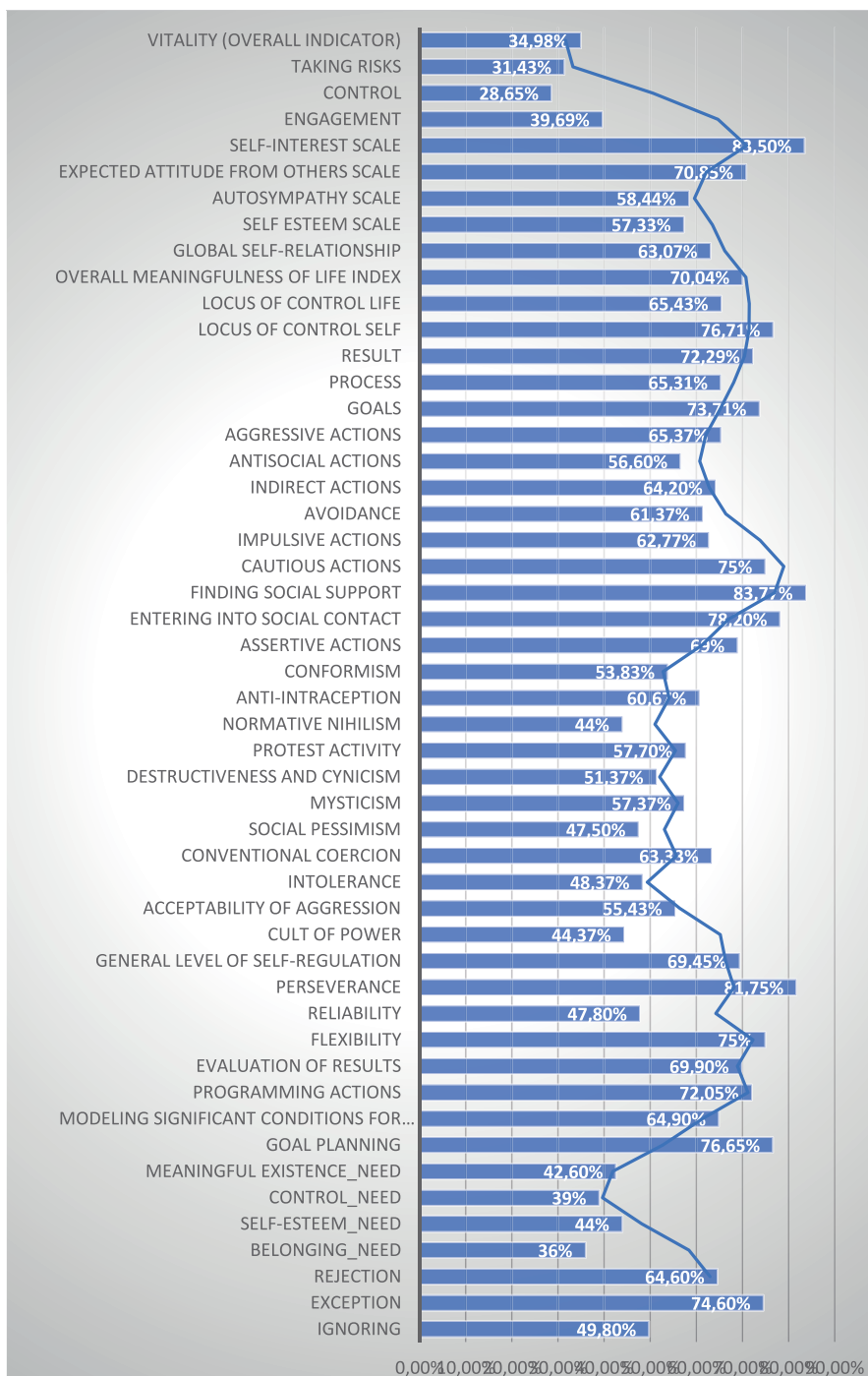


Figure 1. General profile of the life position (personality) of a SECI CT girl-student (with a trend line)

CONCLUSION

1. The socio-psychological features of the life position of adolescents with delinquent behavior of both sexes have both significant differences and common structure-forming elements.

General: Both boys and girls have a fairly high psychological resourcefulness, implying the presence of strong correlation links between individual components of the interdependent components of their life position. It was also established that the core of the psychological resourcefulness of pupils of both sexes is the same, this is resilience and life orientations. The peripheral resourcefulness of girls is built on close connections around global self-attitude, self-respect, and in boys - on the general level of self-regulation, purpose, involvement.

Significant differences were found in the cognitive, behavioral, acmeological and emotional components of their life position.

2. Based on the described portrait of a pupil of the SECI CT, the main risks of the formation of a destructive life position of girls are identified:

R1 - a low level of resilience, which involves the use of non-constructive coping in difficult life situations, under stress (and their level of development is very high: indirect actions (manipulation) and aggressive actions); a subjective feeling of rejection and exclusion; fear of learning a new prosocial experience.

R2 - a violation of the need for control (of one's life, the right and opportunity to make decisions in one's life independently). There are two unfavorable development scenarios: withdrawal into learned helplessness or an attempt to regain the right to make decisions in life by forceful, provocative means;

R3 - low self-esteem combined with high global self-esteem (understanding oneself as a very interesting person) can lead to the actualization of the affiliation need and joining destructive groups, where the level of self-esteem can be quickly increased by forceful methods (the disposition "cult of force" is also in trend) or to the construction of unrealistic plans for the future, which will not be supported by due investment in one's personal development, education, competencies, skills, etc., which will ultimately lead to an increase in risk No. 2. 3.

The identified risks must be taken into account when developing corrective (educational, socio-psychological, pedagogical) programs aimed at a female audience. In this way, it is possible to increase the effectiveness of the corrective impact, making it extremely targeted in its direction.



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ОСОБИНЕ ЛИЧНОСТИ ДЕВОЈЧИЦА СА ДЕЛИНКВЕНТНИМ ПОНАШАЊЕМ

Апстракт:

Релевантност. Питања спречавања и исправљања незаконитог понашања захтевају стварање ефикасних приступа и алата за рад са научно обоснованим циљевима психолошко-педагошког утицаја. У овом тренутку, студије које представљају значајне разлике у процени циљева превенције код девојчица и младића су дефицитарне. **Циљ студије** је да се утврде ризици развоја деструктивне личности код девојчице са делинквентним понашањем како би се идентификовали циљеви за превенцију и корекцију. **Учесници студије:** Ученици посебних образовних установа затвореног типа (Руска Федерација), од којих: Група „Девојке“ N=60, Mage=15,25; Група „Дечаки“: N=75, Mage=15,2. **Методе.** Психодијагностичка батерија од 8 метода развијена је на основу шест компоненти животне позиције тинејџера са делинквентним понашањем (Бонкало С.В., 2012). Статистички критеријуми: дескриптивна статистика, Колмогоров-Смирновљеви критеријуми, Ман-Витнијеви критеријуми, Спирманов коефицијент корелације; блискост повезаности утврђена је према Чадоковом критеријуму. **Резултати.** Добијени су подаци о присуству 11 значајних разлика (од 58 проучаваних карактеристика) у структури личности дечака и девојчица. Скуп резултата омогућио је идентификовање главних ризика формирања деструктивне животне позиције девојчица, описујући профил личности ученице у специјалним образовним установама затвореног типа. **Закључци.** Идентификовани ризици (низак ниво отпорности, ризик од смањене потребе за контролом, ниско самопоштовање у комбинацији са високим глобалним самопоштовањем) требало би да постану основа за развој програма корекције и превенције од стране специјализованих стручњака, чији су циљни корисници искључиво малолетне преступнице женског пола.

Кључне речи: модел животне позиције, социјално-психолошки ризици детињства, делинквентно понашање, адолесценти

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CURRENT TRENDS IN CRIMINAL LAW

UDC: 347.93:004
DOI: 10.5937/PDSC25370V

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DIGITAL EVIDENCE IN COURT PROCEEDINGS
– Between Law and Justice –

Abstract:

Digital evidence represents any information that has evidential value, can be transmitted electronically, and stored. Information technologies are rapidly evolving and significantly altering the way communication is conducted. In professional literature, various definitions of digital evidence exist. Today, computers are increasingly being used as either the instrument or the target of criminal offences. Therefore, in the combat against modern forms of crime, knowledge of digital evidence is essential, along with the existence of specific rules and procedures for its detection and collection by information technology experts. Digital forensics deals with digital evidence and is based on the principle of legality – meaning that digital evidence may only be collected on the basis of a court order. Key issues include: who is responsible for the right to privacy? How can one determine whether there is an overriding interest that justifies the use of digital evidence obtained without the person's knowledge? In other words, does this constitute a violation of the right to privacy? This paper will underscore the significance of digital evidence in court proceedings, with reference to the opinions and case law of the European Court of Human Rights.

Keywords: *digital evidence, legality, collection, assessment, European Court of Human Rights.*

INTRODUCTION

Today, in modern society, computers are an indispensable tool that has completely changed the way we work, creating new forms of labour. Although they have many advantages when used for “positive” purposes, they also have their downsides when used to commit criminal acts.

Modern forms of crime, due to their specific methods of execution and the use of signs in a technological sense, are difficult to prove, especially because of the involvement of Internet providers and many other relevant authorities.

The fight against modern forms of crime, especially those in which computers are used as a means or object of the crime, requires knowledge of digital evidence, particularly regarding procedures for its detection, documentation, and collection.

The presentation of digital evidence in court proceedings is an essential part of crime detection and prosecution. In this regard, it is important to know and use computer forensics, which is a *conditio sine qua non* (an essential condition) for uncovering digital evidence and presenting it in legal proceedings.

Digital evidence today occupies an increasingly important place in the prosecution of criminal acts.

THE CONCEPT OF DIGITAL EVIDENCE

In professional literature, various definitions of the term digital evidence can be found.

The most commonly cited definitions are:

*Any data stored or transmitted using a computer that supports or refutes a theory of how an offense occurred, or that addresses critical elements of a criminal act, such as intent or alibi.¹

*Digital evidence is a broad term used to describe any record generated by, or stored on, a computer system that can be used as evidence in a court proceeding.²

*All information of evidentiary value stored or transmitted in digital form.³

*Information or data, stored or transmitted in binary form, that can be used as evidence.⁴

The terms digital and electronic evidence are used interchangeably.

They can generally be classified into three categories:

(I) records that are computer-stored,

(II) computer-generated records, and

(III) records that are partially computer-generated and partially computer-stored.⁵

1 E. Casey (2004), Digital Evidence and Computer crime, Second Edition, Academic Press, p. 40

2 HB 171 (2003), Guidelines for the management of IT evidence, p. 9

3 SWGDE and SWGIT, Digital & Multimedia Evidence Glossary, p. 19

4 Information technology-Security techniques-Guidelines for identification, collection, acquisition and preservation of digital evidence, p. 24

5 HB 171 (2003), Guidelines for the management of IT evidence, p.12

Digital evidence is defined as any data presented in electronic form and obtained in accordance with the law for use as evidence.⁶

Digital evidence must be obtained in accordance with the law; otherwise, it is considered inadmissible in court proceedings.

It can be found in various places, including user devices—laptops, mobile phones, digital cameras, etc. However, digital evidence also includes address books, e-mails, files, and similar data. Digital evidence refers to data that includes sounds, images, and traffic through various forms of communication.

Despite the broad definition of digital evidence, it is essential that its handling in court proceedings be conducted in a way that withstands judicial scrutiny. Only in such cases can it be used in legal proceedings, as digital evidence presents significant challenges in order to be considered legally valid. It is not uncommon for concerns to arise about its reliability, bearing in mind that original content can easily be destroyed, altered, or damaged, which may lead to various forms of manipulation.

LEGAL FRAMEWORK FOR THE USE OF DIGITAL EVIDENCE

The Criminal Code of Montenegro⁷ defines, in accordance with the Convention on Cybercrime⁸, *pojam računarski sistem, podatak i p* the terms computer system, data, and program.

A computer system is considered to be any device or group of interconnected or interdependent devices, one or more of which, depending on the program, performs automatic data processing.

A computer data is considered to be any representation of facts, information, or concepts in a form suitable for processing in a computer system, including programs through which the computer system performs its functions.

A computer program is considered to be a set of organized computer data based on which the computer system performs its functions.

The Criminal Code prescribes criminal offenses related to this matter in Chapter XXVIII – Criminal Offenses Against the Security of Computer Data (Articles 349–354).

The Criminal Procedure Code of Montenegro⁹ regulates the use of electronic data in various ways—both individually and interconnected—that are automatically processed based on programs. A wide range of devices that operate on the principle of automatic data processing are considered to be computers. For the purpose of proving a criminal offense, a search of computers and computer equipment is almost always conducted.

6 Š. Pavlović, (2017), *Criminal Procedure Code*, Third significantly amended, supplemented, and expanded edition, Libertin Publishing, Rijeka, p. 551

7 Criminal Code of Montenegro, “Official Gazette of the Republic of Montenegro,” no. 70/03 ... “Official Gazette of Montenegro,” no. 40/08 ... 123/24

8 Convention on cybercrime in the criminal, signed in Budapest on 23 November 2001

9 Criminal Procedure Code of Montenegro, “Official Gazette of Montenegro,” no. 57/09 ... 54/24

DIGITAL EVIDENCE AND THE EUROPEAN UNION

The European Union is continuously developing and improving cross-border access to digital evidence in criminal cases with the aim of enhancing access to such evidence, while establishing a legal framework for court orders that are directly addressed to legal representatives of service providers, without the involvement of authorities from the member state where the legal representative is located. This was done through the adoption of the Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, as well as the Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

According to these documents, anyone wishing to provide services within the European Union is obligated to cooperate with investigative bodies based on the principle of mutual trust. However, these proposals do not cover “direct access to e-evidence” and “real-time data interception”.

The Proposal for a Regulation of the European Parliament and of the Council on the European Production Order and the European Preservation Order for electronic evidence in criminal matters provides for the use of specific, standardized forms—namely, the European Production Order Certificate (EPOC) and the European Preservation Order Certificate (EPOC-PR). According to this regulation, both orders must be confirmed or issued by the judicial system of a member state to secure or provide information held by a service provider from another jurisdiction, which is needed as evidence in a criminal investigation or criminal proceeding. Both orders may be served to providers of electronic communications services, state networks, websites, and other roaming and web infrastructure service providers, such as IP address registries and domain name registries, or to their legal representatives, if such exist.¹⁰

The European Preservation Order, like the European Production Order, applies to both identified and unidentified perpetrators of criminal offenses and concerns evidence that has already been obtained. The proposal includes safeguards, such as: - it does not apply to real-time interception of telecommunications; - the measure is limited to what is necessary and proportionate to the objectives of the specific criminal proceedings; - it allows service providers to request clarification from the issuing authority, if needed.

*The Proposal for a Directive of the European Parliament and of the Council on establishing harmonized rules for the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings*¹¹ arose from the need to address the differing approaches taken by member states regarding the obligations imposed on service providers in criminal proceedings. These differing approaches could lead to legal uncertainty. Therefore, an obligation was introduced to appoint a legal representative within the Union who will receive, acknowledge, and enforce decisions issued by the competent national authorities for the purpose of collecting digital evidence, especially in criminal proceedings.

10 H. Sijarčić, H. Halilović (2020), *Digital Evidence and the Modern Criminal Procedure*, *Legal Thought*, no. 9–10, Sarajevo, p. 86.

11 Retrieved from <https://eur-lex.europa.eu/legal-content/SL/ALL,uri COM%/AFIN>, on 18 May 2025

DIGITAL EVIDENCE AND THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on the Protection of Human Rights¹² does not contain specific provisions related to digital evidence, although the case law of the European Court of Human Rights has had to deal with such evidence, the particularities of its collection and use, especially ensuring that it does not lead to violations of guaranteed human rights and freedoms.

From the Court's perspective, it is especially important to determine how digital evidence was collected, its evidentiary value, how it is used, and whether it can serve as a basis for a conviction.

a) Collection of Evidence

Digital evidence can be collected in various ways, including through search and seizure warrants or based on surveillance measures, such as the interception of communications, audio and video recording, and the use of tracking devices. If there is no consent for this method of collection, a violation of Article 8 of the European Convention may be raised. This article states, among other things, that everyone has the right to respect for their private and family life, home, and correspondence. Public authorities may interfere with the exercise of this right only if it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

Evidence may also be collected based on the consent or approval of the individual. The consent must be voluntary and not of such a nature that the person giving it felt there was no other option but to allow access.

Evidence collection is also possible without the person's consent, but only in cases where it is necessary in a democratic society and in the interest of national security. In all cases, there must be a legal basis for the collection; otherwise, it constitutes a violation of Article 8 of the Convention.

The collection and processing of digital evidence is handled by computer forensics, which operates under the *principle of legality*, meaning that collection is carried out only on the basis of a court order, and also under the chain of custody, meaning that one piece of digital evidence must not exclude another.

b) Evidentiary Value

According to the European Court, digital evidence can be important when determining whether certain facts can be considered established (either in proceedings before national courts or in proceedings before the European Court of Human Rights). Such facts relate to questions such as - *whether specific individuals were at a particular place at the time of a given event* (e.g., when phone data indicates the whereabouts of individuals at the time of an alleged poisoning)¹³; *whether there was complicity in certain behavior or events* (e.g., video footage shows police facilitating an attack against certain protesters during a demonstration)¹⁴; *whether the behavior of the accused constituted a criminal offense*

12 European Convention on Human Rights, adopted in Rome on November 4, 1950

13 *Application Navalnyy v. Russia*, no. 36418/20 dated 6 June 2023

14 *Application Women's Initiatives Support Group and Others v. Georgia*, no. 73204/13, dated 16 December 2021

(e.g., video footage shows the accused loading drugs into a car)¹⁵; *whether the person resisted during arrest* (e.g., video footage shows the police threatening to break the accused's arm if he does not stay still, after stepping on his feet until entering the police station)¹⁶; *determining how certain consequences occurred* (e.g., the use of satellite imagery to establish whether houses were destroyed by fire or by bombing)¹⁷.

GUARANTEES AND VALIDITY OF DIGITAL EVIDENCE

Digital evidence shall be considered valid and lawful if the principle of equality of arms is respected, and if access is not denied to documents that are necessary for establishing the facts of the case.

The European Court has taken the position that where evidence is very strong and there is no risk of it being unreliable, the need for corroboration with other material evidence is reduced.¹⁸ The court must properly assess the evidentiary value of each piece of digital evidence presented before making a decision.

European Court has not found that relying on electronic evidence to render a conviction, in situations where such evidence was collected without a basis in national law, automatically leads to an unfair trial, in cases such as:

*recordings of telephone conversations (*Schenk v. Switzerland*, no. 10862/84, dated 12 July 1988)

*use of listening devices to record conversations (*Khan v. the United Kingdom*, no. 35394/97, dated 12 May 2000)

*creating video recordings (*Perry v. the United Kingdom*, no. 63737/00, dated 26 September 2002)¹⁹

PRIVACY AND THE USE OF INFORMATION TECHNOLOGY

Privacy is one of the fundamental human rights. The development of new information technologies has led to the creation of systems that enable mass surveillance, monitoring, and wiretapping. The global electronic communication system has become a source of a wide variety of data about individuals. The development of electronic communications raises numerous issues, primarily the protection of citizens' rights to privacy. The issue of privacy has become especially relevant with the use of information and communication technologies and electronic communications.

15 *Application Fejzula and Mazreku v. the Former Yugoslav Republic of Macedonia*, no. 23065/07, dated 31 May 2011

16 *Application Navalnyy and Gunko v. Russia*, no. 75186/12, dated 10 November 2020

17 *Application Georgia v. Russia (II) [GC]*, no. 38263/08, dated 21 January 2021

18 *Application Basak and others v. Croatia*, no. 40429/14 dated 6 June 2019

19 Handbook, Case Law of the European Court of Human Rights on the Use of Electronic Evidence (2024), European Union and Council of Europe, p. 40

The threat posed by technology, and thus to privacy, increases with the use of the Internet, which has both advantages and weaknesses.

Today, the question is often raised whether the disclosure of so-called ‘encrypted communication’ infringes upon the privacy of individuals whose communication has been revealed, especially in cases involving the commission of serious criminal offenses by criminal organizations.

As early as 2016, investigative authorities in Belgium determined that criminal organizations were using encrypted communication via specially created devices and networks (“Ennet con”), while in 2020, French police authorities decrypted the “Encro Chat” network. Since then, the United States, Australia, the Netherlands, and Belgium have discovered and decrypted communications on Sky ECC and ANOM.

The documentation of encrypted communication between members of criminal groups constitutes significant evidentiary material, provided that such evidence is obtained in a manner and under the conditions prescribed by the Criminal Procedure Code. In Montenegro, judicial authorities are conducting criminal proceedings in which the contents of encrypted communications—primarily Sky ECC—have been submitted as evidence. In such cases, certain judicial decisions have already been rendered, including those concerning the imposition and extension of detention, as well as judgments, although such judgments have not yet become final.

The Canadian communication network Sky Global provided service as a provider, and its most notable products included the Sky ECC messaging application. ANOM is a telecommunications company that developed mobile devices with only one functional application, which was pre-installed and used exclusively for encrypted messaging. These devices lacked all other features typical of modern smartphones.

Considering that these communications were used to commit the most serious criminal offenses by criminal organizations, it is considered that individuals in such cases cannot invoke a violation of the right to privacy, as the prevailing interest lies in uncovering serious criminal offenses.

Criminal groups and organizations have demonstrated significant flexibility in “the use of telecommunications technologies”, which has enabled their unlimited networking and connectivity. The identity of users has been protected through *interface* encryption (concealing it to the point of being undetectable), as well as through registration and usernames, which are typically pseudonyms or nicknames. Believing that communication over encrypted networks could not be intercepted, members of criminal organizations communicated completely openly, coordinating and planning the commission of criminal offenses, often providing confirmation in the form of recordings (videos or images, photographs), including the most serious criminal offenses—such as murders, torture, and others.²⁰

Believing that their devices were protected from surveillance, members of criminal groups openly talked and exchanged messages regarding the planning and execution of criminal acts.

20 C. Osborne (2016), Dutch police close Ennetom encrypted communications network, <https://www.zdnet.com/article/dutch-police-arrest-ownwr-of-ennetcom-encryption-network>, accessed on 21 May 2025

LEGALITY OF EVIDENCE OBTAINED THROUGH “ENCRYPTED COMMUNICATION”

The obtaining of electronic-digital evidence from “encrypted communication” raises certain questions, primarily due to the manner in which the evidence is obtained and the source from which it originates.

When deciding on the legality and admissibility of evidence, the method of its acquisition must be known.

According to Article 17 of the Criminal Procedure Code, among other things, it is prohibited to base a court decision on evidence obtained by violating human rights and freedoms prescribed by the Constitution and confirmed by international treaties.

The central issue is the legality of the way data was transmitted to another country, since encrypted communication (digital evidence) is a document obtained through international legal assistance. Namely, there is no other way to obtain this evidence except through international legal assistance. Therefore, the assessment of the admissibility of evidence obtained abroad is of crucial importance.

The legal assessment of the authenticity and reliability of digital evidence depends on the chosen digital forensic process, methods, and tools for each forensic task, as well as the chain of custody of the collected data, which can demonstrate the preservation of data integrity and reliability.²¹

The quality of evidence must be taken into account, which implies considering whether the circumstances under which the evidence was obtained raise suspicion regarding its reliability or accuracy.²²

CONCLUSION

Digital evidence is a type of evidence that differs from other evidence by the form in which the information is incorporated — a digital form. However, in terms of its value, this evidence is equated with physical evidence, although its collection requires special equipment.

Digital evidence is a modern form of evidence that is increasingly used in court proceedings, especially in the prosecution of criminal offenses and their perpetrators. Although legal regulations recognize the possibility of using digital evidence to prove relevant facts in the proceedings, certain difficulties still exist, particularly regarding the framework for its collection—temporary seizure of items, searches, expert examinations, and others.

The lawful acquisition of digital evidence is crucial for its use. Such evidence can be found in various places, including a wide network of usage, and even through “encrypted” communication among members of organized criminal groups. These arise from the process of mass surveillance of an unspecified number of users of this type of communication.

21 R. Stoykova (2022), *Encrochat: The Hacker with a Warrant and Fair Trails*, p.4

22 *Application Allan v. the United Kingdom*, App.N.48539/99 dated 5 February 2003, para. 43

The use of such evidence in court proceedings is a topic that requires special consideration of procedures to ensure authenticity and integrity.

With this type of evidence, the issue of protecting human rights, particularly privacy, arises. Guarantees for the protection of human rights and fundamental freedoms must be respected, and international standards must be ensured in their protection.

The European Convention on Human Rights does not contain specific provisions related to digital evidence, although case law has had to address this issue due to the specific nature of its collection and use, ensuring that its acquisition and use do not lead to unjustified interference with guaranteed rights and freedoms.

International cooperation is of particular importance regarding the access, exchange, and use of digital data. Therefore, the harmonization of norms with other countries represents a *conditio sine qua non* for the success of discovering and proving, as well as using, such digital evidence obtained in this way.

Considering the rapid development of information technology, it is necessary that positive legal regulations keep pace with this development in accordance with international standards.



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DIGITALNI DOKAZI U SUDSKOM POSTUPKU -između prava i pravde-

Apstrakt:

Digitalni dokaz je svaka informacija koja ima dokaznu vrijednost, koja se može prenijeti u elektronskom obliku i uskladištiti. Informacione tehnologije iz dana u dan ubrzano se razvijaju i radikalno utiču na izmjenu načina na koji se komunicira. U stručnoj literaturi postoje različite definicije digitalnih dokaza. Danas se računari sve češće pojavljuju kao sredstvo ili predmet izvršenja krivičnog djela, pa u borbi protiv savremenih oblika kriminaliteta nužno je poznavanje digitalnog dokaza uz postojanje posebnih pravila i procedura u njihovom otkrivanju i prikupljanju od strane stručnjaka informacione tehnologije. Digitalnim dokazima bavi se digitalna forenzika koja za osnovu ima princip zakonitosti-mogućnost prikupljanja digitalnih dokaza isključivo na osnovu odluke suda.

Ključno pitanje je, ko je odgovoran za pravo na privatnost, kako utvrditi pretežniji interes da se digitalni dokaz koji je pribavljen bez znanja tog lica može koristiti, odnosno, da li se radi o povredi prava na privatnost. U radu će se ukazati na značaj digitalnih dokaza u postupcima pred sudom, sa osvrtom na stavove i praksu Evropskog suda za ljudska prava.

Ključne riječi: digitalni dokaz, zakonitost, pribavljanje, ocjena, Evropski sud za ljudska prava.

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ATTACK ON THE CONSTITUTIONAL ORDER (HIGH TREASON) IN THE CRIMINAL LAW OF BOSNIA AND HERZEGOVINA AND COUNTRIES IN THE REGION

Abstract:

In recent months, the public in Bosnia and Herzegovina, above all, but also all others who have been following developments in the country, have been preoccupied with its difficult political and constitutional situation. This is certainly reflected in the daily discourse over the existence of the criminal offense of attacking the constitutional order or colloquially referred to as high treason committed by even the highest political representatives of all three constituent peoples. Due to the broad definition of this criminal offense in our legislation, which has been further complicated by its imposition by K. Šmit has enabled a large number, primarily political representatives, to engage in classifying certain actions of some other politicians in Bosnia and Herzegovina as an attack on the constitutional order. For example, the Vice President of the Republic of Srpska, Ć. Duraković filed a criminal complaint with the Prosecutor's Office of Bosnia and Herzegovina against the Minister of Internal Affairs of the Republic of Srpska, S. Karan, for making threats to attack the constitutional order. According to him, the complaint was based on the provision of Article 156 of the Criminal Code of Bosnia and Herzegovina, which prescribes a minimum prison sentence of at least five years for attempting to alter the constitutional order through the use or threat of force. On the other hand, daily newspaper headlines² testify to an overwhelming eruption of actions by individuals which are, quite unnecessarily, often qualified as the most serious criminal offenses. Otherwise, scientific and expert treatment of this incrimination has been largely neglected today, in both theory and practice, with only a small number of excerpts and scientific works addressing offenses of this nature, particularly those concerning attacks on the constitutional order.³ In addition to the above, it should be emphasized that in legal theory, there is a fairly common view that the acts of committing an attack on the constitutional order and the incitement to its violent overthrow are imprecisely legally defined in most criminal legislations, which may

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² The RS NA has attacked the constitutional order of BiH (Klix news from 27.2.2025); The proposed draft of the RS constitution is an attack on the constitutional order of BiH and a serious danger (BIRN TV live); The Minister of Scientific and Technological Development and Higher Education of the Republika Srpska, Željko Budimir, stated that the political persecution of the President of the Republika Srpska is the greatest attack on the constitutional order of BiH and the Republika Srpska so far, and that all institutions that are part of that order must defend it (RTRS from 26.2.2025)...

³ According to G. Matić, the reasons for this are the political motivation of the perpetrators of these acts, discontinuity with previous legal systems, i.e. freedoms and human rights (more in: Matić, D.G, High Treason in the Criminal Legislation of the Republic of Serbia, National Security Policy, Year XV, Vol. 26, No. 1/2024, pp. 145-164

create certain difficulties in the practical application of the aforementioned criminal laws. This paper will discuss the provisions of Article 156 of the Criminal Code of Bosnia and Herzegovina, as well as other provisions of this law referring to criminal offenses against the constitutional order, as well as other similar provisions contained in the remaining three criminal codes in Bosnia and Herzegovina.

Keywords: *political crimes, attack on the constitutional order, high treason, Bosnia and Herzegovina.*

1. INTRODUCTORY REMARKS

The criminal legislation of Bosnia and Herzegovina today, in accordance with its constitutional structure and distribution of jurisdiction, consists of four separate criminal law systems, namely: Bosnia and Herzegovina, Republika Srpska, Federation of Bosnia and Herzegovina and Brčko District of Bosnia and Herzegovina. This certainly entails the unobstructed coexistence of four criminal codes (similarly, there are also four criminal procedure laws or four misdemeanor), namely: the Criminal Code of Republika Srpska, which entered into force in July 2017; the Criminal Code of the Federation of Bosnia and Herzegovina, which entered into force on August 1, 2003; the Criminal Code of the Brčko District of Bosnia and Herzegovina, which entered into force on July 1, 2003; and the Criminal Code of Bosnia and Herzegovina, which entered into force on March 1, 2003.

All four criminal codes of Bosnia and Herzegovina prescribe criminal offenses against the constitutional order or constitutional structure, i.e. the so-called political crimes, systematized in a separate chapter as extremely serious crimes directed at endangering, undermining or violating the most important values upon which the social and state order, and the political and economic system of Bosnia and Herzegovina, Republika Srpska, the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina are based. Otherwise, these criminal offences fall into the category of political crimes, whose emergence is linked to the formation of the state as an important collectivity, as well as to the need for its protection and the protection of its most significant goods and values. Historically, political crimes appeared very early and they are among the oldest crimes in general. Interestingly, as the forms of government and political systems have changed, along with the content of these offenses and their forms and modes of manifestation, their character as an attack on the specific social and state order has remained unchanged. Given that these criminal offenses are directed at the violation, undermining, or subversion of the most fundamental social values, whose protection and security is of particular concern to the political authorities, they are regarded in all criminal codes as some of the gravest criminal offenses, for which the most severe penalties⁴ are prescribed.

Until the French bourgeois revolution, such criminal offences have been considered as a special category of crimes for which special rules on criminal liability and punishment of their perpetrators applied. The punishments for the perpetrators of these crimes were often very cruel and inhuman. Even in contemporary criminal law, there are also such legislations that distinguish this group of crimes from all others, either by prescribing them

4 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), Commentary on the Criminal Code of the Republic of Srpska, second amended and supplemented edition, Official Gazette of the Republic of Srpska, Banja Luka, pp. 578-607.

in special laws⁵ or by creating special rules on criminal liability and punishment for their perpetrators or by creating special courts to try the perpetrators of these crimes⁶.

2. A BRIEF OVERVIEW OF CRIMINAL OFFENSES AGAINST THE CONSTITUTIONAL ORDER AND SECURITY

The criminal law protection of the state and government has occupied a significant place in the criminal legislation of every country from its very inception. Until the mid-19th century and in the totalitarian regimes of the 20th century, attacks on the state and its government were considered the most serious and morally reprehensible offenses⁷. Accordingly, from the very beginning and at almost every stage of its development, the state has sought to use harsh repression to protect the established constitutional order, the existing system of government and its holders from all attacks that could threaten it⁸. Therefore, it could be said that torts of this type have existed ever since there has been government, the state, and the struggle for power⁹. The content, scope of incriminations and objects of criminal law protection differed in certain historical phases and in certain countries, but they always expressed the efforts of the ruling class to protect its positions as efficiently as possible¹⁰. Relatively severe punishments are prescribed, even at the earliest stage of the emergence of criminal activity, for the commission of criminal offenses directed against the state itself and its very existence¹¹. Although it is quite clear, as is most clearly confirmed by the former socialist states, that the protection of the state ultimately does not depend exclusively on the application of criminal law repression, or that criminal law only plays a secondary role in this, there is still no criminal legislation without criminal offenses of this type¹².

The importance of the goods protected by these incriminations is enormous. However, regardless of the importance of the goods to be protected and the political nature of these acts, it seems absolutely necessary that criminal law protection be carried out here as well while respecting the basic principles of democratic criminal law¹³. In any case, it must be ensured that incriminations that include activities from the preparation stage have the form of clear and precisely defined legal descriptions that must meet the requirements of the principle of legality in terms of determining the legal entities of criminal acts¹⁴. Accordingly, incriminations must be linked to a specific and clearly described human behavior, a specific action, or a specific procedure¹⁵. In addition to the above, no such criminal offense should deviate from the basic principle of *cogitationis poenam nemo patitur* - that no one can be

5 Thus, in the Kingdom of Yugoslavia, a special Law on the Protection of Public Security and Order in the State from 1921, better known as „Obznana“.

6 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

7 Group of authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

8 Ibidem.

9 Ibidem.

10 Ibidem.

11 Group of authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

12 Ibidem.

13 Ibidem.

14 Ibidem.

15 Ibidem.

punished for his opinion, i.e. for his statements and political commitment because it is against the ruling policy and order¹⁶. It is especially important that a person's thoughts, intentions, plans, ways of political action, permitted by the constitution and international law, must remain outside the reach of criminal law, regardless of how often they are unacceptable from the point of view of the ruling policy¹⁷. Otherwise, the principle that the criminal offense is a real, that is, an objective phenomenon of the outside world would not be respected. And finally, as well as from the point of view of today's criminal laws in Bosnia and Herzegovina, especially important is the understanding according to which broad and vague formulations should be avoided in the descriptions of these crimes, especially when it comes to the act of committing the crime, because that important element of every crime must be clearly and precisely defined in every specific case¹⁸.

In Chapter XVI of the Criminal Code of Bosnia and Herzegovina¹⁹ criminal offenses against the integrity of Bosnia and Herzegovina are prescribed. From the very title of this chapter of criminal offences, it is quite clear which fundamental values are protected by this group of criminal offences. Accordingly, the collective object of protection for all these criminal offenses is broadly set and it refers to the constitutional order and security of Bosnia and Herzegovina²⁰. These are acts that mean an attack on the important assets of Bosnia and Herzegovina, that is, on the fundamental institutions of the constitutional order, on its state and social organization. Thus, with these criminal acts, Bosnia and Herzegovina as a whole is directly attacked, essential and highest attributes of its statehood are endangered, such as the form of government and state organization, territorial integrity and security, that is, the independence of Bosnia and Herzegovina. It is, therefore, about objects of protection that include those values which determine the essence of the constitutional and state order of Bosnia and Herzegovina. All this indicates, as already said, the political character of these criminal acts, which stems both from their protective object and from the motive for their execution²¹.

The common consequence of all criminal acts from this group is endangering the aforementioned protection facilities, i.e. endangering the integrity of Bosnia and Herzegovina, i.e. the constitutional order and security of Bosnia and Herzegovina.

16 Ibidem.

17 Ibidem.

18 Ibidem.

19 *Krivični zakon Bosne i Hercegovine*, Službeni glasnik Bosne i Hercegovine, br. 3/2003; 32/2003 - ispr.; 37/2003; 54/2004; 61/2004; 30/2005; 53/2006; 55/2006; 8/2010; 47/2014; 22/2015; 40/2015; 35/2018; 46/2021; 31/2023 i 47/2023.

20 Criminal acts from this group, as the name itself shows, have a double object of criminal protection: 1) constitutional regulation and 2) state security. Most generally, these crimes can be defined as crimes that mean an attack on the internal and external security of the state. Likewise, their division into two groups is most represented: - high treason, as an attack on the state territory, the constitution and the bearers of power (attack on the internal security of the state); and - treason, as an attack on the external security of the state. The classic and best-known examples of treason and high treason are: participating in a war against one's country, attempting to violently overthrow one's government (rebellion), spying and divulging state secrets, handing over secret documents or divulging the secrets of one's army, state officials or diplomats, divulging information from one's intelligence service to an enemy country and foreign forces, and attempting to assassinate or kill the head of state (more in: Matić, G., (2013), *Krivično delo napad na ustavno uređenje u zakonodavstvu Republike Srbije*, *Zbornik radova sa I međunarodnog naučnog skupa*, Evropski univerzitet, Brčko, pp. 149-155).

21 A group of authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

The perpetrator of the largest number of these criminal acts can be any person, both a domestic and a foreign citizen, or a stateless person²². On the other hand, only in the case of a small number of these crimes, the perpetrator is a citizen of Bosnia and Herzegovina (*delicta propria*).

Except for the criminal offense called “*divulging state secrets*”, which is punishable even when committed negligently, all other criminal offenses from this group can only be committed with intent, and some of them exclusively with direct intent (e.g. murder of representatives of the highest authorities)²³.

According to the prescribed punishments, these crimes are among the most serious ones in general, because for some of these crimes, i.e. their most serious forms, the most severe, i.e. long-term prison sentence of 20 to 45 years, is prescribed (that is, long-term prison or even life imprisonment in the Republic of Srpska). When it comes to the ranges of punishments, they are often set too wide and in this respect allow for the individualization of the punishment to a large extent, but they can also lead to arbitrariness and inconsistency of penal policy. Penalties are usually prescribed with only a special minimum, and sometimes both a minimum and a maximum, usually from one to ten years, but also from six months to five years.²⁴

Criminal acts against the constitutional order and security of the Republic of Srpska (Chapter XXII of the Criminal Code of the Republic of Srpska²⁵) are aimed at jeopardizing, undermining or violating the most important values on which the social and state organization and the political and economic system of the Republic of Srpska are based. These are the basic values established by the Constitution of the Republika Srpska, namely: state and social order, economic and political system, organization of state power and state security, which includes its sovereignty and territorial integrity²⁶. Precisely because of this object of protection defined in this way, these criminal acts are called “political crimes”, the origin of which is closely related to the origin of the state and law in general and the need to protect its most important goods and values.²⁷. Classic or general criminal offenses differ from them. The division of criminal offenses into political (evolutionary) and classical (atavistic) was made according to their nature, and it has its basis in the natural law theory

22 Ibidem.

23 A group of authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, str. 523-554.

24 Ibidem.

25 *Krivični zakonik Republike Srpske*, Službeni glasnik Republike Srpske, br. 64/2017; 104/2018 - odluka Ustavnog suda Republike Srpske; 15/2021; 89/2021; 73/2023 i Službeni glasnik BiH, broj 9/2024 – odluka Ustavnog suda Bosne i Hercegovine.

26 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

27 Politeo, I. (1921), *Politički delikt*, Zagreb; Popovci, S. (1985), *Fenomenologija i struktura političke delinkvencije i njeno suzbijanje na Kosovu*, Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, broj 2-3/1985. godine, pp. 3-24; Lazarević, Lj. (1987), *Krivično zakonodavstvo i kontrarevolucionarno delovanje na Kosovu*, Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, broj 1/1987. godine, pp. 3-20; Bavcon, Lj. (1989), *Kaznenopravna zaštita države i njenog društvenog uređenja*, Zagreb; Pihler, S. (1989), *Kaznenopravna zaštita države i njenog društvenog uređenja – politički delikti*, Glasnik AK Vojvodine, Novi Sad, broj 3/1989. godine, pp. 24-29.

of Hugo Grotius.^{28,29} This division also has a practical significance, because the perpetrators of political crimes cannot be extradited to foreign judicial authorities for the purpose of conducting criminal proceedings, that is, for the execution of sentences.

Domestic criminal legislation takes the view that crimes against the constitutional order and security of the Republika Srpska constitute a unique group of acts that are protected: the socio-political order, the political and economic system, the form of political power and the organization and position of the highest state bodies, as well as the external and internal security of the state, sovereignty and territorial integrity³⁰. All these values are so interconnected in such a way that they represent an indivisible whole as an object of protection.

These crimes are, therefore, political crimes. Their political character is determined by two elements: a) object of protection and b) the motives for which they are committed.

The object of protection in the case of these criminal acts is the social and state organization of the Republika Srpska and its security. The motive behind the attack on these values is the intention to endanger the constitutional order or the security of the state. For the existence of the largest number of these criminal offenses, it is important that the act of commission is undertaken by a person who, at the moment of undertaking the act, acts with such intent, regardless of whether this intent was realized in the specific case. The existence of this intention on the part of the perpetrator at the time of undertaking the act of execution also indicates the form of culpability with which the perpetrator acts, which is direct intent³¹.

The sphere of punishable activities in these criminal offenses is set significantly wider than in other, i.e. classical criminal offences. Thus, in addition to the activity defined by law in the sense of the act of execution, a completed deed also exists in the case of the very initiation of this act. This again means that an attempt in the largest number of these criminal offenses is equated with a completed offense. These are acts in which the action consists of an "attempt" to "change the constitutional order" (Article 278 of the CC of the RS), to "separate a part of the territory" (Article 279 of the CC of the RS) or to "bring the state into a position of subordination or dependence" (Article 280 of the CC of the RS)³². On the other hand, for the existence of some of these acts, it is necessary that the act of execution was undertaken in a certain way, namely: a) by the use of force (absolute or compulsive), b) by the threat of the use of force, or c) in another, unconstitutional way³³. This means that the manner of execution of the act is an element of the essence of these criminal acts, which must be included in the intention of the perpetrator.

28 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, str. 193-215.

29 This division also has a practical significance, because the perpetrators of political crimes cannot be extradited to foreign judicial authorities for the purpose of conducting criminal proceedings, i.e. for the execution of sentences.

30 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

31 Marjanović, Đ. (1988), *O statusu političkih zatvorenika*, Godišnjak Pravnog fakulteta u Sarajevu, str. 161-174.

32 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

33 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

Although the Criminal Code of the Republika Srpska from 2017 prescribes the preparation of a criminal offense as a punishable stage, i.e. a phase in the commission of a criminal offense (Article 21 of the Criminal Code of the RS), preparatory actions that are otherwise aimed at creating the conditions and convenience to commit political crimes are provided as independent criminal offenses³⁴. Thus, punishment for preparatory acts is conditioned by the importance of the object of protection. Namely, the protection of the socio-economic, political and state order, and the preservation of the security of the state as a whole or a particular part of it requires that all those activities which can realistically and directly, closely and actually threaten these protected values be incriminated³⁵. A large number of such activities have the character of preparatory actions, which are distant from the immediate act of execution, but which enable its execution in general or execution in an easier, faster, simpler and more efficient way³⁶.

Analogously to the previous one, in the provision of Article 297 of the CC of RS, a special criminal offense is provided under the name: "*Preparation of criminal offenses against the constitutional order of the Republic of Srpska*", which consists of undertaking preparatory actions for the execution of the political offenses specified by law³⁷. In doing so, the legislator himself has determined that the following shall be considered preparatory acts: a) organizing, planning and agreeing with others the commission of a criminal offense, b) procuring or equipping the means for the commission of a criminal offense and c) other acts which create immediate conditions for the commission of criminal offenses³⁸.

In the majority of these criminal acts, the consequence consists in endangering the constitutional order or the security of the Republic of Srpska. This danger most often occurs in the form of an abstract danger, and much less often as a concrete danger³⁹. The consequence of an injury occurs extremely rarely only in some criminal offenses, namely: the murder of a representative of the highest authorities of the Republic of Srpska (Article 281 of the CC RS)⁴⁰.

In the event that, as a result of the act of committing a basic political criminal offense, a more serious consequence has occurred in the form of an injury of greater scope and intensity, or the act of committing the basic offense has been undertaken under particularly aggravating circumstances indicating a greater degree of severity and danger, then stricter punishment is foreseen in the provisions of Article 298 of the CC RS⁴¹.

Regarding the form of culpability, these criminal acts can only be committed

34 Ibidem.

35 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

36 Ibidem.

37 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

38 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

39 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

40 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

41 Ibidem.

with intent. It is most often a matter of direct intention characterized by the intention to endanger the constitutional order or the security of the Republic of Srpska. An exception exists only for the criminal offense of revealing the secrets of the Republic of Srpska (Article 292 of the CC RS), which can also be committed out of negligence⁴².

The perpetrator of these criminal acts can be any person. On the other hand, only a citizen of Republika Srpska (that is, a domestic citizen) can be a perpetrator of criminal acts, namely: a) preventing the fight against the enemy (Article 284 CC RS), b) serving in the enemy's army (Article 285 CC RS) and c) aiding the enemy (Article 286 CC RS). And finally, in the case of the criminal offense called divulging a secret of the Republic of Srpska (Article 292 of the CC of the RS), only a person entrusted with a state secret in the service or in general at work can appear as the perpetrator of the crime⁴³.

3. ATTACK ON THE CONSTITUTIONAL ORDER IN THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

3.1. Attack on the constitutional order in the Criminal Code of Bosnia and Herzegovina before the intervention of K. Šmit

Article 156 of the Criminal Code of Bosnia and Herzegovina prescribes a criminal offense under the name: Attack on the constitutional order, as follows: Whoever, by the use of physical force or the threat of the use of physical force, tries to change the constitutional order of Bosnia and Herzegovina or to overthrow its highest institutions, shall be punished by imprisonment for at least five years.

The criminal offense of attack on the constitutional order or high treason is a basic criminal offense in this group or head of criminal offenses and one of the basic forms of criminal law protection of the constitutional order and security of Bosnia and Herzegovina (similar to the protection of the state in any other legal system)⁴⁴. Such a finding derives from the protective object of this criminal act, given that it includes the most significant, i.e. basic values of Bosnia and Herzegovina as a state union, its constitutional order and its highest bodies, but also from the act of committing this crime, which includes all those activities that attack the constitutionally established order of Bosnia and Herzegovina, and which do not constitute another, i.e. separate criminal offense. It is therefore a general criminal offense against the constitutional order of Bosnia and Herzegovina, and accordingly, all other criminal offenses under this chapter are only special forms of this criminal offense. As such, this criminal offense is of a subsidiary nature and is applied only if the conditions for the application of those other criminal offenses are not met⁴⁵.

42 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

43 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

44 Matić, G., (2013), *Krivično delo napad na ustavno uređenje u zakonodavstvu Republike Srbije, Zbornik radova sa I međunarodnog naučnog skupa*, Evropski univerzitet, Brčko, pp. 149-155.

45 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

This criminal offense consists of an attempt to change the constitutional order of Bosnia and Herzegovina by the use of physical force or the threat of using physical force, that is, to overthrow its highest bodies, i.e. institutions. From a substantive point of view, in this case we are dealing with two protective objects that are functionally connected, and the attack on the constitutional order simultaneously threatens the highest authorities of Bosnia and Herzegovina⁴⁶.

The act of committing a crime is limited to the use of physical force, that is, physical violence. The protective object of this criminal offense is the constitutional order of Bosnia and Herzegovina and the highest authorities of Bosnia and Herzegovina⁴⁷.

As we have already pointed out, according to the object of protection, this political criminal offense appears in two basic forms, with the fact that the first form of the offense consists of an attack on the order established by the constitution, and the second in an attack on the highest authorities of Bosnia and Herzegovina⁴⁸.

a) The first form of the offense includes an attempt to change the constitutional order of Bosnia and Herzegovina through the use of or the threat of using physical force⁴⁹. The enforcement action should be directed at violently changing the constitution of Bosnia and Herzegovina⁵⁰. This is also the main goal of the perpetrator of the criminal act⁵¹.

The consequence of the act is not explicitly specified by law, with the fact that the nature of this criminal offense implies that this criminal offense belongs to the offense of endangerment. Namely, this criminal offense consists in endangering the protected legal interest, i.e. the constitutional order, i.e. in creating a danger to the constitutional order,

46 Ibidem.

47 The terms constitutional order should be interpreted in the sense of the corresponding constitutional provisions governing the constitutional order of Bosnia and Herzegovina. The concept of the highest authorities of Bosnia and Herzegovina should be interpreted in a similar way, and based on the provisions of Article 167 of the CC of BiH, it can be indirectly concluded that the following authorities are involved: both houses of the Parliamentary Assembly of BiH, the Presidency of BiH, the Council of Ministers of BiH and the Constitutional Court of BiH.

48 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

49 The question of completion of the act in the material sense in the case of political crimes is not without importance. Thus, the criminal offense of attacking the constitutional order (Article 308) defined as an attempt, by force or the threat of the use of force, to change the constitutional order of Serbia or to overthrow the highest state authorities, is considered formally completed as already an attempt to achieve such a goal, because the successful overthrow of the highest authorities and coming to power will, as a rule, preclude responsibility under this provision. After all, this was also the case with the October 5 coup (more in: Vuković, I. (2020), *Krivično delo ugrožavanja teritorijalne celine i moguća odgovornost najviših državnih organa*, Pravni fakultet Univerziteta u Beogradu, pp. 149).

50 Change means replacing the existing state system with another one, which would not be based on the current constitutional solutions (for example, changing the monarchy into a republic). At the same time, it is not important what kind of solution one wants to impose. Also, it is not necessary that the activity of the perpetrator is aimed at changing the constitutional system as a whole, it is enough that any of its components are threatened (for example, the parliamentary system, the system of separation of powers, human rights and the like) (more in: Matić, G., (2013), *Krivično delo napad na ustavno uređenje u zakonodavstvu Republike Srbije*, *Zbornik radova sa I međunarodnog naučnog skupa*, Evropski univerzitet, Brčko, pp. 149-155).

51 Matić, G., (2013), *Krivično delo napad na ustavno uređenje u zakonodavstvu Republike Srbije*, *Zbornik radova sa I međunarodnog naučnog skupa*, Evropski univerzitet, Brčko, pp. 149-155.

and it is completed by the mere undertaking of a violent attempt directed at changing that constitutional order⁵². As with other delicts with such a legal entity, this consequence is contained in the very act of commission and it is presumed. Attempting this criminal offense is not possible, because it represents an act of execution, i.e. it is equated with an act of execution⁵³.

b) The second form of this criminal offense is characterized by the fact that it represents an attempt to overthrow the highest authorities of Bosnia and Herzegovina through the use of or the threat of using physical force. The act of execution consists in a violent attempt to overthrow the said authorities. The term "overthrow of the highest state authorities" means preventing these authorities from performing their legal functions for which they were elected.⁵⁴

With regard to the consequence of this criminal offense, everything stated with respect to the consequence of the previous form of this criminal offense shall also apply to this form.

It is necessary to especially emphasize, in relation to both forms of this act that only the violent endangerment of the constitutional order, which includes only physical violence, is incriminated here⁵⁵. It is an important element of this delict that has a limiting effect and practically determines the width and depth of its punishable zone.

The perpetrator of this criminal offense can be any person, while the subjective element of this criminal offense consists of intent. For the existence of this criminal offense, it is necessary that the action of the perpetrator of the offense was aimed at the violent change of the constitutional order of Bosnia and Herzegovina, that is, the overthrow of its highest authorities. It is not of importance what kind of new constitutional order is intended to be established, what matters is that the existing one is intended to be changed⁵⁶.

The punishment prescribed for this criminal offense is imprisonment for at least five years.

The most serious, or qualified, forms of this criminal offense (as well as some other offenses prescribed in this chapter) are provided for in the provisions of Article 169 of the CC of BiH. According to the aforementioned legal norm, these forms exist when more serious consequences arise from the commission of this criminal act or it is committed under special circumstances. More serious consequences may consist of the death of one or more persons, of endangering human life, of serious violence, or of extensive destruction. Negligence is sufficient for the responsibility of the perpetrator in relation to these consequences. The prescribed punishment for the qualified form of this criminal offense is a prison sentence of at least ten years or a long-term prison sentence⁵⁷.

52 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

53 Matić, D.G., Veleizdaja u krivičnom zakonodavstvu Republike Srbije, *Politika nacionalne bezbednosti*, God. XV vol. 26, broj 1/2024, str. 145-164.

54 Grupa autora, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, str. 523-554.

55 Grupa autora, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, str. 523-554.

56 Ibidem.

57 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II,

3.2. Attack on the constitutional order in the Criminal Code of Bosnia and Herzegovina after the intervention of K. Šmit

The aforementioned norm from Article 156 of the Criminal Code of BiH in the legal order, i.e. the Criminal Code of BiH, existed from the adoption of this law until July 1, 2023, that is, until the adoption of the Decision of K. Šmit enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina. Namely, the aforementioned Decision enacted the Law on Amendments to the Criminal Code of Bosnia and Herzegovina⁵⁸.

Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

58 In addition to changing the provision from Article 156 of the CC of BiH, this Law made several other changes. Thus, in Article 2 of the Law on Amendments to the Criminal Code of Bosnia and Herzegovina, a new criminal offense is prescribed as follows: After Article 203 of the Criminal Code, a new Article 203a is added, which reads: Failure to execute the decisions of the High Representative. Article 203a reads: (1) An official in the institution of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska, Brčko District of Bosnia and Herzegovina, or in a canton, city or municipality or local community or any body of local administration and self-government, or a responsible person who does not apply, does not implement, does not execute or otherwise does not comply with the decision of the High Representative for Bosnia and Herzegovina, or who prevents or otherwise obstructs the application, implementation or execution of such a decision, shall be punished by imprisonment from six months to five year. (2) A person from paragraph (1), who was directly or indirectly ordered to behave in the manner provided for in paragraph (1) of this article, and felt compelled to carry out such an order in order not to lose his livelihood or not be exposed to abuse at the workplace, but informed his superior that such actions could commit a criminal offense, may be punished more lightly. (3) A person referred to in paragraph (1) who was directly or indirectly ordered to behave in the manner provided for in paragraph (1) of this article, but who informed the competent prosecutor about such a situation, shall be exempted from punishment. (4) For the criminal offense referred to in paragraph (1) of this article, a security measure of prohibition from performing duties will be imposed. (5) In accordance with Articles 113 and 114 of this law, a conviction for the criminal offenses referred to in paragraph (1) of this article has the following legal consequences: a) termination of official duties and termination of employment; b) confiscation of decorations, c) prohibition of official duties in legislative, executive, judicial, administrative or any body that is fully or partially financed from public funds; and d) the prohibition of obtaining an official position in a legislative, executive, judicial, administrative or any body that is fully or partially financed from public funds."

Article 3 of the Law on Amendments to the Criminal Code of Bosnia and Herzegovina stipulates: Article 239 of the Criminal Code is amended to read: (1) An official in an institution of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska, Brčko District of Bosnia and Herzegovina, or in a canton, city or municipality or local community or any body of local administration and self-government, or a responsible person who does not apply, does not implement, does not execute or otherwise does not respect the final and binding decision of the Constitutional Court of Bosnia and Herzegovina, including a decision on a temporary measure, a final and enforceable decision or a temporary measure of the Court of Bosnia and Herzegovina, the House for Human Rights of Bosnia and Herzegovina or the European Court of Human Rights, or which prevents or otherwise hinders the application, implementation or execution of such a decision, shall be punished by a prison sentence of six months to five years." (2) A person from paragraph (1), who was directly or indirectly ordered to behave in the manner provided for in paragraph (1) of this article, and felt compelled to carry out such an order in order not to lose his means of livelihood or not be exposed to abuse at the workplace, but informed his superior that such actions could commit a criminal offense, may be punished more lightly. (3) A person referred to in paragraph (1) who was directly or indirectly ordered to behave in the manner provided for in paragraph (1) of this article, but who informed the competent prosecutor about such a situation, shall be exempted from punishment. (4) For the criminal offense referred to in paragraph (1) of this article, a security measure of prohibition from performing duties will be imposed. (5) In accordance with Articles 113 and 114 of this law, a conviction for the criminal offenses referred to in paragraph (1) of this article has the following legal consequences: a) termination of official duties and termination of employment; b)

The aforementioned decision of K. Šmit reads: 1. *The Law that follows and constitutes an integral part of this Decision shall enter into force as provided in Article 4 of that Law, on a temporary basis until the Parliamentary Assembly of Bosnia and Herzegovina adopts it in the same form, without amendments and without additional conditions.* 2. *This Decision enters into force immediately and is immediately published on the official website of the Office of the High Representative and in the “Official Gazette of Bosnia and Herzegovina”.*

According to the aforementioned law, in Article 1, Article 156 of the Criminal Code of Bosnia and Herzegovina is amended as follows: In Article 156, the words: “Whoever uses physical force or the threat of using physical force” are replaced by the words: “(1) Who uses force or the threat of using force, or in some other illegal way”. What is even more interesting, new paragraphs (2) and (3) are added after paragraph (1), which read: “(2) *For the criminal offense referred to in paragraph (1) of this article, a security measure of prohibition from performing duties will be imposed.* (3) *In accordance with Articles 113 and 114 of this law, a conviction for criminal offenses from paragraph (1) of this article has the following legal consequences: a) termination of official duties and termination of employment; b) confiscation c) prohibition of official duties in legislative, executive, administrative or any body that is fully or partially financed from public funds; and d) prohibition of obtaining official duties in legislative, executive, judicial, administrative or any body that is fully or partially financed from public funds.*”

The norm according to which this (so-called Šmit’s) law enters into force on July 2, 2023, is published on the official website of the Office of the High Representative, and is immediately published in the “Official Gazette of Bosnia and Herzegovina”.

By prescribing a security measure called Prohibition of performance of duty in the provision of paragraph 2 of Article 156 of the Criminal Code of Bosnia and Herzegovina, K. Šmit introduced a completely new security measure into the system of security measures through the back door, which is not prescribed by the provisions of Chapter Nine of the Criminal Code of BiH, that is, the provisions of Art. 68 to 74 CC BiH⁵⁹. Namely, in the system of criminal sanctions established by the CC of BiH, security measures represent a special type of criminal sanctions whose purpose is to remove conditions or conditions that may influence the perpetrator to commit criminal offenses in the future. The system of security measures established by this law consists of four types of security measures, namely: 1) mandatory psychiatric treatment, 2) mandatory drug addiction treatment, 3) prohibition of calling, activities or duties and 4) confiscation of objects. Otherwise, according to this legal text, the mentioned security measures can (but do not have to) be imposed on the perpetrator of the criminal act, provided that the conditions stipulated by

withdrawal of decorations; c) prohibition of official duties in legislative, executive, judicial, administrative or any body that is fully or partially financed from public funds; and d) the prohibition of obtaining an official position in a legislative, executive, judicial, administrative or any body that is fully or partially financed from public funds.”

59 That this is a completely new security measure is quite clear if you take into account the conditions that must be met for the implementation of the security measure of banning the performance of calls, activities or duties prescribed by the provisions of Article 73, which still exists in the Criminal Code of BiH. Namely, according to paragraph 1 of this article, a security measure prohibiting the exercise of a certain calling, activity or duty may be imposed on the perpetrator who has committed a criminal offense related to property that was entrusted to him or to which he had access thanks to his calling, activity or duty, if there is a danger that such performance could act as an incentive to commit a new criminal offense by abusing his calling, activity or duty related to property entrusted to him or to which he has access. None of the mentioned conditions are required in the creation of the incrimination of K. Šmit.

the law are met in the specific case (the optionality of their application is noticeable, which is common in all modern criminal legislation).

Similar to the previous one, the imposition, that is, the application of security measures, is optional in all Bosnia and Herzegovina's criminal laws, that is, the court may or may not apply them. Namely, even in situations where the legal conditions are met, the court is not obliged to impose these measures (the exception is the so-called medical security measures). Completely contrary to the aforementioned rule, the Law on Amendments to the Criminal Code of Bosnia and Herzegovina from 2023 introduces the obligation to apply a new security measure called Prohibition of Duty⁶⁰.

4. ATTACK ON THE CONSTITUTIONAL ORDER IN THE CRIMINAL CODE OF THE REPUBLIC OF SRPSKA, THE FEDERATION OF BOSNIA AND HERZEGOVINA AND THE BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA

Chapter thirty-two of the Criminal Code of the Republic of Srpska from 2017 prescribes criminal offenses against the constitutional order and security of the Republic of Srpska.

An attack on the constitutional order as a special criminal offense is prescribed in the provision of Article 278 as follows: Anyone who tries to change the constitutional order of the Republic of Srpska by force or threat of use of force or in another illegal way, will be punished with a prison sentence of two to twelve years (we had an identical norm in the previous Criminal Code of the Republic of Srpska from 2003, in the provision of Article 293)⁶¹.

This criminal offense consists in an attempt to change the constitutional order of the Republika Srpska by force, threat of force or in another illegal way. Therefore, it is a basic, that is, a general political crime⁶².

The protected legal interest in this criminal offense is the constitutional arrangement of the Republic of Srpska. On the other hand, the constitutional arrangement of the Republic of Srpska defines the Constitution of the Republic of Srpska, which determines the social and economic arrangement and the political system, as well as the organization, jurisdiction and mutual relationship of the legislative, judicial and executive authorities⁶³.

The commission of this criminal offense implies the initiation (in the sense of an attempt) of any activity that is directed, suitable for, or ultimately capable of leading to a change in the constitutional order of the Republic of Srpska. For the existence of this criminal

60 The provision of Article 73 paragraph 2 of the CC BiH reads: A security measure prohibiting the exercise of a certain calling, activity or duty may be imposed for a duration that cannot be shorter than one nor longer than ten years, counting from the day the decision becomes final, with the provision that the time spent serving a prison sentence is not included in the duration of this security measure.

61 Krivični zakon Republike Srpske, Službeni glasnik Republike Srpske, br. 49/2003; 108/2004; 37/2006; 70/2006; 73/2010; 1/2012 i 67/2013.

62 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

63 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2017), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka, pp. 193-215.

offense, it is important that the above-mentioned activities are initiated with the aim of changing the constitutional arrangement of the Republic of Srpska, in the manner specified by law: a) using force - force can be absolute (physical) or compulsive (psychological)⁶⁴. Force, in addition to the use of physical, mechanical and other force, also includes the use of hypnosis and stunning means, b) the threat of the use of force - i.e. the announcement of the immediate use of force or c) in another illegal way⁶⁵. The consequence of this criminal act is endangering the constitutional order in the form of an abstract danger.

The perpetrator of this criminal act can be any person, and in terms of guilt, intent is required.

For this, certainly a political crime, a relatively high prison sentence of two to twelve years is prescribed.

Interestingly, this criminal offense, unlike the criminal offense of attacking the constitutional order provided for in the Criminal Code of Bosnia and Herzegovina, includes only an attempt to change the constitutional order of the Republic of Srpska, but not the overthrow of the highest institutions, i.e. organs of the Republic of Srpska⁶⁶. On the other hand, a significantly lighter punishment is prescribed for this offense than for the criminal offense prescribed by Article 156 of the Criminal Code of Bosnia and Herzegovina.

In Chapter Fifteen of the Criminal Code of the Brčko District of Bosnia and Herzegovina⁶⁷ criminal offenses against the state are prescribed (???). Criminal offenses from this legal chapter of the Criminal Code of Brčko District of Bosnia and Herzegovina in terms of type, legal characteristics, forms and threatened punishments mostly correspond to the criminal offenses provided for in the Criminal Code of the Federation of Bosnia and Herzegovina. The only question is the name of this legal head, considering that the Brčko District of Bosnia and Herzegovina does not have the status of a state, so it should be compared to the status position that the Brčko District of Bosnia and Herzegovina has according to the Statute of the Brčko District of Bosnia and Herzegovina (a special territorial unit, i.e. a single administrative unit of local self-government that is under the sovereignty of Bosnia and Herzegovina).⁶⁸

Attack on the constitutional arrangement and the Statute⁶⁹ the established order of the Brčko District of Bosnia and Herzegovina is provided for in the provision of Article 149 of the Criminal Code of Brčko District of Bosnia and Herzegovina, with the following content: Whoever, by using or threatening to use physical force, tries to change the order established by the Constitution of Bosnia and Herzegovina and the Statute of the Brčko District or to overthrow its highest institutions, shall be punished by imprisonment for at least five years.

64 Jovašević, D. – Mitrović, Lj. – Ikanović, V. (2021), *Komentar Krivičnog zakonika Republike Srpske*, drugo izmijenjeno i dopunjeno izdanje, JU Službeni glasnik Republike Srpske, Banja Luka, pp. 578-607.

65 Jovašević, D. - Ikanović, V. (2012), *Krivično pravo – posebni deo*, Panevropski Univerzitet APEIRON, Banja Luka.

66 Grupa autora, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

67 *Krivični zakon Brčko distrikta Bosne i Hercegovine*, Službeni glasnik Brčko distrikta Bosne i Hercegovine, broj 19/2020 – prečišćeni tekst, 3/2024 i 14/2024.

68 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

69 Brčko distrikt BiH, umjesto ustava ima Statut BD BiH kao najviši pravni akt BD BiH.

The criminal offense is the same as the criminal offense from the provisions of Article 156 of the Criminal Code of Bosnia and Herzegovina, which is quite problematic if we bear in mind that it is not a constitutional but only a statutory order, given that the highest legal act regulating the order in the Brčko District of Bosnia and Herzegovina is the Statute of the Brčko District of Bosnia and Herzegovina⁷⁰. The above statement equally applies to the very name of this group of acts, that is, criminal acts from Chapter XV of the Criminal Code of Brčko District of Bosnia and Herzegovina, because Brčko District, in any case, does not have the status of a state.

And finally, in Chapter XV of the Criminal Code of the Federation of Bosnia and Herzegovina⁷¹ criminal offenses against the constitutional organization (that is, organization) of the Federation of Bosnia and Herzegovina are prescribed. On the other hand, the provision of Article 149 of this Law provides for a criminal offense called: Attack on the constitutional structure of the Federation. The content of this incrimination is: Whoever, by the use of or the threat of using physical force, tries to change the constitutional structure of the Federation or overthrow its highest institutions, will be punished by a prison sentence of at least five years. There is no particular difference between this and the incrimination from Article 156 of the Criminal Code of Bosnia and Herzegovina, except that this act only protects the constitutional order of the Federation of Bosnia and Herzegovina, i.e. its highest institution⁷².

5. ATTACK ON THE CONSTITUTIONAL ORDER IN THE CRIMINAL CODE OF THE REPUBLIC OF SERBIA, MONTENEGRO, NORTH MACEDONIA, CROATIA AND SLOVENIA

By provision of Article 308 of the Criminal Code of the Republic of Serbia ⁷³ a criminal offense entitled: Attack on the constitutional order is prescribed, with the following content: *Whoever tries to change the constitutional order of Serbia or to overthrow the highest state bodies by force or threat of use of force, will be punished with imprisonment from three to fifteen years.* The aforementioned criminal offense represents a general criminal offense against the constitutional order and security of the Republic of Serbia. Interesting, in addition to this, in the provisions of Article 309 of the Criminal Code of the Republic of Serbia⁷⁴ another, quite similar criminal offense called *Calling for a violent change of the constitutional order* with the following content is prescribed: (1) *Whoever, with the intention of endangering the constitutional order or the security of Serbia, calls or incites to forcefully change its constitutional order, overthrow the highest state authorities or representatives of those authorities, shall be punished with imprisonment from six months to five years.* (2) *Whoever commits the offense referred to in paragraph 1 of this article with help from abroad shall be punished by imprisonment of one to eight years.* (3) *Whoever, with the intention of dispersing, creates or reproduces material whose content which by its content invites or*

70 Group of Authors (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

71 *Krivični zakon Federacije Bosne i Hercegovine*, Službene novine Bosne i Hercegovine, br. 36/2003; 21/2004 – ispr.; 69/2004; 18/2005; 42/2010; 42/2011; 59/2014; 76/2014; 46/2016; 75/2017 i 31/2023.

72 Group of Authors, (2005), *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Knjiga II, Zajednički projekat Savjeta Evrope i Evropske komisije, Sarajevo, pp. 523-554.

73 *Krivični zakonik Srbije*, Službeni glasnik Republike Srbije, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

74 Stojanović, Z. – Delić, N., (2013), *Krivično pravo, posebni deo*, Beograd, str. 259-272.

incites the commission of the acts referred to in paragraph 1 of this article, or who sends or transfers such material to the territory of Serbia or keeps a large amount of such material with the intention of dispersing it or someone else, shall be punished by imprisonment from three months to three years.

The criminal legislation of Montenegro in Chapter twenty-nine, which is entitled Criminal offenses against the constitutional order and security of Montenegro, foresees three criminal offenses of interest to the topic of this paper, namely Attack on the constitutional order in the provision of Article 360, Overthrow of the highest state authorities in the provision of Article 361 and Calling for a violent change of the constitutional order in the provision of Article 362 of the Criminal Code of Montenegro⁷⁵. An attack on the constitutional order of Montenegro is prescribed in the provision of Article 360 of the CC of Montenegro, with the following content: *Whoever tries to change the constitutional order of Montenegro by force or threat of use of force, shall be punished with imprisonment of three to fifteen years.* On the other hand, the criminal offense entitled Overthrow of the highest state authorities from Article 361 reads: *Whoever, by force or threat of force, tries to overthrow one of the highest state authorities of Montenegro or representatives of those authorities, will be punished with imprisonment from one to eight years.* And finally, the Montenegrin criminal legislation also contains the criminal offense called Calling for a violent change of the constitutional system, and this is in the provision of Article 362, which reads: (1) *Whoever, with the intention of endangering the constitutional system or the security of Montenegro, calls or incites to change its constitutional system by force, overthrow the highest state authorities or representatives of those authorities, shall be punished with imprisonment from three months to five years.* (2) *Whoever commits the offense referred to in paragraph 1 of this article with help from abroad shall be punished with imprisonment of one to eight years.* (3) *Whoever, with the intention of dispersing, creates or reproduces material whose content is such that it invites or incites the commission of the offense referred to in paragraph 1 of this article, or who sends or transfers such material to the territory of Montenegro or keeps a large amount of such material with the intention of dispersing it or someone else, shall be punished by imprisonment from three months to three years.*

In Chapter thirty-two of the Criminal Code of the Republic of Croatia⁷⁶ Criminal offenses against the Republic of Croatia are prescribed. On the other hand, the provision of Article 340 of the Criminal Code of the Republic of Croatia provides for a criminal offense called Treason, and it reads: *Whoever threatens the territorial integrity or the constitutional structure of the Republic of Croatia by the use of force or the threat of use of force, or in any other illegal way, shall be punished by a prison sentence of at least five years.*

75 *Krivični zakonik Crne Gore*, Službeni list RCG, br. 70/2003, 13/2004 - ispr. i 47/2006 i Službeni list CG, br. 40/2008, 25/2010, 32/2011, 64/2011 - dr. zakon, 40/2013, 56/2013 - ispr., 14/2015, 42/2015, 58/2015 - dr. zakon, 44/2017, 49/2018 i 3/2020.

76 *Kazneni zakon*, Narodne novine Hrvatske, br. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023 i 36/2024.



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NAPAD NA USTAVNI POREDAK (VELEIZDAJA) U KRIVIČNOM ZAKONODAVSTVU U BOSNI I HERCEGOVINI I ZEMLJAMA REGIONA

Apstrakt:

Prethodnih mjeseci bosanskohercegovačka javnost najviše, ali i svi drugi koji prate dešavanja u ovoj zemlji zaokupljeni su teškom političkom i ustavnom situacijom u Bosni i Hercegovini. To se svakako ogleda i u svakodnevnom licitiranju postojanja krivičnog djela napada na ustavni poredak ili kolokvijalno nazvanim veleizdaja izvršenog od strane čak i najviših političkih predstavnika sva tri konstitutivna naroda. Zbog širine definicije ovog krivičnog djela u našem zakonodavstvu koje je dodatno svojim nametanjem iskomplikovao K. Šmit, ogroman broj, prije svega političkih predstavnika upušta se u kvalifikovanje pojedinih radnji nekih drugih političara u Bosni i Hercegovini čak i napadom na ustavni poredak. Primjera radi, potpredsjednik Republike Srpske Č. Duraković podnio je Tužilaštvu Bosne i Hercegovine krivičnu prijavu protiv ministra unutrašnjih poslova Republike Srpske S. Karana, zbog prijetnji napadom na ustavni poredak. Po njemu, prijava se temelji na odredbi člana 156 Krivičnog zakona Bosne i Hercegovine koja predviđa zatvorsku kaznu od najmanje pet godina za pokušaj promjene ustavnog poretka upotrebom sile ili prijetnjom sile. S druge strane, svakodnevni novinski naslovi svjedoče o ogromnoj erupciji radnji pojedinaca koje se često puta, sasvim nemušto kvalifikuju ovim najtežim krivičnim djelima. Inače, naučna i stručna obrada ove inkriminacije danas je uglavnom zanemarena, kako u teoriji tako i u praksi, a o rijetko kojem krivičnom djelu manje je napisano stručnih i naučnih radova kao što je to slučaj sa napadom na ustavni poredak. Uz navedeno, treba istaći da je u pravnoj teoriji dosta često izraženo mišljenje po kome su radnje izvršenja napada na ustavno uređenje i pozivanja na nasilno rušenje ustavnog poretka u većini krivičnih zakonodavstava neprecizno zakonski određene, što može stvarati određene teškoće u praktičnoj primjeni navedenih krivičnih zakona.

O tome šta se sve nalazi u odredbama člana 156 Krivičnog zakona BiH, ali i ostalim odredbama ovog zakona koje se odnose na krivična djela protiv ustavnog uređenja, kao i sličnim odredbama u preostala tri krivična zakon(ik)a u Bosni i Hercegovini, biće riječi u ovom referatu.

Ključne riječi: *politička krivična djela, napad na ustavni poredak, veleizdaja, Bosna i Hercegovina.*

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JUVENILE DELINQUENCY AS A SOCIAL AND LEGAL CHALLENGE

Abstract:

Juvenile delinquency represents a complex social phenomenon arising from numerous and interrelated factors – familial, economic, educational, and cultural. Although primarily a social issue, it inevitably requires an appropriate legal response. The aim of this paper is to analyze the phenomenology and etiology of juvenile criminal behavior, as well as to present the criminal-legal status of minors in the Republic of Serbia, with reference to statistical indicators and contemporary theoretical models. Special attention is devoted to identifying key risk factors and circumstances contributing to the emergence of deviant behavioral patterns among youth, including the presence of social-pathological phenomena and the impact of contemporary social changes.

Keywords: *juvenile delinquency; etiology; phenomenology; criminal-legal status of minors.*

1. INTRODUCTION

Juvenile delinquency is one of the most challenging and complex problems of modern society. The phenomenon of young people committing criminal offenses during their developmental stage has profound consequences for both the minors themselves and society as a whole. This issue is not merely of a criminal-law nature, but requires a multidisciplinary approach encompassing social, psychological, and legal aspects. As a significant sociological and legal challenge, juvenile delinquency manifests itself through unlawful and unacceptable acts committed by minors, stemming from complex developmental disorders affecting young people during adolescence, but which can also appear in children under the age of fourteen. The increase in juvenile delinquency affects community safety and represents a challenge for all relevant institutions – from the family and school to judicial bodies and social services. Moreover, this phenomenon reflects deeper social disorders and problems present in the environment in which minors grow up.

Juvenile delinquency is a complex and multidimensional social phenomenon, whose manifestations and prevalence differ depending on the social and cultural context of individual countries. Nevertheless, certain global and universal similarities can be observed within its basic structure. In addition to having a pronounced criminological, legal, social, and economic dimension, juvenile delinquency also encompasses important aspects of family functioning, pedagogical influence, and broader social relations, indicating its interdisciplinary nature.¹

The causes of juvenile delinquency are diverse and often intricately intertwined, including factors such as family, social exclusion, peer influence, economic inequality, the influence of other socio-pathological phenomena, and the lack of adequate support in the process of socialization. This complexity requires a systemic and multidisciplinary approach to prevention and resolution, as well as an adequate legal framework adapted to the particularities of juvenile age.

From both a legal and social perspective, the importance of coordination and cooperation between various segments of society can be observed in order to ensure effective protection and resocialization of young people in conflict with the law.

2. CONCEPT AND PHENOMENOLOGY OF JUVENILE DELINQUENCY

In professional and scholarly literature, in addition to the term *juvenile crime*, numerous other expressions are used to designate this type of socially unacceptable behavior, such as *juvenile delinquency*, *juvenile offending*, *asocial and antisocial behavior of minors*, *hooliganism*, and so on. However, in contemporary criminological and criminal-law literature, the most prevalent and accepted terms are *juvenile delinquency* and *juvenile crime*. Closely related to these terminological distinctions is the issue of defining the concept of juvenile crime, i.e., delinquency. Even at the conceptual level, differences in approach and scope can be observed. The term *juvenile crime* is usually used in a narrower sense, limiting itself to criminal acts for which minors can be held responsible in accordance with applicable legal provisions. In contrast, the term *juvenile delinquency* encompasses a broader spectrum of behaviors, including misdemeanors, unlawful acts, and other forms of asocial or deviant conduct that have not yet reached the threshold of criminal liability.²

The phenomenology of juvenile delinquency involves examining the forms, frequency, and dynamics of delinquent behavior among minors, along with analyzing specific characteristics that distinguish this phenomenon from adult crime. Statistical data and empirical studies indicate that the most common criminal offenses committed by minors are those against property, followed by offenses against human health, and offenses against life and limb, as well as misdemeanors related to disturbing public order and peace. It has been observed that male minors commit criminal offenses far more frequently than their female peers, while younger minors (aged 14 to 16) are more inclined toward negligent acts and behavior influenced by group dynamics, whereas older minors (aged 16 to 18) more often display signs of planned and organized conduct.

1 Jugović, A. (2012). Maloletnički kriminal u savremenom društvu: obeležja, uzroci i efektivni programi socijalne intervencije. In: Kron, L. (Ed.), *Delikt, kazna i mogućnosti socijalne profilakse* (p. 258). Beograd: Institut za sociološka i kriminološka istraživanja.

2 Nikolić-Ristanović, V. (2012). Kriminalitet maloletnika ili maloletnička delinkvencija: pojmovo određenoje i njegov značaj. *Revija za kriminologiju i krivično pravo*, (1-2), pp. 184.

Supporting these observations on the structure and characteristics of juvenile delinquency are data from the Statistical Office of the Republic of Serbia. The following section of the paper presents a table with an overview of criminal sanctions imposed on minors from 2020 to 2024, classified by the type of criminal offense, as well as by the gender and age of the offenders. These data enable a deeper understanding of the patterns present in delinquent behavior, as well as the identification of possible trends and differences in the representation of certain groups within the structure of sanctioned minors.

Table 1: Minors - pronounced criminal sanctions, according to the criminal acts, 2020-2024.³

Criminal offences	2020		2021		2022		2023		2024	
	Num	%	Num	%	Num	%	Num	%	Num	%
Total	1239	100	1383	100	1213	100	1454	100	1375	100
Against life and limb	151	12,2	181	13,1	178	14,7	210	14,4	195	14,2
Against freedoms and rights of citizens and people	52	4,2	45	3,3	53	4,4	74	5,1	106	7,7
Against sexual freedom	17	1,4	25	1,8	18	1,5	41	2,8	30	2,2
Against health of people	259	20,9	229	16,6	211	17,4	259	17,8	238	17,3
Against Commerce	6	0,5	2	0,1	3	0,2	12	0,8	11	0,8
Against Property	543	43,8	635	45,9	506	41,7	583	40,1	480	34,9
Against the safety of public traffic	15	1,2	32	2,3	31	2,6	25	1,7	46	3,3
Against public order and peace	121	9,8	133	9,6	145	12	153	10,5	155	11,3
Other	75	6,1	101	7,3	68	5,6	97	6,7	114	8,3

The presented data in the table show the overall movement in the number of criminal sanctions imposed on minors in the period 2020–2024, with classification by type of criminal offense. The total number of cases varied, with the lowest recorded being 1,213 (2022) and the highest 1,454 (2023). The most represented category in all years were offenses against property, although their share shows a declining trend — from 43.8% (2020) to 34.9% (2024). Offenses against life and limb show a slight increase, from 12.2% in 2020 to about 14.2% in 2024, while offenses against the freedoms and rights of man and citizen record a more significant relative increase, from 4.2% to 7.7%. Offenses against human health have remained stable in percentage share, whereas offenses against the safety of public traffic have shown fluctuations, with a noticeable jump to 3.3% in the last year. In the “other criminal offenses” category, there is also a recorded increase in share from 6.1% to 8.3%.

³ Statistical Office of the Republic of Serbia (2025). *Juvenail criminal offenders, 2024* (June 24, 2025) from: <https://stat.gov.rs/oblasti/pravosudje/>

Tabela 2: Minors - pronounced criminal sanctions, according to the age and sex, 2020-2024.⁴

Criminal offences		2020		2021		2022		2023		2024	
		Num	%	Num	%	Num	%	Num	%	Num	%
Total		1239	100	1383	100	1213	100	1454	100	1375	100
	Female	106	100	121	100	119	100	141	100	157	100
14 years old	Total	188	15,2	224	16,2	188	15,5	242	16,6	265	19,3
	Female	24	22,6	29	24	22	18,5	34	24,1	47	29,9
15 years old	Total	286	23,1	303	21,9	285	23,5	347	23,9	317	23,1
	Female	25	23,6	29	24	32	26,9	31	22	41	26,1
16 years old	Total	392	31,6	408	29,5	349	28,8	431	29,6	376	27,3
	Female	26	24,5	36	29,8	37	31,1	34	24,1	36	22,9
17 years old	Total	373	30,1	448	32,4	391	32,2	434	29,8	417	30,3
	Female	31	29,2	27	22,3	28	23,5	42	29,8	33	21

The presented table analyzes data according to the age and gender of the offenders. The most represented are minors aged 16 and 17, who together account for approximately 58–62% of all cases annually. The share of offenders aged 14 is increasing, particularly in 2024 when it reached 19.3%, which may indicate a trend of earlier involvement of younger minors in criminal activities. Among girls, the share in the total number of convictions remains significantly lower compared to boys, but a slight increase is noticeable, especially in the youngest category (14 years), where the percentage rose from 22.6% to almost 30% during the observed period.

The data indicate certain changes in the structure of juvenile crime, primarily the reduction in the share of property-related offenses, alongside a relative increase in offenses against life and limb and offenses against the freedoms and rights of man and citizen. At the same time, there is a concerning rise in the participation of the youngest age groups, which could have long-term negative consequences for social security and the workload of the justice system. These trends emphasize the need for preventive measures aimed at younger populations, as well as targeted resocialization programs to reduce the likelihood of recidivism.

⁴ *Ibid.*

3. ETIOLOGICAL ASPECTS OF JUVENILE DELINQUENCY

Minors are in a crucial stage of life development, during which the foundations of socialization are formed, and a transition occurs from a phase of immaturity to one of assuming responsibility. The psychological state in this period has a decisive influence on their future life course. This is a stage of intense physiological and psychological changes, accompanied by a mismatch between these two processes, complex and variable emotional reactions, and insufficiently developed life attitudes and value systems. Such developmental specificity often leads to pronounced instability in the psychological functioning of young people.

Understanding these developmental characteristics is essential for correctly identifying factors that increase the risk of deviant behavior. These very factors shape the environment in which young people grow and influence their choices and behavioral patterns, and identifying them enables the planning of targeted prevention measures.⁵

Factors contributing to the occurrence of juvenile delinquency are usually classified as exogenous (external) and endogenous (internal). Among the external, socio-cultural factors, the most notable are the family environment, the education system, the way free time is spent, the influence of the media and peer groups, as well as geographic, climatic, socio-political, economic, and cultural conditions. These also include wars, natural disasters, poverty, unemployment, religiosity, urbanization, and migration. Internal factors encompass personal characteristics of the individual, including intelligence, hereditary predispositions, emotional patterns, motives, inclinations, habits, levels of responsibility and tolerance, as well as the presence of mental disorders. In practice, minors are often simultaneously exposed to the influence of several interwoven criminogenic factors, which further increase the risk of delinquent behavior.⁶

In order to better understand how these factors shape criminal behavior, it is useful to observe them through the lens of contemporary theoretical approaches. These allow for the linking of different factors into coherent models that explain how and why certain young individuals develop antisocial behavioral patterns. One of the most influential models in this regard is the dual taxonomy model.

Contemporary theoretical models addressing etiological factors of juvenile delinquency, with the dual taxonomy being particularly noteworthy, attempt to explain different developmental paths of antisocial behavior. This model distinguishes two basic types: life-course-persistent antisocial behavior and adolescence-limited antisocial behavior. The first type results from the early influence of adverse biological, family, and social factors, such as difficult temperament, deficits in verbal abilities and self-control, often reinforced by unstable family structure, low socioeconomic status, neglect, abuse, and inadequate parenting practices. Such children exhibit pronounced maladaptive traits, leading to persistent social rejection and failure in various areas of life. In contrast, adolescence-limited antisocial behavior appears in young people with a relatively normal developmental trajectory and generally stable family environment. It is most often linked to the desire for independence and social status, as well as imitation of peers who engage in delinquent behavior. Since there are no deep structural and family risks, these individuals

5 Hao, Y. (2024). The Causes and Countermeasures of Juvenile Delinquency Motivation. *Journal of Education, Humanities and Social Sciences*, 40, p. 81.

6 Macanović, N., Grbić Pavlović, N., Kuprešanin J. (2016). *Maloljetnička delinkvencija – prevencija i resocijalizacija*. Banja Luka: Udruženje nastavnika i saradnika Univerziteta u Banjoj Luci, Evropski defendologija centar Banja Luka, p. 37.

usually abandon antisocial patterns once they recognize the negative consequences and return to prosocial values.⁷

In addition to providing a theoretical framework, these models also highlight the need for deeper analysis of psychological factors, as they often mediate between external circumstances and the final behavior of young people. Their role can be decisive in understanding how risk conditions translate into delinquent patterns. They often act as intermediaries between external circumstances and the specific forms of behavior of young people, influencing the way in which they interpret, assess, and respond to their environment. For this reason, psychological aspects require special attention.

Psychological factors represent the key and underlying causes of juvenile delinquency, as criminal behavior arises under their influence, with the acts themselves being their external manifestation. Research mainly focuses on pathological personality traits, negative emotions, abnormal needs, and motives, which provide the basis for understanding and preventing this phenomenon. Among these, incorrect cognitive patterns hold a special place, with values being the central part of personal attitudes and beliefs. They guide an individual's moral assessments and decisions, and can be seen as a kind of "main switch" that shapes and modifies other psychological aspects of personality.⁸

Considering psychological factors leads to the broader social context in which young people's behavior is shaped. The way society treats young people can act as a protective factor, but also as a trigger for deviant behavior. It is therefore important to analyze the social circumstances that contribute to the development of criminal patterns.

Unjust treatment by society often serves as an incentive for the development of delinquent behavior. Young people, faced with pronounced social inequalities, often react negatively, which can contribute to deviant behavioral patterns. Numerous studies show that juvenile offenders have often been exposed to various forms of abuse – physical, sexual, psychological, or a combination thereof – which leaves lasting and profound consequences on their development.⁹ The prevalence of violence against children, both within and outside the family,¹⁰ is a significant risk factor that can contribute to the development of deviant behavioral patterns and increase the likelihood of involvement in juvenile delinquency.

In this regard, the presence of socio-pathological phenomena in the minor or their family members significantly increases the risk of displaying delinquent behavior. Phenomena such as drug and alcohol abuse, prostitution, internet addiction, gambling, suicidal behavior, and other forms of social deviance create an environment devoid of adequate models of socialization and support. Such an environment weakens the

7 Dovijanić, S., Maljković, M. (2024). Etiologija trajnog i adolescencijom limitiranog antisocijalnog ponašanja. In: Kovačević, M. & Čopić, S. (Ed.), *Delinkvencija dece i maloletnika: prevencija i društvena reakcija* (p. 155). Beograd: Univerzitet u Beogradu, Fakultet za specijalnu edukaciju i rehabilitaciju.

8 Zhuoma, L. (2024). The Importance of Preventing Juvenile Delinquency. *Economics, Law and Policy*, 7(3), p. 163-164.

9 Jain, P. (2023). *Juvenile Delinquency - a Biological, a Psychological & a Sociological Approach* (June 27, 2025). Available at SSRN: <https://ssrn.com/abstract=4391713> or <http://dx.doi.org/10.2139/ssrn.4391713>, p. 8.

10 Petrović, M. (2023). Etiologija i fenomenologija nasilja nad decom. *Pravo – teorija i praksa*, 40(2), p. 94.

mechanisms of social control and encourages the adoption of antisocial patterns of thinking and behavior, which can result in their reinforcement and repetition. For this reason, studying the influence of socio-pathological phenomena is an essential component in forming effective and integrated strategies for the prevention of juvenile delinquency.¹¹

It is also important to emphasize the role of contemporary social changes in etiology. Digitalization and the growing influence of social networks have led to the emergence of new forms of peer violence, access to risky content, and easier communication with potentially deviant groups. Thus, classic risk factors are expanding into new, digital dimensions that require special analysis and adapted prevention strategies.

Additionally, the cultural context has a significant impact on the structure and dynamics of juvenile delinquency. Social norms, values, and tolerance toward certain forms of behavior can determine not only the frequency of particular offenses but also the way the system responds to them. In some environments, certain forms of violent or risky behavior may be socially acceptable or even encouraged, making timely intervention more difficult.

The analysis of the etiological aspects of juvenile delinquency shows that it is a multifactorial and complex phenomenon, in which internal and external factors intertwine and mutually reinforce each other. Understanding this process requires a comprehensive, multidisciplinary approach based on continuous monitoring of social changes and the adaptation of preventive measures to new challenges.

4. CRIMINAL-LEGAL STATUS OF THE MINORS

Models of criminal-legal response to minors encompass criminal proceedings, substantive criminal law applicable to minors, and certain aspects of juvenile enforcement law. These elements are interconnected, but differences among the models are primarily observed in the types and specificities of procedures applied to minors. Although it is not always straightforward to classify them into distinct patterns, in doctrine, procedures can be grouped into typical models based on the similarity of dominant procedural principles and rules. In comparative law, the most frequently distinguished models are: 1) the protective model, 2) the judicial model, 3) the modified judicial model, 4) the participatory model, 5) the delinquency control model, and 6) the corporate model.¹²

Understanding different models of handling juvenile offenders is of key importance, as the choice of model largely determines the approach to sanctioning and rehabilitation of minors. In modern systems, emphasis is increasingly placed on preventive and educational aspects, although there are differences in the degree to which these values are integrated into the judicial framework of individual countries.

Procedures for minors in Serbia are based on a judicial orientation, as they are fundamentally conceived as criminal proceedings with typical procedural phases, two main parties, and a court decision regarding the criminal act (*causa criminalis*). Nevertheless, it is a special criminal procedure, significantly modified compared to the general one, aimed

11 Subotin, M., Ođalović, T. (2016). Socijalnopatološke pojave u porodici i njihov uticaj na delinkventno ponašanje maloletnika. *Pravo – teorija i praksa*, 33(10-12), p. 53.

12 Škulić, M. (2015). Reforma maloletničkog krivičnog prava u Srbiji. In: Stevanović, I. (Ed.), *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, (p. 41). Beograd: Institut za kriminološka i sociološka istraživanja

at protecting minors and ensuring a more favorable procedural position. Modifications are reflected in the role of guardianship authorities, broader application of the principle of opportunity, shorter detention periods, special terminology, and other procedural adaptations. Based on these characteristics, the Serbian model can be identified as a modified judicial model, combining elements of judicial and protective approaches.¹³

Of particular importance is an adequate legal framework that enables the practical application of these models and provides uniform rules harmonizing substantive, procedural, and enforcement aspects of the criminal-legal system, thereby achieving a balance between protecting society and safeguarding the rights of the child.

Handling juvenile offenders in Serbia is based on a special legal framework, which includes a set of statutory provisions aimed at protecting their rights, fulfilling the educational function, and ensuring appropriate criminal-legal responses. Legal regulation of procedures concerning juvenile offenders in Serbia primarily includes the Law on Juvenile Offenders and Criminal-Legal Protection of Minors, as well as relevant provisions of the Criminal Code, the Code of Criminal Procedure, the Law on Enforcement of Criminal Sanctions, and the Law on Misdemeanors. Together, these provisions form the normative framework governing the criminal-legal status of minors, from procedural phases, through sentencing, to the execution of imposed decisions.

The Law on Juvenile Offenders and Criminal-Legal Protection of Minors contains provisions applicable to juvenile offenders regarding substantive criminal law, the authorities applying it, criminal proceedings, and the execution of criminal sanctions for these offenders. This law also includes special provisions for the protection of children and minors as victims in criminal proceedings.¹⁴

A minor is a person who, at the time of committing a criminal offense, is between fourteen and eighteen years old, with a younger minor considered to be aged fourteen to sixteen, and an older minor aged sixteen to eighteen. A young adult is a person who, at the time of committing the criminal offense, was eighteen years old but has not reached twenty-one at the time of trial.¹⁵

Minors may be subject to educational measures, juvenile detention, and security measures. These sanctions primarily have a therapeutic rather than a repressive character, except for juvenile detention and institutional educational measures, which, due to restrictions on freedom of movement, inherently include elements of repression. Juvenile detention is prescribed as an exceptional measure and may be imposed exclusively on older minors, i.e., those aged sixteen to eighteen at the time of committing the offense.¹⁶ Age classification of minors plays a significant role in applying criminal-legal measures, allowing a differentiated approach in accordance with the psychophysical maturity of the offender. This ensures proportionality between the severity of the offense and the imposed measure, as well as the potential for successful rehabilitation.

13 *Ibid.*, p. 46.

14 Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica („Sl. glasnik RS“, br. 85/2005), čl. 1

15 *Ibid.*, čl. 3

16 Živković, N. M. (2020). Krivična neodgovornost dece – zločin bez kazne i moguća rešenja. *Strani pravni život*, 3, p. 156.

If a person under fourteen commits a criminal offense, misdemeanor, or economic offense, they cannot bear criminal, misdemeanor, or any other legal responsibility. No proceedings may be initiated, no sanction imposed, nor any other measure applied, as such persons are legally considered children.

In professional public, opinions exist that lowering the age of criminal responsibility for certain serious offenses, particularly those involving violence, should be considered. According to this view, for children aged twelve to fourteen, a rebuttable presumption of (non)responsibility could be introduced, with each case individually assessing the offender's psychophysical maturity. This would allow for the formal issuance of a sentence and stricter sanctions than existing social measures, which, according to proponents, would have significant special and general preventive effects while contributing to justice for both victims and society as a whole. Although such an approach may be perceived as stricter, its supporters argue it represents a response to increasingly frequent cases of severe juvenile violence and serves as a clear deterrent against committing the most serious offenses. Emphasis is placed on citizen safety and the need for society to send an unequivocal message regarding the inadmissibility of such acts, with each decision based on an individual assessment of the minor. However, it should not be overlooked that such a solution has been criticized for potential abuse and because the Convention on the Rights of the Child implicitly requires that the established level of criminal non-responsibility not be lowered.¹⁷ Moreover, it raises the issue of possible legal uncertainty, as maturity assessment would depend on the subjective evaluation of experts and judges.

This dilemma opens a broader question regarding the justification for raising or lowering the age of criminal responsibility, with arguments in professional and legislative circles intertwining considerations of child rights protection, societal security needs, and the efficiency of the criminal-legal system. Discussion of this issue requires a balanced approach that, while respecting international standards, ensures an adequate response to increasingly pronounced forms of juvenile delinquency.

CONCLUSION

Analysis of the phenomenology of juvenile delinquency confirms that it is a complex and multidimensional social phenomenon, whose manifestations depend on cultural, economic, and institutional contexts, as well as universal developmental characteristics of youth. Statistical data indicate a predominance of property offenses, an increase in crimes against life and body, and a concerning trend of younger minors engaging in criminal activity. These findings point to the need to view the problem within a broader social context rather than solely through the lens of committed offenses.

At the same time, it is clear that delinquent behavior is influenced by a complex combination of external and internal factors – from family dynamics and peer pressure to individual psychological characteristics and the presence of social-pathological phenomena. Contemporary theoretical models, such as the dual taxonomy, provide a valuable framework for understanding different developmental pathways of antisocial behavior, which is particularly important for creating targeted preventive strategies.

17 *Ibid.*, p. 161.

In the Republic of Serbia, the criminal-legal status of minors is regulated by a special legislative framework based on a modified judicial model, which seeks to balance the protection of society with the protection of child rights. Special procedural and substantive provisions enable a more favorable position for minors compared to adult offenders, while simultaneously posing challenges in terms of the effectiveness of prevention and rehabilitation.

Effective suppression of juvenile delinquency requires an integrated approach encompassing early identification of risk factors, strengthening family and school prevention, development of social skills among youth, and consistent application of educational measures and alternative sanctions. It is essential to ensure ongoing cooperation among the judiciary, educational institutions, social services, police, healthcare system, and civil sector, with continuous evaluation and adaptation of measures to contemporary challenges, including those in the digital environment. Only through such coordinated and comprehensive action is it possible to reduce juvenile delinquency in the long term and create conditions for healthy youth development in accordance with societal values and norms.



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MALOLETNIČKA DELINKVENCIJA KAO DRUŠTVENI I PRAVNI IZAZOV

Apstrakt:

Maloletnička delinkvencija predstavlja kompleksnu društvenu pojavu koja se javlja kao rezultat brojnih i međusobno povezanih faktora – porodičnih, ekonomskih, obrazovnih i kulturoloških. Iako je u osnovi socijalni fenomen, ona neizbežno zahteva i adekvatan pravni odgovor. Cilj ovog rada je da se analizira fenomenologija i etiologija maloletničkog prestupničkog ponašanja, kao i da se prikaže krivičnopravni položaj maloletnika u Republici Srbiji, uz osvrt na statističke pokazatelje i savremene teorijske modele. Posebna pažnja posvećena je identifikaciji ključnih faktora rizika i okolnosti koje doprinose pojavi devijantnih obrazaca ponašanja kod mladih, uključujući prisustvo socijalnopatoloških pojava i uticaj savremenih društvenih promena.

Ključne reči: *maloletnička delinkvencija; etiologija; fenomenologija; krivičnopravni položaj maloletnika.*

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RULE OF LAW AS THE FOUNDATION OF EUROPEAN INTEGRATION ACHIEVEMENTS AND CHALLENGES OF THE REPUBLIC OF SERBIA WITHIN CHAPTER 24 – JUSTICE, FREEDOM AND SECURITY

Abstract:

The rule of law represents one of the fundamental pillars of the European integration process and a key prerequisite for membership in the European Union. In the context of Negotiation Chapter 24 – Justice, Freedom and Security, this value encompasses a wide range of reform obligations related to an efficient judiciary, the fight against corruption and organized crime, the protection of fundamental rights, migration and border management, as well as interinstitutional cooperation. This paper aims to provide an analysis of the current state of the rule of law in the Republic of Serbia through the lens of reform requirements and assessments presented by the European Commission in its annual reports. Special attention is given to the normative framework, institutional reforms, and the challenges in their implementation. Through a comparative perspective and an analysis of political and institutional factors, the paper highlights the obstacles that hinder the establishment of the rule of law as a sustainable standard. It concludes that progress in Chapter 24 cannot be viewed solely through a formal-legal lens, but requires a profound shift in institutional culture, political will, and transparency. Finally, the paper offers recommendations for further progress, with special emphasis on strengthening judicial independence and improving oversight of reform implementation.

Keywords: Rule of law, European Union, Chapter 24, judiciary, reforms

1. INTRODUCTION

The rule of law represents one of the fundamental principles upon which the European Union rests, as well as a key prerequisite for its functioning and enlargement. According to Article 2 of the Treaty on European Union, the rule of law, together with democracy, human rights, and freedoms, constitutes one of the essential values that all Member States and candidate

countries must respect. This concept implies that all public authorities are bound by the law, that laws are clear, predictable, and equally applicable to all, and that there exists an independent and efficient judiciary guaranteeing the protection of citizens fundamental rights.¹

Since obtaining candidate status for European Union membership in 2012, the Republic of Serbia has embarked on a complex accession process that entails the gradual harmonization of its legislation, institutions, and practices with the Union's *acquis*. The negotiation process, formally launched in 2014, encompasses 35 negotiating chapters, among which Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) hold a particularly important place. In accordance with the enlargement methodology, these chapters are opened among the first and closed at the very end, as progress in these areas constitutes a prerequisite for advancement in all other negotiation fields.

Chapter 24, which covers, *inter alia*, issues of judicial and police cooperation, the fight against organized crime and corruption, the protection of fundamental rights, migration and border management, as well as the implementation of the Schengen *acquis*,² is of special significance for assessing the readiness of the Republic of Serbia for membership. Successful compliance with this chapter requires not only formal alignment with the *acquis communautaire*, but also profound institutional and political transformations that guarantee the sustainable implementation of European standards in practice.

2. THE NORMATIVE FRAMEWORK OF THE RULE OF LAW IN THE EU AND CHAPTER 24

The rule of law as a concept has deep roots in Europe's legal tradition, while its modern form within the European Union (EU) has evolved through several key stages – from the founding treaties, through the Copenhagen Criteria (1993), to the Treaty of Lisbon (2009). Although the original founding treaties of the European Communities (Treaty of Rome, 1957) did not explicitly employ the term “rule of law,” the notions of legal certainty and the primacy of law were implicitly present through the principles of the supremacy of Community law and the case law of the Court of Justice of the European Communities (today the Court of Justice of the EU). The Copenhagen Criteria (1993) represent a turning point in the formalization of this principle as a condition for accession. According to the political criterion, any state wishing to join the EU must possess “stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.” This obligation goes beyond the mere adoption of legislation – it requires the establishment of practices and an institutional culture that ensure equality before the law, protection from arbitrary authority, and the existence of an efficient judicial system. Further development of the concept was brought by the Treaty of Lisbon (2009), which in Article 2 of the Treaty on European Union (TEU) explicitly designates the rule of law as one of the fundamental values upon which the EU is founded, while Article 49 TEU further confirms that only European states which respect these values and commit themselves to promoting them may become members of the Union.

The case law of the Court of Justice of the European Union (CJEU) has also made a significant contribution to the operationalization of the concept. In Case C-64/16

1 Treaty on European Union (consolidated version). Official Journal of the EU (C 202), 07.06.2016.

2 Schengen Borders Code (EU) 2016/399, Official Journal of the EU (L 77/1), 23.03.2016

(Associação Sindical dos Juízes Portugueses),³ the Court established that Member States must ensure judicial independence as a fundamental element of the rule of law, while in Case C-791/19 (*Commission v. Poland*),⁴ it confirmed that institutional reforms undermining judicial independence constitute a violation of Article 19 TEU. This evolutionary development demonstrates that the rule of law within the EU is not a static concept but rather a dynamic value that is continually shaped through normative instruments and jurisprudence. Candidate countries are therefore expected to adopt not only legal norms but also the standards of their consistent application.

There are several key legal documents and instruments of the EU that form the backbone of the normative framework of the rule of law. These include: the Treaty on European Union (TEU), in which Article 2 defines the rule of law as one of the fundamental values of the EU, alongside democracy, freedom, and human rights; Article 6, which confirms the binding force of the Charter of Fundamental Rights and the respect for the European Convention on Human Rights; and Article 49, which conditions membership on the respect for and promotion of these values. The Charter of Fundamental Rights of the EU (2000/C 364/01)⁵ codifies fundamental rights directly linked to the rule of law, including the right to a fair trial (Article 47), an independent and impartial judiciary, freedom of expression, and equality before the law. Its application is binding on all Member States, as well as on candidate countries harmonizing their legislation. In addition, secondary sources of EU law and monitoring instruments play an important role, such as the European Commission's annual Rule of Law Report, which covers all Member States and indirectly serves as a reference point for candidate countries; the EU Rule of Law Framework (2014), a mechanism for early detection of systemic threats to the rule of law; and conditionality instruments, which include the possibility of suspending EU budgetary funds if a Member State (or candidate country) seriously jeopardizes the rule of law (Regulation (EU) 2020/2092). Furthermore, the case law of the CJEU, with judgments such as C-619/18 (*Commission v. Poland*)⁶ and C-157/21 (*Hungary*),⁷ defines specific standards regarding judicial independence and the prohibition of political pressure on the judiciary, which are equally relevant for both Member States and candidate countries.

For candidate countries, including the Republic of Serbia, alignment with these norms constitutes the basis for progress in the accession negotiations. Every reform in the areas of the judiciary, public administration, or security must comply with these standards, and the European Commission monitors this compliance through regular reports and specific monitoring mechanisms within Chapters 23 and 24. The European Union has developed a set of institutional and legal mechanisms for monitoring and safeguarding the rule of law, both within the Union and in relation to countries in the accession process. These instruments serve to detect systemic problems at an early stage, ensure corrective measures, and, where necessary, apply sanctions or conditionality regarding financial assistance.

For candidate countries, these mechanisms have a dual function – they serve both as a roadmap for reforms and as a benchmark of progress towards membership. In order to respond promptly to serious threats to the rule of law, the European Commission established the EU Rule of Law Framework in 2014. This framework operates as a three-stage process:

3 Case C-64/16 *Associação Sindical dos Juízes Portugueses*, Judgment of 27 February 2018.

4 Case C-791/19 *Commission v. Poland*, Judgment of 15 July 2021

5 Charter of Fundamental Rights of the European Union (2000/C 364/01).

6 Case C-619/18 *Commission v. Poland*, Judgment of 24 June 2019

7 Case C-157/21 *Commission v. Hungary*, Judgment of 16 November 2021

(1) assessment of the situation and dialogue with the Member State, (2) recommendations for addressing the identified shortcomings, and (3) monitoring the implementation of the recommendations. Although it is formally applied only to Member States, the principles and methodology of this framework are also used in the progress reports on candidate countries, including the Republic of Serbia, as reference standards for assessing systemic issues in the areas of the judiciary, the fight against corruption, and fundamental rights.⁸

Since 2020, the European Commission has published annual *Rule of Law Reports* for all Member States, analyzing the functioning of judicial systems, the fight against corruption, media freedom, and institutional checks and balances. Although candidate countries are not covered by this document, its reporting methodology serves as a model for assessing the state of play in the accession process. In practice, the Progress Reports on the Republic of Serbia (e.g., COM (2024) 692 final) contain specific sections mirroring this structure, thereby allowing comparability with Member States.⁹ One of the most recent EU instruments is the conditionality mechanism governing access to EU funds in cases where a Member State seriously endangers the rule of law. Although this mechanism does not formally apply to candidate countries, its logic is reflected in the accession negotiations: progress in Chapters 23 and 24 becomes a condition for opening and closing other chapters, while failure to deliver on reforms may lead to a suspension of negotiations and the loss of access to pre-accession funds (IPA III).¹⁰

For countries engaged in accession negotiations, the EU has developed specific instruments:

- Action Plans for Chapters 23 and 24 – containing measurable objectives, deadlines, and progress indicators;
- Interim benchmarks – which must be met before the chapters can be provisionally closed;
- Regular reports of the European Commission and expert missions – which assess the actual implementation of adopted legislation rather than mere formal alignment.

These mechanisms make it possible to measure progress objectively, through concrete results such as the number of high-level corruption investigations, the duration of judicial proceedings, compliance with Schengen rules, or the transparency of public institutions.¹¹

In 2020, the EU adopted a “new enlargement methodology” with the aim of making the accession process more credible, predictable, and politically guided. The key innovations are reflected in four principles: (1) Credibility – strengthening the demand for genuine reforms and tangible results; (2) Stronger political governance of the process – through regular summits/ministerial formats and greater involvement of Member States

8 European Commission. (2014). A new EU Framework to strengthen the Rule of Law. Brussels, COM(2014) 158 final.

9 European Commission. (2024). Serbia 2024 Report. Brussels, COM(2024) 692 final.

10 Regulation (EU) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ L 433/1, 2020.

11 Council of the European Union. (2016). *Revised EU enlargement methodology for Chapters 23 and 24*. Brussels, 2016.

in monitoring; (3) Dynamism through the clustering of chapters; and (4) Predictability, with clear incentives for progress and sanctions for stagnation (“reversibility”). Particular emphasis is placed on the “*fundamentals first*” approach – the rule of law, the functioning of democratic institutions, public administration reform, and the economic criteria are opened first and closed last, thereby determining the overall pace of negotiations.¹²

The methodology introduces clusters (e.g., internal market, competitiveness / connectivity, good governance), which are opened as a whole once the initial benchmarks are met; subsequently, final transitional benchmarks are set for individual chapters within each cluster. At the same time, phased integration (“phasing-in”) into certain EU policies, programs, and markets is envisaged as a reward for measurable progress, while in cases of backsliding, negotiations may be slowed down or suspended, already closed chapters reopened, and financial support adjusted accordingly.¹³

In 2020, the Council of the EU approved the revised methodology and has since emphasized in its conclusions the focus on fundamental reforms (rule of law, fundamental rights, democratic institutions, public administration reform, and economic competitiveness) as the core criterion for advancement.¹⁴ Since 2023/2024, the methodology has been further operationalized through the Growth Plan for the Western Balkans and the new Reform and Growth Facility amounting to €6 billion (2024–2027). These instruments enable earlier inclusion of partners into segments of the Single Market (e.g., the free movement of goods and services and SEPA), accompanied by clear reform conditions and measurable “reform agendas.” This approach accelerates the delivery of tangible benefits prior to full membership and gives concrete expression to the “reward for performance” principle embedded in the new methodology.

Chapter 24 – Justice, Freedom and Security – was incorporated into the European Union’s negotiation framework following the Treaty of Amsterdam (1997), which established the concept of the Area of Freedom, Security and Justice (AFSJ). Previously, issues of internal security, police, and judicial cooperation were largely regulated through intergovernmental agreements, such as the Schengen Agreement (1985) and its subsequent protocols. By integrating these areas into the EU’s institutional framework, they became part of the „*acquis communautaire*“ and a binding obligation for all future Member States. In the enlargement process after 2000 (particularly for the Central and Eastern European countries), Chapter 24 acquired strategic importance, as it became evident that legal and institutional transformation in the fields of security and justice requires a lengthy period and profound reforms. Unlike certain other chapters, where the primary task is the adoption of legislation, the focus here is on actual capacities and results – from the efficiency of courts, through border control, to the fight against organized crime.

For candidate countries, including the Republic of Serbia, Chapter 24 is among the most important, as it provides the basis for assessing the functionality of the rule of law, together with Chapter 23 (Judiciary and Fundamental Rights). It directly influences the perception of the candidate country’s credibility, both among EU Member States and international partners, and conditions progress in other negotiation chapters – without

12 European Commission, **Enhancing the accession process – A credible EU perspective for the Western Balkans**, COM(2020) 57 final, 5 Feb 2020

13 European Commission, **EU accession process – clusters** (brochure), Oct 2022 (six clusters; „fundamentals open first and close last“)

14 Council of the EU, **Conclusions on enlargement (2022)** – emphasis on the rule of law, fundamental rights, democratic institutions and public administration reform.

the fulfillment of interim benchmarks in Chapters 23 and 24, negotiations in other areas, including the economy and the internal market, may be slowed down or blocked. In cases of stagnation or backsliding, the EU may apply the principle of “reversibility” – temporarily suspending negotiations or reverting to an earlier stage until the identified problems are resolved.¹⁵ In its 2023 Enlargement Report, the European Commission emphasized that “Chapters 23 and 24 represent the „litmus test“ of a candidate country’s readiness for membership, as they reflect the level of institutional maturity, political will, and capacity to implement EU law in practice”.¹⁶

The key areas of Chapter 24 include: Judicial and police cooperation in criminal matters – based on mutual trust and the mutual recognition of decisions (European Arrest Warrant – EAW)¹⁷ and instruments for the enforcement of sanctions, supported by Eurojust/Europol and data exchange through SIS II, VIS, and ECRIS. Candidate countries are required to ensure full legal harmonization, IT system interoperability, designated contact points, and the routine use of Joint Investigation Teams (JITs). For the Republic of Serbia, priorities include technical integration (SIS II/ECRIS) and strengthening capacities for cross-border investigations, accompanied by practices that build mutual trust among partners.

The fight against organized crime, corruption, and terrorism – EU standards encompass the criminalization of terrorism¹⁸ and money laundering¹⁹, as well as advanced mechanisms for the freezing and confiscation of assets, supported by GRECO guidelines and operational cooperation with Europol/Eurojust (and the EPPO in relation to the EU budget).²⁰ The Republic of Serbia is expected to translate these norms into measurable outcomes: a higher number of high-quality financial investigations and final convictions in cases of high-level corruption, sustainably funded specialized units, effective whistleblower protection, and stronger oversight of public procurement.

Migration, asylum, and border management – The Common European Asylum System (CEAS) prescribes harmonized procedures, reception conditions, Dublin responsibility, and EURODAC, while the Schengen Borders Code, VIS, and SIS II regulate border control and the movement of persons. Candidate countries are required to ensure interoperability, adequate asylum capacities, infrastructure, and cooperation with Frontex. As a transit route, the Republic of Serbia needs to increase its accommodation and operational capacities, accelerate procedures, and modernize border control equipment and IT systems, while ensuring full respect for human rights.²¹

15 Council of the European Union. (2021). *Revised Enlargement Methodology: Ensuring Credibility and Reversibility*. Brussels, 2021.

16 European Commission. (2023). *EU Enlargement Strategy and Main Challenges*. Brussels, COM(2023) 700 final.

17 Council of the European Union. (2002). *Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States*, OJ L 190/1, 2002.

18 Directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism, OJ L 88/6, 2017.

19 Directive (EU) 2018/1673 on combating money laundering by criminal law, OJ L 284/22, 2018.

20 GRECO Recommendations and Evaluation Cycles (Council of Europe) – relevant sources for the prevention of corruption; United Nations Convention against Transnational Organized Crime (Palermo Convention), 2000; United Nations Convention against Corruption (UNCAC), 2003.

21 Regulation (EU) No 604/2013 (Dublin III) establishing the criteria and mechanisms for determining

Protection of fundamental rights and freedoms – The EU Charter of Fundamental Rights, the European Convention on Human Rights,²² and anti-discrimination directives form the foundation for fair trial rights, the prohibition of discrimination, freedom of expression and media pluralism, minority rights, and access to justice.²³ Obligations include the establishment of independent bodies (ombudsman, commissioner), transparency of media ownership, and effective judicial protection. The Republic of Serbia is expected to strengthen the safety of journalists, the capacities of independent institutions, the equal application of minority rights, and access to justice.

International and interinstitutional cooperation – The European judicial area relies on mutual recognition through the EJN/ENCJ networks (European Judicial Network/ European Network of Councils for the Judiciary) and coordination via Eurojust, while security cooperation is conducted through Europol/Frontex and interoperable databases. Candidate countries are required to establish centralized coordination, interoperable IT systems, and actively participate in Joint Investigation Teams (JITs) and operations. The Republic of Serbia needs to consolidate the coordination of the judiciary, police, and regulatory bodies, increase its participation in JITs, and accelerate technical interoperability (SIS II/VIS).

3. PROGRESS AND CHALLENGES OF THE REPUBLIC OF SERBIA

The Republic of Serbia, as a candidate country for membership in the European Union since 2012, has been undertaking profound institutional and legislative reforms in order to align its legal system and institutional capacities with EU standards, particularly in the areas of the rule of law and internal security encompassed by Chapter 24. Although certain progress has been achieved in the adoption of laws and strategic documents, numerous reports of the European Commission and international organizations indicate that the results of reform implementation remain limited, while political and institutional challenges persist. Since the beginning of the accession negotiations in 2014, the Republic of Serbia has adopted a series of reform documents and laws aimed at strengthening the rule of law, reinforcing the judiciary, combating corruption, and aligning with Schengen standards. One of the key reforms was the amendment of the Constitution of the Republic of Serbia in 2022, which introduced changes in the judiciary in order to reduce political influence over the appointment of judges and prosecutors. The appointment of judges is now primarily within the competence of the High Judicial Council, while the role of the National Assembly in this process has been significantly reduced.²⁴ Similar changes were

the Member State responsible for examining an asylum application; Regulation (EU) No 603/2013 (Eurodac) establishing a database of fingerprints of asylum seekers; Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive); Directive 2013/33/EU laying down standards for the reception of applicants for international protection (Reception Conditions Directive).

22 European Convention on Human Rights (ECHR), Rome, 1950.

23 Directive (EU) 2016/343 on strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings; Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences; Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime; Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (OJ L 190/1, 2002).

24 Official Gazette of the Republic of Serbia, *Amendments to the Constitution*, no. 16/2022.

introduced in the prosecution system through the establishment of the High Prosecutorial Council, thereby formally strengthening institutional independence. Although these constitutional amendments were assessed as a positive step, the Venice Commission, in its 2023 opinion, emphasized the need to ensure the effective implementation of the new arrangements, noting that “normative reforms will have no effect unless pressures on holders of judicial office are removed and institutional capacities for independent decision-making are reinforced”.²⁵

In recent years, the Republic of Serbia has also adopted and revised several important laws and strategies, such as the Action Plans for Chapters 23 and 24 (initially adopted in 2016 and revised in 2020 and 2023) – defining specific measures, indicators, and deadlines for meeting European standards. The Law on the Organization and Competences of State Authorities in Combating Organized Crime, Terrorism and Corruption (2018) – established the basis for specialized prosecutors’ offices and courts for the most serious criminal offenses. The National Judicial Reform Strategy (2023–2028) – focuses on the digitalization of courts, reducing case backlogs, and strengthening the professional training of judges. The Law on Asylum and Temporary Protection (2018) and the Law on Foreigners (2018) – aligned with EU CEAS standards. The Integrated Border Management Strategy (2022–2027) – aimed at strengthening border control capacities and ensuring interoperability with SIS II and VIS systems.

With the aim of strengthening the fight against corruption and organized crime, specialized prosecutors’ offices and court departments for the suppression of organized crime and high-level corruption have been established, along with the Agency for the Prevention of Corruption, whose competences include oversight of the assets of public officials and the control of conflicts of interest, as well as the Administration for the Prevention of Money Laundering, which cooperates with international bodies (MONEYVAL and FATF).

However, according to the European Commission’s 2024 Report on the Republic of Serbia (COM(2024) 692 final), these mechanisms still demonstrate insufficient effectiveness in conducting investigations and prosecuting high-level corruption cases, while public trust in the judiciary remains low.²⁶

Each year, the European Commission publishes the Progress Report on the Republic of Serbia, assessing the progress achieved in meeting the political and economic criteria, as well as in aligning with the EU acquis. In the context of the rule of law and Chapter 24, these reports represent the most relevant assessment instrument, as they contain both quantitative indicators (number of judgments, investigations, asylum procedures) and qualitative evaluations (institutional independence, political pressures, transparency). According to the European Commission’s 2024 Report on the Republic of Serbia (COM(2024) 692 final), Serbia has achieved moderate progress in most areas covered by Chapter 24, but key problems remain in the fields of implementation and institutional independence. The Commission particularly emphasizes progress regarding judicial independence – a positive step was achieved with the adoption of constitutional amendments (2022) and new laws on courts and prosecutors’ offices (2023) – while also noting that political influence on the process of appointment and promotion of judges and prosecutors remains a concern, especially through informal pressure and public statements made by political actors.

25 Venice Commission. (2023). *Opinion on Constitutional Amendments Concerning the Judiciary in Serbia*. Strasbourg.

26 European Commission. (2024). *Serbia 2024 Report*. Brussels, COM(2024) 692 final.

Fight against corruption – The legislative framework is largely aligned with European standards, but the results in prosecuting high-level corruption cases remain limited. The number of indictments and final convictions is low, while investigations are often slow and burdened with procedural flaws.²⁷

Fight against organized crime – Cooperation with Europol and participation in regional operations have been positively assessed. Nevertheless, the Commission notes that investigative and judicial capacities remain limited, and Joint Investigation Teams (JITs) with EU Member States are still insufficiently utilized.²⁸

Migration and borders – Moderate progress has been made in border management and asylum procedures, but significant investments are still required in infrastructure, staff training, and IT system interoperability with EU networks (SIS II, VIS, Eurodac).²⁹

Protection of fundamental rights – The normative framework is aligned with European standards, but media freedom and the safety of journalists remain areas of serious concern, with numerous reported cases of threats and political pressure.³⁰

A comparison of the last six European Commission reports reveals the following trends:

- Progress has been slowest in the areas of the fight against corruption and media freedom, where assessments have stagnated for years at the level of “limited progress.”
- Judicial independence shows improvements at the normative level (constitutional and legislative reforms), but implementation assessments have not significantly improved.
- Migration and border management represent an area where steady, albeit slow, progress has been recorded, owing to investments in infrastructure and training.
- Cooperation with EU agencies (Europol, Frontex, Eurojust) has gradually improved, but the need for stronger interinstitutional coordination continues to be emphasized.

Although the Republic of Serbia has adopted a significant portion of legislation and strategic documents in line with European Union standards, the key challenges in the area of the rule of law and Chapter 24 do not lie in the normative sphere, but rather in their consistent and effective implementation, as well as in issues of political will, institutional culture, and public trust. These challenges can be grouped into three interrelated categories: (1) implementation of laws and strategies, (2) political influence on institutions, and (3) low levels of public trust in the judicial and security system.

Implementation of laws and strategies – Numerous laws and strategies adopted in recent years – from the Action Plans for Chapters 23 and 24, through the Law on the Organization and Competences of State Authorities in Combating Organized Crime, Terrorism and Corruption (2018), to the Integrated Border Management Strategy (2022–2027) – constitute a normative framework aligned with EU standards. However, the European

27 Ibid., Section on Anti-Corruption.

28 Ibid., Section on Organized Crime.

29 Ibid., Section on Migration and Borders.

30 Ibid., Section on Fundamental Rights.

Commission, in its 2024 Report, notes that “the implementation of adopted laws and strategies continues to proceed slowly and unevenly, particularly in the areas of prosecuting high-level corruption, asylum procedures, and interoperability with EU databases”.³¹

The key obstacles to implementation include - a lack of administrative capacities – insufficiently trained personnel in the judiciary, police, and regulatory bodies; financial constraints – insufficient resources for the modernization of infrastructure, IT systems, and staff training; and fragmentation of competences, that is, weak coordination between ministries, independent bodies, and the prosecution service.

Similar problems have been observed in other countries of the region. Montenegro, according to the 2024 European Commission Report, faces almost identical challenges, while Croatia managed to overcome these obstacles only after centralizing the coordination of reforms within a special government body, which enjoyed direct political and budgetary support.³²

Political influence on institutions – One of the most frequently highlighted challenges in all European Commission reports from 2018 to 2024 is the perception and reality of political influence on the judiciary, the prosecution service, and regulatory bodies. Despite the constitutional amendments of 2022, the Commission assesses that “informal pressures on judges and prosecutors, as well as public statements by high-ranking officials regarding individual cases, remain a common practice that undermines public trust and the credibility of reforms”.³³

The main forms of political influence include: interference in the appointment and promotion of judges and prosecutors, often through informal networks and political recommendations; pressure on independent regulatory bodies (such as the Agency for the Prevention of Corruption and the Commissioner for Information of Public Importance) through budgetary constraints and leadership appointments; and the instrumentalization of the media to exert pressure on investigative bodies and to shape public opinion regarding sensitive cases.

Comparative experiences show that Croatia managed to significantly reduce political influence through transparent appointment procedures and public competitions, while Montenegro, according to the latest European Commission report, faces the same problem as the Republic of Serbia – weak protection of independent bodies and pressures on prosecutors in high-profile corruption cases.³⁴

Public trust in institutions – Low levels of public trust in the judicial system and internal security institutions represent an additional challenge for the consolidation of the rule of law. According to public opinion surveys and perception indices (e.g., Transparency International – Corruption Perceptions Index 2024, in which the Republic of Serbia ranks 101st out of 180 countries), the perception of corruption remains high, while trust in judicial independence is low.³⁵

The factors contributing to this situation include: lengthy judicial proceedings and frequent statutes of limitations in criminal cases; a lack of transparency in the work of

31 European Commission. (2024). *Serbia 2024 Report*, General Assessment. Brussels, COM(2024) 692 final.

32 European Commission. (2013). *Croatia – Final Monitoring Reports on Chapters 23 and 24*. Brussels.

33 European Commission. (2024). *Serbia 2024 Report*, Judiciary and Anti-Corruption Sections..

34 European Commission. (2024). *Montenegro 2024 Report*. Brussels, COM(2024) 701 final.

35 Transparency International. (2024). *Corruption Perceptions Index 2024*. Berlin.

courts and prosecutors' offices, particularly in cases of public interest; and limited access to justice for citizens due to high costs and the lack of free legal aid.

By comparison, Croatia succeeded in improving public perception through the introduction of an online case-tracking system, while Montenegro, according to the European Commission, continues to face "low public trust in the judiciary, which must be addressed through a combination of institutional reform and proactive communication with the public".³⁶

4. PERSPECTIVES AND RECOMMENDATIONS

The progress of the Republic of Serbia in aligning with European standards in the field of the rule of law and internal security depends on the state's ability to overcome the identified structural obstacles and to ensure the sustainability of reforms. The European Commission and other international actors emphasize that the next steps must not focus solely on the formal adoption of laws, but above all on their consistent implementation, the strengthening of institutional culture, and the provision of political will to carry reforms forward.³⁷ The process so far has shown that the Republic of Serbia often adopts laws and strategies aligned with the *acquis communautaire*,³⁸ yet their implementation remains limited. In its 2024 Report, the European Commission stressed that "the focus of the next phase must be on strengthening the mechanisms for the implementation of reforms, with results measured on the basis of objective indicators,"³⁹ and therefore the following measures are recommended:

- Establishing a centralized body for the coordination of reforms in the areas of Chapters 23 and 24, with direct political and budgetary support from the Government, following the Croatian model of 2010 - 2013.⁴⁰
- Defining clear, measurable objectives and performance indicators (e.g., number of final convictions in high-level corruption cases, length of court proceedings, interoperability of IT systems).
- Utilizing IPA funds and EU technical assistance to finance training, court digitalization, and infrastructure modernization.

36 European Commission. (2024). *Montenegro 2024 Report*. Brussels, COM(2024) 701 final.

37 European Commission. (2024). *Serbia 2024 Report – General Overview*. Brussels, COM(2024) 692 final

38 Zakon o organizaciji i nadležnosti državnih organa u borbi protiv organizovanog kriminala, terorizma i korupcije [Law on the Organization and Competences of State Authorities in Combating Organized Crime, Terrorism and Corruption], "Sl. glasnik RS", br. 94/2016, 87/2018 - dr. zakon i 10/2023; Nacionalna strategija za reformu pravosuđa 2023–2028 [National Judicial Reform Strategy 2023–2028], "Sl. glasnik RS", br. 101/2020 i 18/2022; Zakon o azilu i privremenoj zaštiti [Law on Asylum and Temporary Protection], "Sl. glasnik RS", br. 24/2018; Zakon o strancima [Law on Foreigners], "Sl. glasnik RS", br. 24/2018, 31/2019 i 62/2023; Strategija integrisanog upravljanja granicom 2022–2027 [Integrated Border Management Strategy 2022–2027], "Sl. glasnik RS", br. 101/2020 i 18/2022.

39 European Commission. (2024). *Serbia 2024 Report – General Overview*, Recommendations Section.

40 European Commission. (2013). *Croatia – Final Monitoring Reports on Chapters 23 and 24*. Brussels.

- Ensuring regular monitoring by the European Commission and civil society in order to prevent the formal implementation of reforms without tangible results.

One of the main challenges in the implementation of reforms is the fragmentation of competences and weak coordination among different institutions – ministries, the judiciary, the police, independent bodies, and civil society. The absence of synchronized action leads to slow enforcement of laws and weak monitoring of results; therefore, the European Commission recommends that the Republic of Serbia:

- Establish operational working groups bringing together all relevant stakeholders (judiciary, police, independent bodies, academia, and civil society) to ensure faster information exchange and joint planning.⁴¹
- Introduce mandatory semi-annual reports to be submitted by all institutions to the coordinating body, with results made publicly available.
- Digitalize monitoring and reporting processes through a central online platform accessible to institutions and citizens, following the model developed by Croatia in the final phase of its accession negotiations.⁴²
- Recognize transparency as a key factor in strengthening public trust – regular publication of statistics, reports, and results of case prosecutions contributes to the perception of impartiality and institutional effectiveness.

5. CONCLUSION

The rule of law in the context of European integration is not a mere formal requirement, but a substantive criterion of democratic consolidation and sustainable development. Chapter 24 has a dual role: it assesses technical and institutional capacities (borders, migration, police-judicial cooperation) while simultaneously testing depoliticization and institutional resilience. The Republic of Serbia has made progress in the normative sphere—particularly with the constitutional amendments of 2022 and the adoption of accompanying legislation—yet reports point to a gap between legal provisions and practice: limited convictions in high-level corruption cases, insufficient interoperability with EU systems, and persistent perceptions of political influence combined with low public trust.

The priority must be to shift the focus from the mere adoption of norms to measurable results. This entails depoliticized appointment procedures, stable financing and staff strengthening of specialized units, systematic financial investigations and asset confiscation, as well as transparent performance reporting. In the area of borders, asylum, and migration, technical investments (IT interoperability, infrastructure, training) must go hand in hand with Frontex and CEAS standards. International and interinstitutional cooperation (Europol, Eurojust, joint investigation teams) should become routine rather than the exception.

41 European Commission. (2024). *Serbia 2024 Report – Governance and Coordination*.

42 Ibid., Digitalization Best Practices.

Centralized coordination of Chapters 23/24 is essential, with clear quarterly objectives and public reporting, alongside the active involvement of civil society. The rule of law is a long-term, dynamic process; the consistent implementation of already adopted reforms—measured through tangible outcomes—constitutes the key lever for accelerating the path to membership and building a predictable and resilient constitutional order.



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VLADAVINA PRAVA KAO OSNOV EVROPSKIH INTEGRACIJA DOSTIGNUĆA I IZAZOVI REPUBLIKE SRBIJE U OKVIRU POGLAVLJA 24 PRAVDA, SLOBODA I BEZBEDNOST

Apstrakt:

Vladavina prava predstavlja jedan od osnovnih stubova procesa evropskih integracija i ključni preduslov za članstvo u Evropskoj uniji. U kontekstu pregovaračkog Poglavlja 24 – Pravda, sloboda i bezbednost, ova vrednost obuhvata širok spektar reformskih obaveza koje se odnose na efikasno pravosuđe, borbu protiv korupcije i organizovanog kriminala, zaštitu osnovnih prava, upravljanje migracijama i granicom, kao i međuinstitucionalnu saradnju. Ovaj rad ima za cilj da pruži analizu trenutnog stanja vladavine prava u Republici Srbiji kroz prizmu reformskih zahteva i ocena koje Evropska komisija iznosi u svojim godišnjim izveštajima. Posebna pažnja posvećena je normativnom okviru, institucionalnim reformama i izazovima u njihovoj primeni. Kroz uporednu perspektivu i analizu političkih i institucionalnih faktora, ukazuje se na prepreke koje usporavaju uspostavljanje vladavine prava kao održivog standarda. Rad zaključuje da napredak u Poglavlju 24 ne može biti posmatran isključivo formalno-pravno, već da zahteva dubinsku promenu institucionalne kulture, političke volje i transparentnosti. Na kraju se nude preporuke za dalji napredak, uz poseban akcenat na jačanje nezavisnosti pravosuđa i unapređenje nadzora nad sprovođenjem reformi.

Ključne reči: *Vladavina prava, Evropska unija, Poglavlje 24, pravosuđe, reforme*

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CRIMINAL LIABILITY FOR THE ABUSE OF COMPUTER VIRUSES – STATUS AND PROSPECTS¹

Abstract:

Given the increasing prevalence of the almost daily use of computer programs, data, or systems in various spheres of human, social, and economic life, it is necessary to ensure, and subsequently improve, their effective, lawful, and high-quality protection—both technical and legal. In this way, overall computer security is raised to a qualitatively higher level. It is particularly endangered by various unlawful activities involving the misuse of computer programs, data, or systems.

A particularly dangerous form of such computer misuse appears in the creation, insertion, distribution, or dissemination of different types of computer viruses. These are malicious computer programs designed to cause damage to a computer, network, or data, and are introduced into a system with the intention of compromising the confidentiality, integrity, or availability of computer data, or with the aim of disrupting the functioning of a computer or computer network in other ways. The criminal legislation of Serbia, as well as several comparative legal systems, prescribes specific incriminations for the creation or dissemination of computer viruses. This paper addresses their elements, characteristics, forms of manifestation, and substantive content.

Keywords: *computer program, computer virus, misuse, criminal offense, liability*

INTRODUCTION

In the modern world, increasing attention is devoted to the establishment, strengthening, and improvement of systems of computer (information, cyber) security. This is particularly due to their growing vulnerability to numerous unlawful activities carried out by individuals or groups. The entirety of such diverse activities, which violate or endanger computer systems, programs, or data - thereby undermining computer security to a greater or lesser extent-constitutes cybercrime.²

¹ The paper is the result of a long-term scientific research project “Progressive development of law in modern digital society”, which is financed by the Provincial Secretariat for Higher Education and Scientific Research activity (decision number 003069523 2024 09418 003 000 000 001-01003069523 2024 09418 003 000 000 001-01, 21.11.2024).

² Dragojlović, J., Koprivica A., (2023). Osvrt na računarski kriminalitet u zakonodavstvu Republike

Namely, cybercrime refers to various activities that compromise the security of computer data, whereby the criminal offenses it encompasses are committed by means of, or through, the use of computers, with the computer serving as the instrument of their commission. However, this concept also includes criminal offenses consisting of the disabling of computers or computer networks, in which the computer itself becomes the object of attack.³ Within the framework of cybercrime, two categories of criminal offenses can be distinguished:

a) offenses that directly target computer technology systems by disabling, damaging, or destroying computer data or programs, interfering with their use, or engaging in unauthorized access to a computer network or electronic data processing itself and

b) offenses in which computer technology is used as a means for committing other types of criminal offenses.⁴

In practical terms, cybercrime, in the broadest sense of the term - or crime related to the use of computers - is defined in legal theory as the commission of criminal offenses through the misuse of computers or computer systems. This means that the very act of committing such offenses necessarily involves the use of computers or computer systems either as the means or as the target of the offense. A specific manifestation of cybercrime, which in recent times has been gaining increasing significance, scope, and prevalence - while also producing pronounced negative and harmful consequences - is the misuse of computer viruses in various forms.

ON COMPUTER VIRUSES

A computer virus is a malicious computer program (or “code”) characterized by a broad capacity for self-replication (copying, reproducing) within other files with which it comes into contact. It may reside in and infect any computer program, boot sector, or macro-enabled document, thereby altering the content of such a file or inserting (copying) its own code into it. A computer virus typically consists of two parts: a) self-replicating code that enables the multiplication of the virus and b) a payload, which may be “harmless” or harmful. In some cases, the virus may consist solely of self-replicating code.

Computer science today represents a highly dynamic field undergoing rapid development and continuous advancement.⁵ Consequently, it is not surprising that the number and types of computer viruses are multiplying on an almost daily basis. Nevertheless, certain categories of computer viruses can be distinguished, such as: a) **Boot sector viruses** – targeting the Master Boot Record (MBR) or the boot sector of a computer, b) **Parasitic viruses** – infecting executable files by inserting their code into the structure of the program, c) **Multipartite viruses** – simultaneously attacking both boot sectors and executable programs, d) **Companion viruses** – creating a “.com” file using the name of an existing “.exe” program into which they implant their code, e) **Link viruses** – rapidly infecting computer systems or programs, f) **Macro viruses** – exhibiting extensive

Srbije, U: Počuca, M., (urednik), Zbornik radova, Dve decenije razvoja pravne misli, Pravni fakultet za privredu i pravosuđe, Novi Sad, str. 410-420.

3 Mrvić Petrović, N. (2005). *Krivično pravo*, Beograd: Službeni glasnik, str. 322.

4 Đorđević, Đ. (2011). *Krivično pravo. Posebni deo*. Beograd: Kriminalističko-policijska akademija, str. 177.

5 Zirojević, M., Ivanović, Z. (2022). *Cyber law*. Beograd: Institut za uporedno pravo, str. 98-112.

self-replication capabilities, thereby deleting or altering existing computer data, g) **Power viruses** – designed to maximize CPU energy consumption.⁶

Computer viruses spread in numerous ways, including through local networks, Bluetooth connections, e-mail, downloads from various Internet sources, portable media (USB drives, memory cards, CD/DVD discs), and other types of “peripherals” that connect two or more software-controlled computer devices or systems. The stages of viral infection caused by computer viruses are generally described as follows:

- a) **Dormant phase** (optional) – during which the virus program remains inactive even though it has gained access to a computer and is present in the system, it does not yet take any action;
- b) **Propagation phase** – when the virus begins to spread by replicating itself, placing copies into other programs or certain system areas. Such copies (“clones”) need not always be identical to the original version;
- c) **Triggering phase** – when the previously inactive virus is activated, initiating the computer operations for which it was primarily designed;
- d) **Execution phase** – when the full activity of the virus manifests, resulting in various harmful consequences such as file deletion, data theft, system crashes, file corruption, and similar effects.

In order to combat or prevent such unlawful activities - namely the creation, insertion, dissemination, or distribution of computer viruses - modern criminal legislation establishes, within the system of computer-related criminal offenses, criminal liability, i.e., the punishability of their perpetrators. This specific incrimination, titled “**creation and insertion of computer viruses**,” is prescribed not only by the criminal legislation of Serbia but also by the legal systems of several countries in the region (Montenegro, Republika Srpska – BiH, and North Macedonia). In this way, the computer virus itself becomes the object of attack in computer-related criminal offenses.

INTERNATIONAL STANDARDS FOR COMBATING THE MISUSE OF COMPUTER VIRUSES

The foundation for a unified approach to combating the misuse (creation, insertion, dissemination) of computer viruses at the national legislative level is provided by relevant international standards established through regional (European) instruments, such as:

- a) The Council of Europe Convention on Cybercrime (Budapest, 2001); and
- b) Directive 40/2013/EU of the European Parliament and of the Council (2013).

The Convention on Cybercrime serves as the primary source of international standards for the prevention and suppression of cybercrime in European countries.⁷ This

6 Dulčić, K. (2007). Oblici štete od računalnih virusa i odgovornost za štetu, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 28(1), str. 189-228.

7 Dragojlović J., Krstinić D., (2015). Evropski standardi u borbi protiv visokotehnološkog kriminaliteta i njihova implementacija u zakonodavstvu Republike Srbije, *Evropsko zakonodavstvo*, 14(51), str. 92-103.

Convention (Article 1), in its first chapter entitled “Use of Terms,” defines the basic concepts related to cybercrime, such as: a) computer system – any device or group of interconnected or interdependent devices, of which one or more, based on a program, automatically processes data, b) computer data – any representation of facts, information, or concepts in a form suitable for processing by a computer system, including the relevant program that enables the computer system to perform its functions, c) traffic data – any computer data relating to communication via a computer system, generated by a computer system forming part of the communication chain, and containing information on the origin, destination, route, time, date, size, duration, or type of the service involved.

In Chapter Two, entitled “Measures to be Adopted at the National Level,” Part One: “Substantive Criminal Law” provides for several computer-related criminal offenses. In this section, “Offenses against the Confidentiality, Integrity, and Availability of Computer Data and Systems” are prescribed, including an offense relevant to the subject of this paper, entitled “Misuse of Devices” (Article 6).⁸ Based on this international standard, all European countries are obliged to incorporate this incrimination into their domestic criminal law/code.

According to these provisions, this criminal offense occurs if any of the following activities are intentionally (with intent) and unlawfully carried out:⁹

1. The production, sale, procurement for use, import, distribution, and other forms of making available of: a) devices, including computer programs, that are primarily designed or adapted for the purpose of committing one of the computer-related criminal offenses, or b) computer passwords, access codes, or similar data enabling access to a computer system as a whole or to any part of it (including computer viruses).
2. Possession of any of the aforementioned items with the intent to use them for the commission of one of the computer-related criminal offenses. Any state adopting this incrimination may, by law, stipulate that a certain quantity of such items constitutes a qualifying condition. However, actions involving these activities are exempt from liability if they are not intended for the commission of a computer-related criminal offense (e.g., when used for authorized testing or protection of a computer system).

Another international instrument in this field - Directive 40/2013/EU of the European Parliament (2013) - prescribes punishable attacks directed against information systems. This directive amended Council Framework Decision 2005/222/JHA,¹⁰ this directive, as part of the “*acquis communautaire*,” aims to harmonize the criminal legislation of the European Union member states in the field of attacks against information systems by establishing minimum rules concerning the definition of computer-related criminal offenses and the prescription of criminal sanctions for their perpetrators. Within the framework of this directive, information systems are identified as a key element of political, social, and economic interaction in the European Union. The uninterrupted use of

8 Dragojlović, J., (2023). Jurisdiction for criminal offenses of cybercrime – international and national standards, *Pravo teorija i praksa*, 40(1), str. 63-83.

9 Vojković, G., Štambuk Šunjić, M. (2006). Konvencija o kibernetičkom kriminalu i Kazneni zakon Republike Hrvatske. *Zbornik Pravnog fakulteta u Splitu*, 43(1), str. 123-136.

10 Marković, I. (2012). *Evropsko krivično pravo. Pravni život*, 61(12), str. 503-520.

information systems, as well as their security, quality, efficiency, and proper functioning within individual EU member states, is of vital importance for the development of both the internal market and a modern, innovative, and competitive market economy.

Directive 40/2013/EU of the European Union (2013) establishes a system of criminal liability and punishability for offenses involving the creation and use of so-called botnets, which consist of remotely controlling a significant number of computers by infecting them through the installation of malicious software, thereby facilitating precisely targeted cyberattacks.¹¹ These are situations in which such a network - a botnet - is established or created, and can be activated without the knowledge or consent of the owner or user of the computers, in order to initiate attacks on a large scale. Such attacks typically have the capacity, capability, and power to cause significant harm to any natural or legal person. These types of extensive attacks can result in substantial economic damage, both through the disruption of information systems and communications, and through the loss or alteration of commercially sensitive confidential information and data.

THE MISUSE OF COMPUTER VIRUSES UNDER THE LAW OF THE REPUBLIC OF SERBIA

Criminal liability for the creation and dissemination (distribution) of computer viruses, based on international standards, is currently provided for in only a small number of modern criminal legislations. In the countries of Southeastern Europe, this incrimination is prescribed by the Criminal Code of the Republic of Serbia. Apart from Serbia, only three other legal systems in the region recognize this incrimination: Montenegro, North Macedonia, and Republika Srpska – Bosnia and Herzegovina. Under the law of the Republic of Serbia, the Criminal Code¹² in Chapter Twenty-Seven, entitled “Criminal Offenses against the Security of Computer Data,” the Criminal Code of the Republic of Serbia provides, among other offenses, the computer-related criminal offense “Creation and Insertion of Computer Viruses” (Article 300). This offense consists of creating a computer virus with the intent of inserting it into another person’s computer or computer network.¹³

Apart from the security of computer data, in terms of the protected object, the computer virus itself constitutes the object of attack in this criminal offense. A computer virus is a program that, once loaded into a computer’s memory, can spread uncontrollably and destroy existing data or programs on that computer. In the broadest sense, computer viruses are defined by electrical engineering experts as a specific type of computer program capable of self-replication, spreading covertly, and infecting other programs in order to achieve a goal predetermined by the virus author.

It is important that the object in question is a “virus,” that is, a computer program which is suitable, appropriate, or sufficient to cause certain changes or damage to the use or functionality of another person’s computer, either wholly or partially.¹⁴ The concept of a computer virus is defined by the Criminal Code itself (Article 112, point 20) as a computer

11 Bača, N., Ćosić, J. (2013). Prevencija računalnog kriminaliteta. *Policija i sigurnost*, 22(1), str. 146-158.

12 Službeni glasnik RS, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

13 Dragojlović, J. (2025). *Krivično pravo. Posebni deo*. Novi Sad: Pravni fakultet za privredu i pravosuđe, str. 241-242.

14 Stojanović, Z., Deliće, N. (2013). *Krivično pravo. Posebni deo*. Beograd:Pravni fakultet, str. 256-257.

program or another set of instructions introduced into a computer or computer network, designed to replicate itself and affect other programs or data in the computer or network by adding this program or set of instructions to one or more computer programs or data. Since it represents only a specific type of computer program, it is also important to note the concept of a computer program (Article 112, point 19), defined as an organized set of instructions used to control the operation of a computer and to solve a specific task with the help of the computer.

At this point, due to the topicality of the subject, it is important to highlight the solution contained in the Draft Law on Amendments and Supplements to the Criminal Code from November 2024 (Articles 13 and 46), which introduces two innovations in this area:

1. A change in the name of the criminal offense, which would now be called **“Creation and Insertion of a Malicious Computer Program”** (Article 46) and
2. A revised conceptual and substantive definition of a **“computer virus”** (Article 13). According to the proposed solution, it is now termed a **“malicious computer program”** (Article 112, point 20). This is a program created with the purpose of causing harm to a computer, computer network, or computer data, and is inserted into a computer with the intent of compromising the confidentiality, integrity, or availability of computer data, applications, and operating systems, or otherwise interfering with the operation of a computer or network.

In this way, the domestic legal provision is aligned with contemporary needs, international standards, and European Union regulations. The content of a computer virus is specified more precisely, as the concept now comprehensively defines computer programs created with the intent to cause damage to a computer, computer network, or computer data.

The act constituting the basic form of the offense is defined as the **creation**.¹⁵ This involves the preparation, composition, or creation of a new, previously non-existent computer program in the form of a **virus**. For the offense to exist, such activity must be carried out with a specific intent on the part of the perpetrator. This intent refers to the insertion of the newly created computer virus into another person's computer or computer network. This intent, which defines **direct intent** as the form of the perpetrator's culpability, must exist at the moment the act of execution is undertaken, regardless of whether this intent is ultimately realized in the specific case.¹⁶

For this offense, which may be committed by any person—but in practice most often by a technically trained individual—the law alternatively prescribes either a fine or imprisonment of up to six months. In addition to the penalty, the perpetrator is obligatorily subjected (paragraph 3) to a **security measure** in the form of confiscation of the objects, devices, and tools used to commit the offense, regardless of whether they are in the perpetrator's ownership or not.

A more severe, qualified form of this criminal offense (paragraph 2) exists in cases where a computer virus is inserted or introduced into another person's computer or computer network, regardless of whether the virus was created by the perpetrator or by

15 Dragojlović J., Danojlić, M., (2015). Krivično delo pravljenje i unošenje računarskih virusa kao oblik ugrožavanja računarskih sistema, U: Bejatović, M., (urednik), Zbornik radova, Prilagođavanje pravne regulative aktuelnim trendovima u regionu, Pravni fakultet za privredu i pravosuđe, Novi Sad, str. 639-648.

16 Delić, N. (2021). *Krivično pravo. Posebni deo*. Beograd: Pravni fakultet, str.330-331.

another individual, thereby causing harm to another natural or legal person. Such harm may be of a property (material) nature or non-property (immaterial, affective) nature. This offense is qualified by the **more serious consequence**- the damage caused - which must be in a causal relationship with the act of execution. For this offense, the law alternatively prescribes either a fine or imprisonment of up to two years.

ABUSE OF COMPUTER VIRUSES IN REGIONAL COMPARATIVE CRIMINAL LAW

The Law of Bosnia and Herzegovina

Of the four legislative texts in the field of substantive criminal law in Bosnia and Herzegovina, within the system of computer-related criminal offenses, only the Criminal Code of the Republic of Srpska¹⁷ provides for a specific incrimination under the title: “Creation and Introduction of Computer Viruses” (Article 409). Specifically, in Chapter Thirty-Two, this offense is included within the group of criminal offenses against the security of computer data, highlighting a terminological distinction of these incriminations in comparison with other analyzed comparative legislations (which use the term “računarski” [*computer-related*] rather than “kompjuterski” [*computer*]).

The criminal offense of creating and introducing computer viruses manifests itself in two forms: a) the basic form, and b) the aggravated form of the offense. The basic offense consists of creating a computer virus with the intent of introducing it into another person’s computer, computer network, or telecommunication network.

The object of protection of this offense is the security of the proper, efficient, lawful, and reliable functioning of computers, computer networks, or telecommunication networks. The object of attack in this offense is the computer virus. This is a computer program which, once introduced into a computer’s memory, spreads uncontrollably and destroys the data or programs stored on that computer.

The act of commission of this offense is understood as the making, creation, production, or composition of a previously non-existent computer virus, carried out in a manner and through procedures by which, in computer technology, a virus as a computer program is generated.¹⁸ The determination of what constitutes a virus, how it is created or composed, and how it is introduced into a computer is made by the court on the basis of expert findings and opinions provided by specialists in computer and information technology. The act of creation involves the application of certain technical procedures through which a new computer virus (with new properties or effects) is generated, or the effect, scope, or functionality of an already existing virus—previously developed by another person - is enhanced.

For this criminal offense to exist, it is essential that the computer virus is created with the intent of being introduced into another person’s computer or computer/telecommunication network, regardless of whether such introduction actually occurs in a specific case. The consequence of the offense consists in the violation - damage or

17 Službeni glasnik Republike Srpske, br. 64/2017, 104/2018, 15/2021, 89/2021, 73/2023, 9/2024, 105/2024, 147/2025, 19/2025 i 31/2025.

18 Jovašević, D., Mitrović, Lj., Ikanović, V. (2021). *Komentar Krivičnog zakonika Republike Srpske*. Banja Luka: Službeni glasnik, str. 807-809.

impairment (to a greater or lesser extent) - of other programs within a computer or computer network, the inability to use normally the programs stored in the computer, or the disruption of data processing within the computer.

The perpetrator of this offense may be any person, while in terms of culpability, direct intent is required. This highest form of conscious and voluntary conduct is characterized by a specific subjective element - the intent of the perpetrator to insert the created computer virus into another person's computer. Such intent must exist at the very moment the act of execution - the creation of the virus - is undertaken. In fact, this intent must motivate the perpetrator to commit the act of execution, though it need not be realized in every particular case.

For this offense, the law alternatively prescribes either a fine or imprisonment of up to six months. In addition to the penalty, the perpetrator is obligatorily subjected (paragraph 3) to a security measure consisting of the confiscation of the objects - devices and tools - used to commit the offense, i.e., by means of which the virus was created or deployed (*instrumenta sceleris*).

A more severe form of the offense (paragraph 2) exists if the introduction of a computer virus into another person's computer or computer network results in damage. The qualifying circumstance in this case is the scope, intensity, or nature of the resulting consequence. The consequence appears in the form of injury or damage, which may be either pecuniary or non-pecuniary, of any amount or value, and which is the result of the perpetrator's negligence.

Unlike the consequence of endangering the security of a computer or telecommunication network which constitutes the outcome of the basic form of the offense the aggravated form requires a consequence in the form of actual harm. It is essential that a causal link exists between the harm of any kind, in any amount or value and the act of execution, i.e., the introduction of the computer virus. This causal relationship must be established by the court in each particular case as a matter of fact.

The Law of Montenegro

The second legislative text in the Southeastern European region that explicitly establishes criminal liability for the misuse of computer viruses is the Criminal Code of Montenegro¹⁹ in Chapter Twenty-Eight, entitled "Criminal Offenses against the Security of Computer Data," within the system of computer-related criminal offenses, the Criminal Code of Montenegro provides for the offense titled "Creation and Insertion of Computer Viruses" (Article 351). This offense consists of creating a computer virus with the intent of introducing it into another person's computer system. In addition to the security of computer data, as the object of protection, the computer virus constitutes the object of attack.

The Criminal Code (Article 142, point 22) provides the definitional meaning of this legal concept, according to which a computer virus is considered to be "a computer program that endangers or alters the functions of a computer system and modifies, compromises, or unlawfully uses computer data." This definition of a computer virus remained in force in

19 Službeni list Republike Crne Gore, br. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 42/2015, 58/2015, 44/2017, 49/2018, 3/2020, 26/2021, 144/2021, 145/2021, 110/2023 i 123/2024.

Montenegro until 2020, when, following the adoption of an amendment to the Criminal Code²⁰ a significant amendment was made to this incrimination, removing the term “computer virus” from the definitional description of the object of attack, but not from the title of the offense (which appears to be an oversight by the legislator).

According to the new legal description, the object of attack in the offense under Article 351 of the Criminal Code of Montenegro is a “malicious computer program.” A malicious computer program (Article 142, point 22) is defined as a program created to cause harm to a computer, computer network, or computer data, which is introduced into a computer without the user’s consent with the intent of compromising the confidentiality, integrity, or availability of computer data, applications, or operating systems, or otherwise interfering with the operation of a computer or computer network.

The offense under Article 351 of the Criminal Code of Montenegro consists of the following constitutive elements: a) act of execution: defined as the creation of a new, previously non-existent malicious computer program (virus); and b) intent: the act must be carried out with a specific intent, which motivates the perpetrator to commit the offense and must exist at the moment the act is undertaken. However, this intent need not be realized in a specific case. The intent consists of inserting the created malicious computer program (virus) into another person’s computer system, i.e., a system belonging to any other natural or legal person.

The perpetrator of the offense may be any person, while in terms of culpability, **direct intent** is required, qualifying the perpetrator’s intent to insert the malicious computer program into another person’s computer system, regardless of whether this was actually carried out in a specific case.

For this offense, the law alternatively prescribes either a fine or imprisonment of up to **one year**. In addition to the penalty, the perpetrator is mandatorily subject to a **security measure** consisting of the confiscation of objects (devices and tools) used to commit the offense (*instrumenta sceleris*).

A more severe form of the offense (paragraph 2) exists if the perpetrator inserts a malicious computer program (virus) into another person’s computer system, thereby causing harm. This offense is qualified by the following circumstances: a) act of execution: the insertion (writing, embedding) of a malicious computer program, regardless of whether it was created by the perpetrator or by a third party; b) the malicious computer program is inserted into another person’s computer system, i.e., a system belonging to another natural or legal person, not the perpetrator; c) consequence: the act results in harm, causing damage (either pecuniary or non-pecuniary) to another natural or legal person, irrespective of the type, significance, or scope of the damage.

For this aggravated form of the offense, the law alternatively prescribes either a fine or imprisonment of up to **two years**.

The Law of North Macedonia

The last legislative text in the region surrounding the Republic of Serbia that, based on international standards, establishes liability and punishability for the criminal

20 Službeni list Republike Crne Gore, br. 144/2021.

offense titled “Creation and Insertion of Computer Viruses” is the Criminal Code of North Macedonia (Article 251a).²¹ However, unlike the previous legal solutions, this offense is, based on the type of protected object, classified within the group of criminal offenses against property (Chapter Twenty-Three). Furthermore, when defining the concept and content of computer-related criminal offenses, the Macedonian legislator uses the term “computer” rather than “computer related”.

The criminal offense “Creation and Insertion of Computer Viruses” consists of creating a computer virus or acquiring one from another source with the intent of introducing it into another person’s computer or computer network.²² While the object of protection, according to the group protected object, is property (or the right to property), the object of attack is the computer virus.

However, unlike the previously mentioned legislative texts, the Macedonian legislator does not define this term under “meaning of legal expressions” (Article 122), although related terms are defined in this section, such as: a) computer system – a device or a group of interconnected devices, of which one or more perform automatic data processing according to a specific program (point 26) and b) computer data – a representation of facts, information, or concepts in a form suitable for processing by a computer system, including a program suitable for operating the computer system (point 27).

The act of commission of this criminal offense consists of two alternatively prescribed activities. These are:²³ a) creation – the making, designing, composing, or constructing of a computer virus; and b) acquisition – receiving, accepting, or using a computer virus created by another party.

For the offense to exist, it is essential that any of the alternatively prescribed activities within the act of commission be carried out with a specific intent – namely, the intent to introduce the computer virus into another person’s computer or computer network, regardless of whether this intent is realized in the specific case. However, the intent must be present on the part of the perpetrator at the time the act is undertaken, and it should motivate the perpetrator to commit the act.

The perpetrator of the offense may be any natural or legal person, while in terms of culpability, direct intent is required, qualifying the legally prescribed intent with which the perpetrator acts in committing this offense. For a natural person, the law alternatively prescribes either a fine or imprisonment of up to one year. If the perpetrator is a legal entity, a fine is prescribed (paragraph 5).

According to explicit statutory provision, attempt to commit this offense is punishable (paragraph 4).

The criminal offense under Article 251a of the Criminal Code appears in two more severe, qualified forms.

21 Služben vesnik na Republika Makedonija, br. 37/96, 80/99, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 827/2013, 14/2014, 27/2014, 28/2014, 28/2014, 41/2014, 115/2014 i 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 169/2016, 97/2017, 170/2017, 248/2018, 36/2023 i 188/2023.

22 Nikolovska, S. (2013). *Metodika na istraživanje kompjuterski kriminalitet*. Skopje: Fakultet za bezbednost, str. 143-148.

23 Zvrlevski, M., Andonova, S., Milošeski, V. (2014). Atanasov, R. (2021). *Priručnik za kompjuterski kriminal*. Skopje: OSCE, str. 121-127.

The first aggravated form (paragraph 2) is committed by a person who, through the use of a computer virus, causes damage to another person's computer, computer system, computer data, or computer program. This is a consequence-based offense, meaning the act of commission consists of causing damage (of any kind, pecuniary or non-pecuniary) to another person's computer, computer system, computer data, or computer program. The act is carried out in a specific manner – by using, employing, or inserting a computer virus. For this offense, the law prescribes imprisonment from six months to three years.

The most severe form of this criminal offense (paragraph 3) occurs in two manifestations: a) offense qualified by a more severe consequence – if the use of a computer virus causes “greater” damage to another natural or legal person. “Greater” pecuniary benefit or “greater” pecuniary damage (Article 122, point 34) is defined as benefit or damage corresponding to the amount of five average monthly personal incomes in North Macedonia at the time of the offense; b) offense qualified by a special circumstance – method of execution – collective or group commission, occurring if the offense is carried out by a group of multiple persons specifically formed to commit the computer-related criminal offense. For this offense, the law prescribes imprisonment from one to five years.

CONCLUSION

The development of modern information and communication, as well as computer technology, alongside numerous benefits for individuals, the economy, and society as a whole, has also brought new challenges in the form of their misuse. This has led to the emergence of a new type of computer crime, representing a sophisticated method of committing previously existing “classic” criminal offenses. A particularly dangerous form of such computer misuse, which has become increasingly significant in recent times, manifests in the **malicious creation, insertion, distribution, or propagation of various types of computer viruses**. These are malicious computer programs designed to cause harm to a computer, computer network, or computer data, introduced into a computer with the intent to compromise the confidentiality, integrity, or availability of computer data, or to otherwise disrupt the operation of a computer or computer network.

In order to combat such unlawful activities by individuals or groups, modern criminal legislation in Serbia, as well as comparative legislation in regional states – Montenegro, North Macedonia, and the Republika Srpska (BiH) – based on international standards contained in: a) the **Council of Europe Convention on Cybercrime** and b) **Directive 40/2013/EU of the European Parliament and of the Council**, establishes a specific criminal offense with almost identical content, constitutive elements, and characteristics: the **creation and insertion of computer viruses (or malicious computer programs) into another person's computer or computer network**.

This offense, in addition to protecting the **security of computer data (or systems)** as the object of protection and the **computer virus** as the object of attack, prescribes as the act of commission the activity of **creating a computer virus by any means**, with the intent of introducing or inserting it into another person's computer, computer system, or telecommunications network. For the basic form of the offense, alternative penalties are prescribed: **a fine or imprisonment of up to six months** (Serbia, Republika Srpska), or **imprisonment of up to one year** (Montenegro, North Macedonia).

Beyond the basic form, most of the analyzed criminal codes prescribe only **one aggravated form**, which is qualified by the consequence resulting from the insertion of the computer virus. This aggravated consequence arises in the form of damage caused to another person's computer or computer system (for which a **fine or imprisonment of up to two years** is alternatively prescribed – Serbia, Republika Srpska, Montenegro). Only in the legislation of North Macedonia are **two aggravated forms** established: a) causing any damage (for which a fine or imprisonment of up to two years is prescribed), and b) causing “greater” damage (punishable by imprisonment from **one to five years**).

In addition to the more precise definition of the offense of **creation and insertion of computer viruses** (through the adoption of the Draft amendment to the Criminal Code of November 2024), it is also appropriate to consider the following **de lege ferenda** issues: 1) increasing the statutory maximum imprisonment for the basic form of the offense to **up to one year** and 2) introducing an aggravated qualification of the offense based on the following qualifying circumstances: a) causing **property damage** in the legally prescribed amount of 450,000 or 1,500,000 dinars, b) committing the act with a specific type of intent, namely the intent to **obtain unlawful pecuniary gain** or to **cause pecuniary harm** to another person and c) committing the act against a specific type of **passive subject** – a computer or computer system of significance to state authorities, public services, institutions, enterprises, or other entities of general importance.



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KRIVIČNA ODGOVORNOST ZA ZLOUPOTREBU RAČUNARSKIH VIRUSA – STANJE I PERSPEKTIVE

Apstrakt:

S obzirom na sve veću raširenost gotovo svakodnevne primene računarskih programa, podataka ili sistema u različitim oblastima ljudskog, društvenog ili privrednog života, potrebno je obezbediti, a potom i unaprediti njihovu efikasnu, zakonitu i kvalitetnu, ne samo tehničku, već i pravnu zaštitu. Na taj način se opšta računarska bezbednost podiže na kvalitetno viši nivo. Ona je posebno ugrožena različitim protivpravnim delatnostima zloupotrebe računarskih programa, podataka ili sistema.

Posebno opasan vid takve računarske zloupotrebe se javlja u obliku zlonamernog pravljenja, unošenja, distribucije ili širenja različitih vrsta računarskih virusa. Radi se o zlonamernim računarskim programima koji su napravljeni sa ciljem nanošenja štete računaru, računarskoj mreži ili računarskim podacima i koji se ubacuje u računar sa namerom ugrožavanja poverljivosti, celovitosti ili dostupnosti računarskih podataka, odnosno sa ciljem ometanja rada računara ili računarske mreže na druge načine. Krivično zakonodavstvo Srbije, kao i neka druga uporedna zakonodavstva predviđaju specifičnu

inkriminaciju pravljenja ili širenja računarskih virusa, o čijim elementima, karakteristikama, oblicima ispoljavanja i sadržini govori ovaj rad.

Ključne reči: računarski program, računarski virus, zloupotreba, krivično delo, odgovornost

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MONEY LAUNDERING AND LEGAL PROCEDURES AGAINST THIS PART WORLDWIDE

Abstract:

Money laundering is the illegal process of making large amounts of money generated by criminal activities, such as drug trafficking or terrorist financing, appear to have come from a legitimate source. Money from criminal activity is considered dirty and the process “launders” it to make it look clean. Money laundering is a serious financial crime that both white-collar and street criminals engage in. Most financial companies today have an anti-money laundering (AML) policy to detect and prevent this activity. However, as today many activities take place in the digital sphere, money itself is digital, and actions are instant and easily cross national borders. “Tax havens” contribute to money laundering, as does buying real estate for cash, which flourishes in former socialist countries. All this places difficult tasks before the representatives of the law who are struggling with this phenomenon, which has a long history and deep roots.

Keywords: *money laundering, crime, digital money, offshore companies, tax havens*

1. INTRODUCTION

Money laundering (also known as asset laundering) is the process of exchanging large amounts of money obtained through criminal activities, such as drug trafficking, for money or goods of legitimate origin. It is a crime in many jurisdictions, with different definitions describing the crime itself. It is essentially an operation within the framework of organised crime and the shadow economy. Money laundering begins with the commission of a serious crime (obtaining illegal benefits in financial markets or other economic sectors). Money laundering is an independent criminal offense that does not require a previous court conviction for the execution of the criminal act from which the funds originated. Very often as a result of money laundering we get investment in real estate, which was visible during prohibition in the USA (as well as in Mexico, the Bahamas and Canada, from where alcohol was smuggled into the USA), then during the reign of the Colombian drug cartels in the USA (especially the construction boom in Miami) and today, very visible in the Balkan states.

2. DEFINITION OF MONEY LAUNDERING

Money laundering consists of adjusting the tax legality of money from criminal or unjustified activities. That is, it is an activity in which a criminal person or organisation, engaged in a criminal act, processes the financial gain derived from illegal actions, in order

to try to give them the appearance of resources obtained through legal actions, such as tax evasion or any other illegal act, where the real source of the property is deliberately avoided. Money laundering is, technically, the conversion or transfer of property; that is, concealing the nature of earnings; acquiring, possessing or using property, knowing that it derives from criminal activities; or participation or assistance in the movement of funds so that the profit appears legitimate.

Money obtained from certain crimes, such as extortion, insider trading, drug trafficking and illegal gambling, is “dirty” and needs to be “cleansed” to be taken out of illegal activities and put into legal flows. Banks and other financial institutions treat money that has no established origin with great suspicion, but it can be legalised through numerous types of investments, so that it is then viewed without suspicion.

Money can be laundered using many methods that vary in complexity and sophistication. Money laundering usually consists of three steps:

- The first consists of introducing cash into the financial system in some way (“placement”);
- the second involves the execution of complex financial transactions to conceal the illicit origin of the cash (“layering”);
- and, finally, the acquisition of wealth created by transactions of illicit funds (“integration”).

Some of these steps may be skipped, depending on the circumstances. For example, it would not be necessary to market non-monetary income that is already in the financial system.

3. HISTORY

There are certain authors who point out that financial crime, both counterfeiting and money laundering, existed even before the existence of money as we know it today. However, the custom of using certain practices to conceal income from illegal activities dates back to the Middle Ages when usury was declared a criminal offense. Merchants and moneylenders circumvented the laws and concealed them with ingenious mechanisms. It was during this time that pirates pioneered the practice of “laundering” the gold obtained from raids on European merchant ships plying the Atlantic between the 16th and 18th centuries.

To classic piracy was added the practice of buccaneers and filibusters, which were covertly assisted by certain European governments. The most famous case is the English pirate Francis Drake, who was knighted by the English Queen Elizabeth I on his ship, as a reward for successful attacks on Spanish ports and ships. In 1612, England offered pirates who abandoned their profession an unconditional pardon and the right to keep the fruits of their crimes. Much of the wealth accumulated by corsairs and pirates was protected by the heirs of the Templar tradition and the bankers of the time. This is how financial safe havens, known today as tax havens, were born, a modern version of those old havens. Interestingly, even now, many tax havens are located precisely in the Caribbean.

With the economic and military power of pirates and privateers, European and American populations began to believe that trade and finance were entirely dependent on them. The rulers of the time recognized that the treaties and laws in force were insufficient in the fight against pirates and invited renowned jurists such as Hugo Grotius and Francisco de Vitoria to seek a legal solution. The result was the creation of the first concepts of international law ¹, like *mare nostrum*, *mare liberum* and *hot pursuit*. The result of these actions was the almost complete elimination of this criminal phenomenon.

The word 'laundry' (in the sense of legitimising ill-gotten money) originated in the United States in the 1920s, when American mobsters created a network of Sanitary Cleaning Shops owned by Al Capone in 1928 during Prohibition to hide the illegal origin of their money, i.e. criminal activities. The mechanism consisted in presenting the income from illegal activities as income from laundry business. Since most of the payments at the laundromats were made in cash, it was very difficult to distinguish which money came from crime and which came from legitimate business. This company would allow deposits in the bank of low-value notes, common in the laundry shops, more than those derived from the circulation of alcoholic beverages prohibited by the then current Prohibition Act and other criminal activities in which it was engaged, such as the investigation of prostitution, gambling and extortion.

The use of the term "money laundering" was first noted in the English newspaper The Guardian and became popular in the 1970s, such as cases such as Watergate. The informant, called "Deep Throat" (William Mark Felt), advised Washington Post reporter Bob Woodward with the following words: *"Follow the money. The committee to re-elect then-President of the United States Richard Nixon will be involved in financial transactions funneling illegal campaign funds to Mexico and then back to the United States through a Miami company."*

In the 1970s, with the beginning of the global drug trade, the phenomenon of money laundering was noticed again. The proceeds from drug sales were deposited in banks without any control. After money was introduced into official financial systems, it moved easily through the formal circuit. The term was first used in court in 1982 in the United States when allegedly laundered Colombian cocaine money was seized.

4. SCALE OF MONEY LAUNDERING IN THE WORLD

There are several regulatory bodies that annually estimate the amount of money laundered, either globally or nationally. An IMF spokesman estimated in 1996 that 2-5% of the entire world economy included money derived from this activity²

The Financial Action Task Force on Money Laundering (FATF), an intergovernmental body, stated that *"in general, it is absolutely impossible to give a reliable estimate of the amount of money being laundered and therefore FATF does not publish any figures relating to this practice"*.³

1 "Science: Volume 2, Issue 3, Chapter 11." **ILCE Digital Library**. Accessed September 10, 2025. http://bibliotecadigital.ilce.edu.mx/sites/ciencia/volumen2/ciencia3/100/html/sec_11.html.

2 International Monetary Fund. "Factsheet on the IMF." **IMF News**. Accessed September 10, 2025. <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp021098>

3 Financial Action Task Force on Money Laundering. "FAQs: Money Laundering." **FATF**. Accessed September 10, 2025. <https://www.fatf-gafi.org/en/faq/moneylaundering.html#d.en.11223>.

Academic commentators have also been unable to estimate with certainty the amount of money laundered in the world.⁴ Various estimates of global money laundering are repeated often enough to be considered true, but no researcher has yet managed to overcome the difficulties inherent in measuring illicit activity. Despite the difficulty in measuring the magnitude of money laundering worldwide, the amount of money laundered each year is in the billions or even trillions of dollars and is of great concern to national governments.⁵

Money laundering remains a major concern for the financial services industry in Latin America, one of the world's most corrupt regions. Organisations in the financial sector reported about 50% of money laundering incidents in Latin America. According to PWC's 2014 Global Economic Crime Survey, in Latin America, only 2.8% of respondents in Latin America claimed to have experienced antitrust or competition law hassles, compared to 5.2% of respondents Worldwide.

In Italy, the complex and widespread phenomenon of money laundering is inextricably linked to tax evasion, and is difficult to counter because it often crosses Italian borders. Estimates range between 1.7% and 12% of GDP according to Pierre-Carlo Padoano⁶. 75% comes from tax and excise evasion, which shows that evasion and money laundering are linked.

Consequently, governments and international bodies have taken measures to prevent and end money laundering and to imprison those responsible for money laundering. Financial institutions have also made efforts to detect and prevent transactions involving dirty money, either to comply with government requirements or to avoid risks associated with the institution's reputation.

5. THE FIGHT AGAINST MONEY LAUNDERING

Money laundering cases have existed as long as there have been large-scale criminal enterprises. Anti-money laundering laws were developed alongside laws related to the war on drugs. Recently, anti-money laundering regulations have been seen as a parallel to the fight against financial terrorism, as both involve the transfer of funds through financial systems. Financial terrorism is defined as revealing the location where money is moved.

In 1989, the Financial Action Task Force - FATF was created in the USA. In 1990, the FATF issued its 40 recommendations against money laundering, which, despite being non-binding, served as a guide for most countries in preventing and repressing this behaviour.⁷

The 40 recommendations have been modified, interpreted and updated on several occasions, expanding their objectives to combat the financing of terrorism and organised crime. There are a number of ways in which other countries have vigorously sought ways to

4 Reuter, Peter, and Edwin M. Truman. *Chasing Dirty Money: The Fight Against Money Laundering*. Washington, DC: Institute for International Economics, 2004.

5 Ibid.

6 "Il riciclaggio in Italia vale il 12% del PIL." **TIO**. Accessed September 10, 2025. www.tio.ch/economia/dal-mondo/1258340/il-riciclaggio-in-italia-vale-il-12-del-pil.

7 International Federation of Accountants. *Anti-Money Laundering*. 2nd ed. IFAC, 2015. <https://www.ifac.org/knowledge-gateway/building-trust-ethics/publications/anti-money-laundering-2nd-edition>.

combat money laundering. After the creation of the FATF, several organisations joined at the regional level to fight against these bad financial practices, such as Gafisud (GAFILAT). This trend has been a great step forward for nations to come together and show a firm hand against money laundering and many other tax crimes that affect society.

In addition to organisations born in the world to fight money laundering, numerous international agreements have been signed in which money laundering plays a leading role. Their goal is nothing more than to try to monitor all these funds of dubious origin and apply very strict economic and criminal sanctions to those involved.

During 2011–2015, a number of large banks faced increasing fines for violating money laundering regulations. This includes HSBC, which was fined \$1.9 billion in December 2012⁸, and BNP Paribas, which was fined \$8.9 billion in July 2014 by the US government.⁹

Many countries have introduced or strengthened border controls on the amount of cash that can be carried and introduced central transaction reporting systems where all financial institutions must report all financial transactions electronically. For example, in 2006 Australia established the AUSTRAC system and required reporting of all financial transactions.¹⁰

6. LEGAL PROCEDURES AGAINST MONEY LAUNDERING AROUND THE WORLD

6.1. THE EUROPEAN UNION

The fourth iteration of the EU Anti-Money Laundering Directive (AMLD IV) was published on 5 June 2015, following the publication of the latest legislative set in the European Parliament.¹¹ This directive harmonised EU and US money laundering laws, which is beneficial for financial institutions operating in both jurisdictions.¹² The Fifth Money Laundering Directive (5MLD) entered into force on 10 January 2020, addressing a number of weaknesses in the European Union's anti-money laundering and terrorist financing regime that emerged following the adoption of the Fourth Money Laundering Directive, AMLD IV).¹³

The lack of harmonisation of anti-money laundering requirements between the US and the EU has complicated efforts by global institutions seeking to standardise the *Know Your Customer* (KYC) component of their anti-money laundering programs in major jurisdictions to comply. AMLD IV promises to better align ABC regimes, taking a more risk-based approach compared to its predecessor, AMLD III.¹⁴

8 "HSBC fined \$1.9bn over money laundering." **BBC News**. December 11, 2012. <https://www.bbc.com/news/business-20673466>.

9 Proress, Ben, and Jessica Silver-Greenberg. "BNP Paribas Admits Guilt and Agrees to Pay \$8.9 Billion Fine to U.S." **The New York Times**, June 30, 2014.

10 "AUSTRAC Annual Report 2014-2015 at a glance." **AUSTRAC**. Accessed September 10, 2025. <http://austrac.gov.au/ar-14-15-austrac-at-a-glance>.

11 PwC. *AMLD IV: A Global Alignment?*. PwC, 2015. www.pwc.com/en_US/us/financial-services/regulatory-services/publications/assets/aml-global-alignment.pdf.

12 Ibid.

13 Marria, Vishal. "The EU's 5th Anti-Money Laundering Directive: What Does It Mean?" **Forbes**, September 13, 2018.

14 European Commission. *Proposal for a Directive of the European Parliament and of the Council on the*

Certain components of the directive, however, go beyond current EU and US requirements, posing new implementation challenges for banks. For example, more civil servants are included in the scope of the directive, and EU member states are required to establish new registers of “beneficial owners” (i.e. those who own or control each company) which will affect banks. AMLD IV entered into force on June 25, 2015.¹⁵

On January 24, 2019, the European Commission sent official warnings to ten member states as part of a crackdown on weak enforcement of money laundering regulations. The commission sent Germany a formal notice, the first step in EU legal proceedings against non-compliant countries. Belgium, Finland, France, Lithuania and Portugal received reasoned opinions, while the second stage of the procedure, which can lead to fines. The second round of reasoned opinions was sent to Bulgaria, Cyprus, Poland and Slovakia. Ten countries have two months to respond or face legal action. The Commission has set a deadline of 26 June 2017 for EU countries to implement new rules against money laundering and terrorist financing.¹⁶

In 2018, the European Parliament and the Council adopted Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on preventing the use of the financial system for money laundering or terrorist financing (*Directive (UE) 2018/843 du Parlement européen et du Conseil du 30 mai 2018 modifiant la directive (UE) 2015/849 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux ou du financement du terrorisme ainsi que les directives 2009/138/CE et 2013/36/UE*).¹⁷ By 2020 at the latest, member states had to implement the new directive.

On February 13, 2019, the commission added Saudi Arabia, Panama, Nigeria and other jurisdictions to the blacklist of countries that pose a threat due to weak controls on terrorist financing and money laundering. This is a more comprehensive list than the one made by the FATF.

In addition, the European Commission has created a list of high-risk countries for money laundering and terrorist financing, including: Afghanistan, Iran, Iraq, North Korea, Syria, Uganda, Vanuatu and Yemen (as of 20 September 2016), Trinidad and Tobago (from 14 February 2018), Pakistan (from 2 October 2018), Bahamas, Barbados, Botswana, Cambodia, Ghana, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Panama and Zimbabwe (from 1 October 2020).

The European Commission plans to create a single body for monitoring money laundering at the level of the Eurozone by 2023.¹⁸

prevention of the use of the financial system for the purpose of money laundering and terrorist financing. COM(2013) 45 final. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0045>.

15 Ibid.

16 “EU cracks down on member states over weak money laundering laws.” *Reuters*, January 24, 2019. <https://www.reuters.com/article/us-eu-moneylaundering-idUSKCN1P11H4>.

17 European Parliament and Council. *Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on preventing the use of the financial system for money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU*. OJ L 156, June 19, 2018.

18 “LCB-FT Regulation Européenne.” *LCB-FT.fr*. Accessed September 10, 2025. <https://www.lcb-ft.fr/lcb-ft-regulation-europeenne>.

6.2. ITALY

In Italy, money laundering is regulated by Legislative Decree of November 21, 2007, no. 231 - Implementation of directive 2005/60/EC on preventing the use of the financial system for the purpose of laundering proceeds of criminal activities and financing terrorism, as well as directive 2006/70/EC containing enforcement measures.

6.3. BELGIUM

The Unit for the Processing of Financial Information (CTIF), established by the law of January 11, 1993, is responsible for the analysis of facts and suspicious financial transactions related to money laundering or terrorist financing that are transferred to it by institutions and persons covered by the law. The CTIF is an independent administrative authority, with the status of a legal entity, under the control of the Ministers of Justice and Finance. Under the direction of the magistrate, it consists of financial experts and a senior officer of the Federal Police.¹⁹

CTIF report 2021 shows significant increase in amount of dirty money detected in Belgium, report L'Echo, De Tijd and Knack 14 May 2022. The number of reports to CTIF has increased by 50% since 2020, which is a record year. At the same time, the number of files sent to the courts is growing, as is the cumulative amount of suspected fraud: +42% in one year to 2.336 billion euros.

Finally, from 2019 to 2021, the number of files related to organized crime almost doubled, for amounts that almost quadrupled. CTIF notes that the main criminal networks controlled the port of Antwerp, making Belgium one of the main entry points for the cocaine trade in Europe. CTIF also monitors, on the trail of the judicial system and the police, the progress of independent money laundering networks that work hand in hand with drug traffickers, who are responsible for the entire chain of handling dirty money, from its reception to its reintegration into the real economy.

6.4. LATIN AMERICA

In *Argentina*, the fight against money laundering is carried out through the Financial Information Unit (according to its website, "...the Financial Information Unit of the Republic of Argentina (UIF) is an authority, responsible for the analysis, treatment and transmission of information, in order to prevent and prevent money laundering of money (ML), financing of terrorism (FT) and complex economic and financial crimes (DEC) is developed around the control, detection, investigation and punishment of money laundering/TF/DEC crimes in order to contribute to strengthening the financial system and preserving the socio-economic order. ..").²⁰

In *Chile*, Law No. 19,913 from 2003 established the *Financial Analysis Unit*, whose

19 "Cellule de Traitement des Informations Financières." **finances.belgium.be**. Accessed September 10, 2025. https://finances.belgium.be/fr/sur_le_spf/institutions_qui_dependent_du_spf_finances/cellule_de_traitement_des_informations_financieres.

20 "Unidad de Información Financiera." **argentina.gob.ar**. Accessed September 10, 2025. <https://www.argentina.gob.ar/uiif>.

role is to prevent and hinder the use of the financial system to commit the criminal offense of money laundering and terrorist financing.

In *Colombia*, an obligation to cooperate in the prevention and suppression of money laundering, which was the result of any activity against the law, was concluded between the Government of the Republic of Paraguay and the Government of the Republic of Colombia. Entities under the supervision of the Financial Administration of Colombia must implement a Money Laundering and Terrorist Financing Risk Management System, called SARLAFT, in accordance with the provisions of Chapter Eleven of Basic Legal Circular 007 of 1996. At the same time, the Company Administration, in accordance with circular 100-00005 of June 14, 2014, requires companies that generate at least a gross income equal to or greater than 160,000 gross wages to implement a “System of self-control and management of the risk of money laundering and financing of terrorism” (SAGRLAFT).

6.5. AUSTRALIA

The Financial Transactions Reporting Act 1988 requires cash-handling entities to provide information to AUSTRAC and provides for rigorous procedures when opening new accounts with Australian banks.²¹ The Proceeds of Crime Act 1987 provides for penalties for money laundering and asset confiscation. The Law on Prevention of Money Laundering and Combating the Financing of Terrorism from 2006 is the basic legal instrument in the fight against money laundering.²²

6.6. CANADA

In Canada, the Proceeds of Crime Act was passed in 1991, requiring customer identification and data retention by the financial sector to facilitate money laundering investigations. In 2000, this law was amended in order to expand its scope, which established the Financial Intelligence Agency (FINTRAC). In 2001, the law was amended again. The new name of the law was the Proceeds of Crime and Terrorist Financing Act, and the agency expanded its scope to include the detection of sources and channels of terrorist financing. In Canada, banks, insurance companies, securities dealers, other cash services businesses, casinos, notaries, accountants, real estate agents and dealers in certain metals and gems are required by law to report and keep records.

6.7. THE UK

UK anti-money laundering and counter-terrorist financing laws are based on the Terrorism Act 2000, the Counter-Terrorism, Crime and Security Act 2001, the Proceeds of Crime Act 2002, the Serious Organised Crime Act and the Police from 2005 and other legal acts. UK law differs from that of many countries, such as the US and European countries. In the United Kingdom, money laundering charges are not limited to proceeds of crime

21 *Financial Transactions Reports Act 1988*. Cth. Australia. <https://www.legislation.gov.au/Series/C2004A03657>.

22 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. Cth. Australia. http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/alacfa2006522/.

or other monetary restrictions. Any person who commits a crime in the UK and thereby gains, whether in money or otherwise, or avoids payment of an obligation and thereby causes damage to a creditor (for example tax evasion), will automatically also face a charge of money laundering.

The body responsible for detecting and preventing criminal activity in the United Kingdom is the National Crime Agency. Lawyers, accountants, tax advisors and inadequacy assessors are required to submit reports to government authorities. Financial institutions, credit institutions, estate agents, trusts and service companies, high value dealers (above €15,000 in sterling) and casinos fall under the same regulations.

6.8. THE UNITED STATES

In the United States, the Money Laundering Control Act was passed in 1986, which criminalized the crime, punishable by up to 20 years in prison. The law, contained in Section 1956 of Title 18 of the United States Code, prohibits individuals from engaging in financial transactions with assets obtained through certain specified crimes, known as “Specific Unlawful Activities” (SUAs).

The law requires that the individual specifically intend to make the transaction to conceal the source, ownership or control of the funds. There is no minimum money threshold, and no requirement that the transaction succeed in actually concealing the money. “Financial transaction” is broadly defined and need not include a financial institution or even a business. The mere transfer of money from one person to another, with the intention of concealing the source, ownership, location or control of the money, is considered a financial transaction under the law. Possession of money without a financial transaction or intent to conceal it is not a crime in the United States.²³

In addition to money laundering, the law contained in Section 1957 of Title 18 of the United States Code prohibits spending more than \$10,000 received from SUA, regardless of whether the individual chooses to conceal it. It carries a lesser penalty than money laundering, and unlike money laundering statutes, it requires the money to pass through a financial institution.²⁴

6.9. RUSSIA

After Russia was included in the FATF blacklist in June 2000, a draft law on strengthening anti-money laundering measures in the country’s financial system was finalised, and in 2001 a specialized body was created within the structure of the Ministry of Finance. - Committee of the Russian Federation for Financial Monitoring (CFM) headed by Viktor Zubkov. As a result, in October 2002, Russia was excluded from the “black list”, and in June 2003 - it was admitted to the FATF itself.²⁵

23 Cassella, Stephen. “Money Laundering Laws.” *United States Attorneys’ Bulletin* (September 2007): 21–34.

24 Ibid.

25 “Gosudarstva ugrozhayuschie mirovoj finsisteme vklyucheny v cherny j spisok.” *Vedomosti*, February 27, 2010. https://www.vedomosti.ru/finance/news/2010/02/27/gosudarstva_ugrozhayuschie_mirovoj_finsisteme_vklyucheny_v_chernyj_spisok.

In 2004, the CFM was transformed into the Federal Service for Financial Supervision (FSFM). The Egmont Group is an informal association of financial intelligence units (FIUs) of the world, including the fight against money laundering. In 2006, the authorities of the European Union explained the need to declare cash by citizens crossing the borders of the European Union and the United States, in the fight against terrorism and money laundering.²⁶

On May 7, 2012, Vladimir Putin issued Decree No. 596 “On long-term state economic policy”, which envisages the drafting of a law aimed at the “de-offshoreisation” of the Russian economy. Drafting of the law is entrusted to Rosfinmonitoring.²⁷

Many banks, including Russian ones, actively use the *Know Your Customer* principle. Thus, the bank reduces the risks of involving its clients in transactions related to the legalisation (laundering) of income or the financing of terrorism, which threaten the bank's reputation. The bank is interested in the origin of the client's funds in order to make sure that the capital has no criminal origin and is not used for criminal purposes.²⁸

6.10. PORTUGAL, BRAZIL AND MACAU S.A.R.

In Portugal, the criminalisation of money laundering was introduced by law in 1993, under the influence of the first Community Directive. In 2004, the criminal offense was introduced into the Criminal Code (Law No. 11/2004 of March 27, which added Article 368-A).

In Macau, criminalization was introduced in 1997 with the so-called Organised Crime Law. This issue was reformed in 2006 by Law no. 2/2006, dated April 3.

Brazil signed the Vienna Convention and in March 1998 approved Law no. 9,613, which is a typical crime of money laundering. On July 9, 2012, Law 12,683 was adopted, abolishing the list of previous criminal offenses required for conviction for money laundering. From that date, all crimes under the Brazilian Penal Code are considered prior crimes.

7. CONCLUSION

Money laundering goes hand in hand with the organised crime, and usually it is derived from certain illegal goods (like alcohol, drugs, etc), and always from illegal operations. Also, the tax evasions provide a large basis for the money laundering. This all leads to the fact that several billions of dollars each year have been laundered and it amounts to some 5% of the world's GDP.

Many legislations stood up and started fighting the money laundering, but some of them started it too late, only in the 21st century. The laws that have been adopted have been „a motley crew“, and few global initiatives have been started in order to tackle the money laundering around the world. The bad thing is that the „common world order“ is falling

26 “Valyuta.” *Rossiyskaya Gazeta*, November 16, 2006. www.rg.ru/2006/11/16/valuta.html.

27 *Rossiyskaya Gazeta*, “Valyuta.”

28 Абаканова В. А. “Экономическая составляющая легализации преступных доходов (экономико-правовые аспекты).” *Научный журнал НИУ ИТМО. Серия «Экономика и экологический менеджмент»*, no. 3 (2014).

apart, and many sanctions that the countries across the globe impose to each other only reinforce the „necessity“ for smuggling, black markets, „parallel imports and exports“ and of course, money laundering, making the path towards the „clean sheet“ in the financial world only too bumpy and uncertain.



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ПРАЊЕ НОВЦА И ЗАКОНСКЕ ПРОЦЕДУРЕ ПРОТИВ ОВОГ ДЕЛА ШИРОМ СВЕТА

Апстракт:

Прањеновца је незаконит процес стварања великих количина новца генерисаних криминалним активностима, као што је трговина дрогом или финансирање тероризма, као да су потекле из легитимног извора. Новац од криминалне активности сматра се прљавим, а процес га „пере“ да би изгледао чист. Прање новца је озбиљан финансијски злочин којим се баве и криминалци са „белим крагама“ (у администрацији) и на улици. Већина финансијских компанија данас има политику против прања новца (anti-money laundering, AML) како би открила и спречила ову активност. Но, како се данас многе активности одвијају у дигиталној сфери, и сам новац је дигиталан а акције су инстантне и лако прелазе државне границе. „Порески рајеви“ доприносе прању новца, као и куповина некретнина за готовину која цвета у бившим социјалистичким земљама. Све ово поставља тешке задатке пред представнике закона који се боре са овом појавом, која има дугу историју и дубоке корене.

Кључне речи: прање новца, криминал, дигитални новац, офшор компаније, порески рајеви

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SPECIAL CIRCUMSTANCE FOR DETERMINING A PUNISHMENT FOR CRIMINAL OFFENCES COMMITTED OUT OF HATRED IN CRIMINAL LEGISLATION OF THE REPUBLIC OF SERBIA

Abstract:

The topic of the paper is to analyse the content, reasons and needs for the introduction of a new provision of Article 54a of the Criminal Code of the Republic of Serbia, which stipulates the obligation to take into account as an aggravating circumstance when determining the sentence, the fact that a criminal offence was committed out of hatred due to the victim's actual or presumed affiliation with a group characterised by one of the common personal characteristics prescribed in this article, as well as to analyse its repressive and preventive effects. The paper also emphasises the application of the aforementioned provision since 2012, when the article was introduced into the criminal legislation of the Republic of Serbia. At that time, hate crime was codified in domestic criminal legislation for the first time. The essence of the aforementioned provision is to provide additional criminal protection to certain groups (or individuals belonging to them, e.g. national minorities) from hatred-motivated attacks. An explicit obligation to investigate the motive of hatred and its evaluation when determining the sentence is established. In this manner, the legislator has taken a significant step in the incrimination of hate crimes and hate speech in general. The paper analyses whether, during the period of its existence, this provision has been applied in theory and in court practice, particularly in which way, whether the introduction of this provision has proven justified, what difficulties in its application have been identified and how this institute could be applied even better in the future.

Keywords: *special circumstance in sentencing, punishment, motives, criminal code, standard sentencing, hate crimes.*

1. INTRODUCTION

Every criminal offense entails the existence of a certain threat and is therefore sanctioned by the most severe penalties recognised by the society. However, when a criminal offense is committed out of hatred toward a person based on their personal characteristic, such as race, religion, national affiliation or other attributes, the offense thereby becomes more dangerous and requires a stricter response by the state, as it undermines the most fundamental values of the society, in fact, the principle of equality, the right to human dignity and the fostering of diversity. This is particularly applicable in situations where the protected value and object of protection is a minority ethnic group.

When it comes to domestic legislation, the Criminal Code of the Republic of Serbia does not prescribe hate crimes as a separate criminal offense, but defines them in a certain manner. Although the concept of hate crime has existed for a long time in comparative criminal law, Serbia adopted this concept only in 2012 by prescribing in Article 54a of the Criminal Code, that the court shall consider as an aggravating circumstance the fact that a criminal offense was committed out of hatred based on the race, religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another person, unless such aggravating circumstance is already prescribed as an element of the criminal offense. In other words, this concerns a mandatory aggravating circumstance that the court must take into account when determining the type and severity of the punishment. In this context, prejudice is taken into account as an aggravating circumstance, and given the general social threat posed by such criminal offenses, their stricter sanctioning is justified.

Sanctions in the domain of criminal law protection in cases of discrimination, as well as convictions for crimes motivated by one of its grounds (racial or religious hatred, affiliation with a certain minority group, etc.), represent an exceptionally effective means of making discrimination visible in the society and ensuring adequate protection in cases of violations of the guaranteed rights. Therefore, it is of crucial importance that cases of discrimination are initiated as frequently as possible, even if the suspects have not been identified at the time of initiating the proceedings. Recent amendments to criminal legislation have brought the existing legal provisions closer to international standards; however, the implementation of criminal law protection against discrimination requires the effective enforcement of legal provisions and engagement of all competent authorities as participants in the criminal proceedings.¹

Therefore, in order to understand this institute, it is important to compare the situation before and after the introduction of Article 54a, what has been achieved by its adoption, the underlying motives, reasons and effects for its implementation, as well as its potential impact on the prevention and suppression of hate crimes against persons belonging to national minorities.

2. THE SITUATION BEFORE THE CRIMINAL CODE AMENDMENT

Prior to the amendments to the Criminal Code and introduction of hate crimes, a similar circumstance already existed in our legislation, namely, *base motives*. Base motives represent the legal concept most closely resembling hatred among the existing statutory institutes; however, they cannot fully serve the function of hate crimes. In this regard, Article 54, which relates to the general rules on sentencing, stipulates that “the court shall impose a sentence within the legally prescribed limits for the offense, having regard to the purpose of punishment and taking into account all circumstances that may mitigate or aggravate the sentence (extenuating and aggravating circumstances), in particular: the degree of culpability and the motives for which the offense was committed...” Furthermore, in the special part of the Criminal Code, Article 114, Paragraph 5 stipulates that anyone who deprives another person of life out of greed... or other base motives shall be punished for aggravated murder by imprisonment of at least 10 years or imprisonment ranging from 30 to 40 years. The criminal offense of abuse and torture, specifically Article 137, Paragraph 2, prescribes: “Whoever causes great pain or severe suffering to another by use of force,

1 T. Drobnjak, (2010) *Krivičnopravna zaštita od diskriminacije (Criminal legal protection against discrimination)*, in: *Antidiskriminacioni zakon (Law on the Prohibition of Discrimination)*, Belgrade, p. 90

threat or other unlawful means... or does so out of other motives based on any form of discrimination, shall be punished by imprisonment from six months to five years.”² It is clear that the Criminal Code, even prior to the amendments, stipulated that the court must consider the motives for which the offense was committed when determining the sentence, which, through systemic interpretation, encompasses hatred, among other factors.

It could be observed that while several criminal offenses already specifically penalised discriminatory intent, there remained a need for a more systematic approach to sanctioning hate crimes. Moreover, the competent security and judicial institutions have not always dealt with these issues adequately or effectively, which has caused victims to experience fear throughout all stages of the proceedings.

3. INTRODUCTION AND ANALYSIS OF ARTICLE 54A OF THE CRIMINAL CODE

Owing to the initiative of non-governmental organisations, the concept of hate crime was incorporated into the amended Criminal Code of the Republic of Serbia. In December 2012, the Government of the Republic of Serbia, acting as the proposer, submitted to the National Assembly a Draft Law on Amendments to the Criminal Code, which included Article 54a. On 24 December 2012, the National Assembly adopted the Law, which entered into force on 1 January 2013. This marked the first time that hate crime was codified in Serbian criminal legislation. In this regard, Article 54a reads as follows – Special Circumstance for Determining a Punishment for a Criminal Offence Committed out of Hatred: *“If a criminal offense is committed out of hatred based on the race, religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another person, the court shall consider this circumstance as an aggravating circumstance, unless it is already prescribed as an element of the criminal offense.”*³

A linguistic interpretation of the given norm leads to the conclusion that its application requires that the commission of a criminal offense is motivated by hatred arising from a discriminatory attitude toward certain social groups. In other words, a discriminatory attitude toward specific social groups resulted to hatred, which then served as the motive for the committed criminal offense. Two key concepts are central here: **hatred** - as a form of emotion and **discriminatory attitude** - as a form of prejudice.⁴

This legal structure (the separation of the provision into a distinct article) and the expressly mandatory aggravating effect, highlight the specificity of the new criterion. It marks a departure from the traditional model of standard sentencing, which is based on an open list of value-neutral relevant circumstances. The described intervention has posed two significant questions for criminal law theory: first, whether there is justification for such an amendment; and second, what kinds of challenges may arise in the application, determination and assessment of this special circumstance.⁵ Although the provision

2 I. Stjelja and D. Todorović, (2015) *Zločini iz mržnje - Postupanje državnih organa u slučajevima napada na LGBT osobe u Srbiji (Hate Crimes – Institutional Responses to Attacks Against LGBT People in Serbia)*, Belgrade 2015, p. 8

3 Criminal Code of the Republic of Serbia (“Official Gazette of the RS”, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012 and 104/2013)

4 N. Delić, (2012) „*Sudska psihologija kao nastavna i naučna disciplina*“, Crimen, Belgrade 1/2012, p. 42.

5 D. Miladinović-Stefanović, *Odmeravanje kazne za krivično delo učinjeno iz mržnje (Sentencing in Cases*

establishing that hatred based on discrimination constitutes a mandatory aggravating circumstance represents, in essence, a “significant” departure from the general rules on sentencing and raises a number of contentious issues, legal theory supports the view that such a solution is justified, primarily due to the need to harmonise domestic legislation with international standards.⁶

Based on relevant international instruments, the purpose of this provision, or Article 54a of the Criminal Code, is to ensure stricter punishment, thereby enhancing criminal law protection for certain vulnerable social groups whose affiliates are victims of various hate-motivated offenses due to their affiliation. Thus, in the context of criminal law, hate crimes are criminal offenses in which the perpetrator targets the victim because of their actual or presumed affiliation with particular social group.⁷

There are opinions suggesting that the enactment of Article 54a of the Criminal Code was unnecessary, and that there was no need to introduce such a provision, given the fact that hatred could already be taken into account as an aggravating circumstance, under Article 54 of the Criminal Code, within the scope of the motives for which the offense was committed. It is therefore rightly pointed out that the provision on hatred as an aggravating circumstance aligns with the punitive function of criminal law.⁸ However, regarding the implementation of Article 54 of the Criminal Code in so-called hate crime cases, the problem lay in the generality of this provision, the absence of explicit reference to prejudice or hatred, as well as to protected categories. Moreover, the law did not prescribe this circumstance as a mandatory aggravating factor but rather as a discretionary aggravating one, which resulted, so to speak, in hate crimes being less visible, that is, the adequacy of the state authorities’ response in cases motivated by hatred was often questioned, along with whether perpetrators in such cases received appropriate sanctions. It was precisely these shortcomings that Article 54a of the Criminal Code was intended to address. Specifically, the purpose of the special (harsher) punishment of criminal offenses committed out of hatred is to prevent crimes motivated by prejudice against others and thereby ensure equality and social tolerance.⁹

A provision in Article 54a of the Criminal Code makes it clear that, among other protected characteristics, national or ethnic affiliation is recognised by law.¹⁰ An ethnic group may be defined as a group distinguished from the wider population by certain characteristics such as religion, culture, geographic origin or language.¹¹ The concept of

of Hate-Motivated Offenses) Collection of papers - Faculty of Law in Niš LXIV, Niš 2013, p.258

6 D. Kolarić, (2013) „Mržnja kao otežavajuća okolnost“ (*Hate as an Aggravating Circumstance*), in: Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena (New Solutions in Serbia's Penal Legislation and Their Practical Enforcement), Zlatibor, p. 418

7 Z. Stojanović, D. Kolarić, (2012) „Nova rešenja u Krivičnom zakoniku Republike Srbije“ (*New solutions in the Criminal Code of the Republic of Serbia*), Bezbednost (Security) 3/2012, p. 13

8 E. Ćorović, (2015) *Sistem krivičnih sankcija Republike Srbije (Criminal Sanctions System in the Republic of Serbia)*, Sven, Niš, p.149

9 A. Ivanović, (2020) *Krivično zakonodavstvo i prevencija kriminaliteta (norma i praksa) (Criminal Legislation and Crime Prevention (Standards and Practice))*, Collection of papers- 11th International Scientific and Expert Conference on Criminal Legislation and Crime Prevention (Standards and Practice) Trebinje, p.245

10 A. R. Ivanović, D., Randelović, M., Totić, (2019) *Govor mržnje u elektronskim medijima i na društvenim mrežama (Hate Speech in Digital Media and on Social Media Platforms)*, Monitor, Novi Pazar, p. 35

11 M.Kolaković-Bojović i A. Đukanović, (2023) *Zločini iz mržnje u Republici Srbiji (Hate Crimes in the Republic of Serbia)*, Belgrade, p. 72

national affiliation could, in a strict sense, be linked to the legal notion of citizenship, while in a broader sense it could refer to national origin, indicating a sense of cultural belonging to a national group that may or may not correspond to the individual's citizenship.¹²

It is important to clarify that the court is required to treat hatred as an aggravating circumstance, except when it is already established as an element of the criminal offense. This means the legislator has prohibited double consideration of this factor under the law (for example, hatred is explicitly defined as a feature, or an element of the criminal offense in the Criminal Code, in cases such as criminal offense of violent conduct at a sports event or public gathering (Article 344a, Paragraph 1 of the Criminal Code). The same applies to offenses under Article 317 (incitement of national, racial and religious hatred and intolerance) and the criminal offence under Article 387 (racial and other discrimination) of the Criminal Code.

With regard to the prosecution and punishment of hate crimes committed against persons belonging to national minorities, it is essential to consider what is to be protected in case of these offences. A protected characteristic refers to a specific fact shared by affiliates of a group, such as ethnic affiliation or another common factor. Given the nature of hate crimes as defined in this way, attention must be directed toward their recognition, accurate identification and the appropriate response by the competent authorities. Proving hate crimes could be particularly complex and challenging, which underscores the crucial role of the police, courts and prosecutors' offices in this process. The commission of a hate crime disrupts the balance of social relations and creates a specific relation between the offender, the victim and the society. Restorative justice offers a mechanism capable of repairing these damaged relationships. Certain examples of good practice in applying various forms of restorative justice in case of hate crime commission serve as clear evidence of that.

When it comes to the existence of one or more motives for the commission of a criminal offense, in the application of Article 54a of the Criminal Code, it may be useful, during the assessment, to ask whether the offense would have been committed in the absence of the motive of hatred; in other words, to determine whether this motive was decisive (and what degree of intensity of hatred is required). The motive, thus, represents the central element of the special circumstance for sentencing, which must be directed toward specific social groups and/or based on particular grounds. Establishing a motive of hatred is therefore a complex task. It involves recognising hatred among other present negative emotions and identifying it as the dominant motive behind the commission of the criminal offense. It should also be taken into account that hatred may be an unconscious motive, that prejudice does not necessarily result in hatred and that a hate crime may still be committed out of hatred, even in the absence of a discriminatory attitude.¹³ What qualitatively distinguishes hatred from other specified negative emotions is the fact that hatred results in destruction, unlike anger or contempt, which may involve potential aggressiveness. This may well be the fundamental reason why the legislator, in Article 54a of the Criminal Code, recognised only hatred based on discrimination as a mandatory aggravating circumstance, and not any other negative emotion.¹⁴

12 See more in: OSCE /ODIHR (2014) *Prosecuting Hate Crimes: A Practical Guide*. Poland, p. 31.

13 N. Delić, *Krivičnopravni značaj mržnje u svetlu identitetskog preobražaja Srbije* (*Hate and Its Criminal Law Implications amid Serbia's Identity Transformation*), in: Vasić, R., Polojac M. (ur) *Identitetski preobražaj Srbije prilozi projektu 2015 - kolektivna monografija*, 2016, Belgrade, p. 148-149.

14 Delić, N. (2016), *op.cit.*, p.139

Hatred is recognised in a specific and distinct manner in the domestic criminal legislation of the Republic of Serbia. It manifests and operates in two primary forms. In the first instance, hatred, specifically its creation, incitement, fuelling, intensification or endorsement, constitutes an essential element of the previously analysed criminal offence categorised as “political” in nature, as defined in Article 317 of the Criminal Code of Serbia: “*Incitement of national, racial and religious hatred and intolerance.*” On the other hand, the Criminal Code of Serbia explicitly identifies “hatred” as a particular type of motive¹⁵ that constitutes an “aggravating” circumstance (Article 54s of the Criminal Code) that courts are required to take into consideration when sentencing the perpetrator of the criminal offense. It should be emphasised that, in accordance with the legal provision, the relevance of a mandatory aggravating circumstance is not attributed to hatred in general, or to any form of hatred *per se*, but exclusively to a specific type, i.e. hatred based on discrimination.¹⁶

Hatred and intolerance towards the victim (whether an individual or a group affiliate) based on a personal characteristic as the motive for committing a criminal offence, is now a particular area of concern in criminal law. The aim should be to impose stricter sanctions on offenders when their motive for committing a criminal offense is hatred or intolerance towards the victim based on a personal characteristic, as this represents a significant social threat. The affiliation of a person to a specific group constitutes a *personal characteristic of that individual*. This personal characteristic may be either actual or *presumed*, where the perpetrator believes it to be present in the victim, even if it is not. According to the case law of the European Court of Human Rights (ECHR), hatred may also be directed towards an individual based on a real or presumed *connection* with someone who belongs to a protected group that either actually possesses or is presumed to possess a particular status or protected characteristic.¹⁷

It should be noted that, for the time being, the presumed affiliation is not included in the scope of Article 54a of the Criminal Code of the Republic of Serbia, although it is part of the definition of discrimination under the Law on the Prohibition of Discrimination. It is similar in case of actual or presumed association with a person who possesses, or is presumed to possess, protected personal characteristics. Such affiliation with a particular group may arise not only from a typical close relationship (such as kinship, friendship, or marriage), but may also extend to individuals who advocate for or promote the rights and interests of the protected group.¹⁸

One of the key issues in the enforcement of Article 54a of the Criminal Code is the question of its recognition within the indictment and the potential risk of exceeding the charges. It is crucial here that hatred, as the motive for the commission of a criminal offense, be identified already at the indictment stage. This is particularly important in light of Article 68, Paragraph 1, Item 10 of the Criminal Procedure Code (CPC), stipulating that the defendant shall have the right to respond to all facts and evidence brought against them. In this context, the question arises whether *hatred as a motive* should be reflected only in the factual description of the offense within the indictment or it also needs to be incorporated into the legal framework. Given that the court is not bound by the legal qualification of the offense (Article 420, Paragraph 2 of the CPC), it is sufficient that hatred,

15 D.Jovašević, (2024) *Mediji, kazneno pravo i pravosuđe (Media, Penal Law and Judiciary)* Belgrade, p. 260

16 Z. Stojanović, (2014) „Racist and xenophobic motivation as an aggravating circumstance in sentencing“, *Strani pravni život*, Belgrade 2/2014, p. 16–17.

17 See more in: *Škorjanec v. Croatia*, petition no. 25536/14, judgment as of 28 May 2017, par. 56.

18 D. Miladinović-Stefanović, (2013) *op.cit.*, p. 263

as a motive for the commission of an offense, be included in the factual description of the offense attributed to the defendant. At the same time, there is no obstacle preventing public prosecutors from referring to Article 54a of the Criminal Code in the indictment; on the contrary, such an approach is, in fact, encouraged. In any case, the court would still be obliged to establish facts relevant to the presence or absence of hatred as a motive for committing the criminal offense.¹⁹ It is especially important that the public prosecutor “request” the court to apply Article 54a in the sentencing process, provided that the factual description of the offense states it was committed out of hatred and the statement of reasons outlines all the relevant supporting circumstances. Such practice is both appropriate and preferable, as it directs the evidentiary proceedings before the court, especially regarding the presentation of evidence relevant to sentencing. The court is required, when assessing the evidence, to take into account the motive of hatred as outlined in the indictment and to provide a reasoned explanation as to whether the application of Article 54a of the Criminal Code is appropriate. If the court establishes that the offense was unquestionably committed out of hatred, it will be obliged to apply the provision of Article 54a when determining the sentence and to state this explicitly in the judgment.

In addition to the above, an important issue concerns *the relationship between the indictment and the judgment* in situations where the public prosecutor does not include hatred as the motive for committing the criminal offense, but the court finds in its judgment that the offense was committed out of hatred and invokes Article 54a of the Criminal Code in sentencing. This, however, raises the question of whether, in such a case, the court would be exceeding the scope of the indictment. When addressing this question, one should primarily be guided by the previously described existence of two parallel tracks in our criminal legislation concerning hate crimes, i.e. the prohibition on double consideration of hatred as the motive for commission of a criminal offense. In fact, the specificity of Article 54a lies precisely in the fact that it applies to those criminal offenses in which hatred does not constitute an element of the offense itself. Therefore, the fact that the public prosecutor includes in the indictment, and the court establishes beyond doubt, all the factual elements comprising the offense for which the accused is found guilty, ensures the factual consistency between the indictment and the judgment. By contrast, the determination of facts relevant to the use of Article 54a of the Criminal Code pertains to the assessment of circumstances significant for sentencing. This is governed by Article 83 of the Criminal Procedure Code, which stipulates that the subject of evidence includes facts that constitute elements of a criminal offense or facts on which the use of another provision of criminal law depends. This encompasses the provisions of not only Article 54a, but also Article 54 of the Criminal Code. As for the court’s resulting obligations, if it establishes beyond doubt that the criminal offense was committed out of hatred, it is required to explicitly consider this circumstance during the sentencing process. Specifically, given that the aggravating circumstance is mandatory, if the court relies on it and it was not included in the indictment, the court risks violating the right of the accused to defense, as he or she would not have been given the opportunity to respond to all the facts and evidence against them. Although this is a mandatory aggravating circumstance, which formally does not take precedence over the circumstances assessed by the court under Article 54 of the Criminal Code, it remains possible for the court to establish the existence of extenuating circumstances at the same time, in accordance with the general sentencing rules provided in Article 54 of the Criminal Code.²⁰

19 M.Kolaković-Bojović i A. Đukanović, *op.cit.*, p. 74

20 E. Čorović, (2020a) Krivičnopravni aspekti (Aspects of Criminal Law). U: Ivanović, A. (ur) *Priručnik za simulaciju suđenja iz oblasti zločina iz mržnje*. Novi Pazar. p. 17

4. CONCLUSION

The short period since this institute was incorporated into the domestic criminal law system has contributed to the fact that it has not yet been sufficiently addressed in legal theory, nor has it seen a broader application in judicial practice that would help crystallise clearer positions on this legal institute. As a result, two key questions arise. First, is the introduction of such a circumstance justified, considering the capacities of domestic legislation prior to its enactment, the trends in hate crime in our country, obligations arising from international instruments and comparative legal experiences? Second, what problems and/or potential abuses may be expected in its application and how could they be overcome? Even despite conflicting expert opinions regarding the justification for introducing Article 54a into the Criminal Code, the prevailing view is that such a provision is both desirable and necessary.

Effective implementation presupposes certain substantive amendments, which would involve eliminating hatred as a substantive legal concept and shifting the focus toward the discriminatory attitude. Accordingly, two normative-technical approaches are possible. The first approach treats the discriminatory attitude as a motive, while the second considers it to have an element of intent. Another possible solution would be, following the model of pecuniary gain as a motive in certain criminal offenses, to introduce qualified forms of particular offenses that would exist when the basic form of the offense is committed “because of” (or “on the basis of”) affiliation with certain groups, or “with the intent” to discriminate.²¹

A developed awareness of the consequences resulting from discrimination and hatred must exist within the society. One way to combat such behaviour is by introducing the provision of hatred as a mandatory aggravating circumstance, in the Criminal Code. Naturally, it should be kept in mind that societal change cannot be achieved automatically simply by enacting this provision. It is a long-term process, which makes the successful implementation of the law by the courts critically important, as it also influences the prevention of future criminal offences. Thus, the amendment to the Criminal Code arose from the need for more comprehensive and systematic legal regulation in this area, the necessity for a more effective institutional response, as well as the broader societal need to combat criminal offenses motivated by discrimination.

The possibility of determination and imposition of criminal sanctions based on Article 54a may also lead to certain abuses, which is why a thorough training of all justice system actors is essential to ensure the proper application of this institute. Only a correct and legislator-intended application of this provision may result in both special and general prevention of hate crimes and protection of significant social values.

21 DeliĆ, N. (2016). , *op.cit.*, p. 150



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ПОСЕБНА ОКОЛНОСТ ЗА ОДМЕРАВАЊЕ КАЗНЕ ЗА КРИВИЧНА ДЕЛА УЧИЊЕНА ИЗ МРЖЊЕ У КРИВИЧНОМ ЗАКОНОДАВСТВУ РЕПУБЛИКЕ СРБИЈЕ

Апстракт:

Тема рада се односи на анализу садржине, разлога и потребе увођења нове одредбе у виду члана 54а Кривичног законика Републике Србије, којим је прописана обавеза узимања као отежавајуће околности приликом одмеравања казне, чињеницу када је кривично дело учињено из мржње због стварне или претпостављене припадности жртве групи коју одликује неко од заједничких личних својстава прописаних у овом члану, као и анализе репресивних и превентивних ефеката исте. Рад се осврће и на примену наведене одредбе од 2012. године када је поменути члан уведен у кривично законодавство Републике Србије. Тада је први пут у домаћем кривичном законодавству кодификован злочин из мржње. Суштина споменуте одредбе јесте у пружању додатне кривичноправне заштите одређеним групама (односно појединцима који им припадају, нпр. националне мањине) од напада који су засновани на мржњи. Успоставља се експлицитна обавеза истраге мотива мржње и његовог вредновања приликом одмеравања казне. На овај начин, законодавац је учинио значајан корак у инкриминацији злочина из мржње и говора мржње уопште. Рад анализира да ли је у овом период постојања ове одредбе иста заживела у теорији и судској пракси, а посебно на какав начин, да ли се показало оправданим увођење ове одредбе, које су потешкоће приликом примене ове одредбе и на који начин би се овај иститут могао још боље у будућности применити.

Кључне речи: *посебна околност за одмеравање казне, кажњавање, побуде, кривични законик, редовно одмеравање казне, злочини мржње.*

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SPECIAL TRENDS IN THE PROTECTION OF JUVENILE PERSONS IN CRIMINAL PROCEEDINGS IN THE REPUBLIC OF SERBIA

Abstract:

Modern legal systems are based on the principles of the rule of law, the rule of law and the protection of fundamental human rights. The tendency to protect human rights is particularly expressed in criminal law, which most often takes the position of denying some guaranteed human rights. These denials of human rights must be based and grounded on legal and statutory principles. The subject of this scientific work is the position of minors in criminal proceedings, while the basic hypothesis of the work is that minors in criminal proceedings are particularly sensitive because they are under eighteen years of age and are in the process of psychological and physical development, and therefore should be treated in a special way, taking into account all their psychological and physical characteristics.

In the work, the author discusses several important issues related to the protection of minors in criminal proceedings, namely the issue of the existence of specialized judicial bodies before which criminal proceedings involving minors are conducted, the issue of the protection of a minor who has the status of an injured party during questioning, as well as the position of a minor injured party in proceedings against an adult. The aim of this work is to point out the special sensitivity of minors who participate in any way in judicial proceedings, using analytical, normative and comparative methods.

Keywords: *minor, criminal proceedings, injured party, hearing.*

INTRODUCTION

Minors in criminal proceedings represent a particularly sensitive category. Minors may come into contact with the judicial authorities in very different ways and under different circumstances, which can cause them to have different kinds of feelings, mostly negative, and there is also fear of the consequences that may occur for them. This fear is particularly intensified in situations in which the minor is the injured party, and must face the person who caused him or her certain harm in the court proceedings. The subject of this work is criminal proceedings conducted against minors, which must have a protective model, taking into account all the psychological and physical specificities of minors. In addition to being protective, proceedings against minors must be fair and take into account all possible models of alternative treatment.

The essence of the problem is reflected in the maximum application of all procedural possibilities to provide minors with protection from all potential problems they may have

during the procedure. The penetration of the idea of human rights protection into criminal proceedings is primarily manifested through improving the position of the accused, while reducing repressive measures against him to the smallest possible extent.¹ Given that the defendant represents the weaker party in the proceedings, since most criminal proceedings are initiated and prosecuted by the public prosecutor, it is logical that the focus of protection of rights is on the defendant. Here, the issue of protecting the rights of the defendant is very delicate, and one must move between optimal levels of protection of human rights, while taking into account the fact that the defendant, by committing his unlawful act, committed a criminal offense and caused damage to the injured parties. Therefore, the protection of the rights of the defendant must be conditioned by the gravity of the criminal offense that he is charged with, as well as the gravity of the consequences that occurred.²

The issue of protection of minors who have the status of injured parties and who are parties to the proceedings is a separate issue. Likewise, the issue of protection of minors who have the status of defendants is the subject of consideration of the still positive Law on Juvenile Perpetrators of Criminal Offenses and Criminal Protection of Minors.³

In the work itself, the position of minors in criminal proceedings will be treated in two ways: as injured parties and as defendants, and the aim of the work is to determine the difference in treatment depending on the procedural position of the minor in the proceedings itself. The starting hypothesis of the work is that minors in criminal proceedings are particularly sensitive because they are under eighteen years of age and are in the process of psychological and physical development, and therefore they should be treated in a special way, taking into account all their psychological and physical characteristics. It is for this reason that a comparison of legal solutions is made depending on the procedural position that the minor has in criminal proceedings.

The work applies analytical, normative and comparative methods, with the aim of proving the hypothesis, i.e. achieving the goal of the work, which is to determine the difference in the treatment of minors depending on their procedural position in criminal proceedings.

PROTECTION OF A MINOR INJURED PERSON

A particularly sensitive issue regarding the treatment of a minor injured party is the question of his or her questioning, which is carried out in the capacity of a witness. Given the specific nature of minors and their vulnerability, this questioning takes place in the presence of psychologists, pedagogues and other experts.⁴ Unfortunately, in practice, one gets the impression that there is a certain relativization of the integration of experts into this hearing procedure. That is, one gets the impression that the normative basis for raising this issue to an adequate level is not explicit enough, because the legislator uses the phrase "as a rule", which contributes to the aforementioned relativization. Practice proves

1 Antonović, R. (2023) "Kazna - od represije do prevencije", *Dve decenije razvoja pravne misli*, Pravnički dani prof. dr Slavko Carić, Univerzitet Privredna akademija, Pravni fakultet za privredu i pravosuđe, Novi Sad, str. 445.

2 Knežević, S. (2010) *Maloletničko krivično pravo*, Pravni fakultet Univerziteta u Nišu, str. 322.

3 "Official Gazette of the Republic of Serbia" No. 85/2005

4 Banović, B; Ilić, Rajković, A. (2012) "Krivičnoprocesna zaštita maloletnih lica - domaća i uporedna rešenja", *Strani pravni život*, Institut za uporedno pravo, Beograd, str. 89.

that there are often deviations from the rule of including experts in the hearing procedure of minors. The only place where deviations are not tolerated under any circumstances is in the hearing of children, i.e. persons under the age of fourteen.⁵

Some authors perceive the deviation from the strict application of these legal provisions as a “softening” and relativization that has no logical basis. Those who support the “softening” of imperative norms find justification in the simplification and acceleration of the procedures that are being conducted. However, can the quality of the procedure be influenced, as well as the traumatization of minors, who are probably encountering the court and the judicial procedure for the first time, in the name of efficiency?

Police officers cannot take statements from minors without the presence of a public prosecutor and experts. If such an interrogation were to occur, it could possibly be considered an informative interview, and the information obtained in this way has the character of information received from citizens.⁶ Therefore, when it comes to the number of times a minor can be questioned, there are legal restrictions that do not allow these persons to be questioned more than twice. Exceptionally, for the purpose of the procedure, the questions may be asked more than twice. If this exception occurs, which implies questioning more than twice, increased care must be taken to protect the rights of the minor. Any additional questioning may lead to secondary and tertiary victimization of the minor and may cause additional consequences for him.

A minor as a witness does not have to be questioned directly, but can also be questioned using technical devices for transmitting images and sound. Under these circumstances, the questioning would be conducted without the presence of other parties in a room designated for the witness, and the questions would be asked in the presence of experts, psychologists, pedagogues and social workers. With the use of technical devices, it is possible to question a minor in home conditions, at school or any other room known to the minor.⁷ At the main hearing, the minutes of the questioning of the minor as a witness are read, and if audio-visual equipment was used during his questioning, a recording of his questioning will be played.

A special type of protection is enjoyed by a minor who has certain mental deficiencies, or who is particularly sensitive and in a difficult condition. Such a minor, given his or her personal characteristics, is not allowed to confront the accused.

An injured minor, when criminal proceedings are being conducted against an adult, must have a representative, starting from the first hearing of the accused. If the minor does not have a representative, the court is obliged to appoint a representative from among lawyers who have special knowledge in the field of children's rights and criminal law protection of minors. The costs of representation are borne by the court's budget. However, even with this provision, we often encounter the issue of its relativization with explanations from comparative law practice. Therefore, the issue of appointing a representative to a minor, who appears in the role of an injured party, appears more as a possibility than as an obligation.⁸

5 Škulić, M. (2014) *Zaštita dece/maloletnih lica kao oštećenih i svedoka u krivičnom postupku*, International Management Group, Beograd, str. 52.

6 Marinković, D. (2006) “Policijsko saslušanje osumnjičenog“, *Bezbednost*, Beograd, str. 682.

7 Đurđić, V. (2015) “Priroda, struktura i principi krivičnog postupka prema maloletnicima“, *Maloletnici kao učinioci i kao žrtve krivičnih dela*, Institut za kriminološka i sociološka istraživanja, Beograd, str. 94.

8 Milošević, N. (2008) “Planirane izmene u zakonu o maloletnim učiniocima krivičnih dela i

Special difficulties arise in situations where a minor injured party identifies the accused. These are particularly difficult encounters for minors with those who have caused them some harm or caused them some evil. The court must be particularly careful in this regard, and ensure that the identification takes place in stages, without the possibility for the accused to learn the minor's identity.

Measures to protect minors, who appear in the role of the injured party, must be at a higher level when proceedings are conducted against adults. The protection of minors requires the implementation of the basic postulates of extra-judicial protection, which means that certain powers towards minors may be exercised only by authorized officials, specially trained and expert in working with minors. Exceptionally, if circumstances so indicate, the specialization of authorized police officers may be waived.

The issue of protection of minors is addressed, among others, by the Law on Police,⁹ in the part relating to summons, delivery of written summonses, parental care, prohibition of filming the scene of a criminal offense for the purpose of protecting the victim, and physical protection of victims from the danger that exists and is threatened by the perpetrator of a criminal offense.

PROTECTION OF A JUVENILE DEFENDANT

Although they are perpetrators of criminal acts, minors who find themselves in this position still enjoy a more privileged position than adults who have also committed a criminal act. The reason lies in their specific psychophysical status.¹⁰ Namely, the socially conditioned socio-pedagogical and psychological aspects of juvenile delinquency are given priority, and the criminal-legal aspect is placed on the secondary plan. Sciences such as biology, psychology and sociology have made a great contribution to this protective treatment of juvenile offenders. Therefore, one gets the impression that in such situations the crime committed is secondary, and that the personal, social and psychological aspects of the juvenile perpetrators of criminal acts are placed in the foreground.

The protective model, which was introduced in relation to juvenile offenders, began to develop at the beginning of the twentieth century. It gave broader powers to the judge in conducting criminal proceedings against juveniles. To this should be added the absence of formalism, the abandonment of proportional sentencing and the vagueness of criminal sanctions against juveniles. The presence of this model is limited in time to the period after World War II. The social and legal circumstances that preceded the appearance of this model on the judicial scene of most countries were conditioned by the economic crisis and general distrust of the treatment that includes the stay of juveniles in a special type of institution. Instead, it is proposed to introduce a type of parapenal or diversionary measures as an alternative to the institutional treatment used until then.¹¹

krivičnopravnoj zaštiti maloletnih lica", *Krivičnopravna pitanja maloletničke delinkvencije*, Beograd, str. 278.

9 "Official Gazette of the Republic of Serbia" No. 6/2016, 24/2018 and 87/2018

10 Antonović, R. (2023) "Deca kao žrtve i kao izvršioci krivičnih dela", *Baština* broj 61, Institut za srpsku kulturu, Priština - Leposavić, str. 182.

11 Joksić, I; Matijašević, J. (2024) "Položaj maloletnika u krivičnom pravu Srbije", *Pravni život*, br. 4, Beograd, str. 66.

In the legal system of the Republic of Serbia, there are special juvenile justice bodies, namely: special departments for juvenile delinquency in the internal affairs bodies, a special public prosecutor for juveniles and a special judge for juveniles, or the juvenile panel before the district court. All persons who appear before juveniles must have special knowledge in the field of child rights and juvenile delinquency. The juvenile panel in the first instance proceedings is composed of a juvenile judge and two jurors of different genders, who are selected from among educational workers and other professional professions that are in contact with children and young people.¹²

The basic characteristics of criminal proceedings conducted against juvenile perpetrators of criminal offenses are: the application and use of specific procedural treatments, specialization of judicial bodies (courts and prosecutors' offices), informality of proceedings and their liberalization, special procedural rules, adapted to the personal characteristics of juvenile perpetrators of criminal offenses, and a deep penetration of inquisitorial elements.¹³

Every judicial proceeding, including proceedings conducted against minors, must be fair. Fairness in proceedings conducted against minors is reflected in the protection of the minor's personal rights, as well as the protection of the minor's interests, which are expressed through his or her free will. This type of will of the minor must actually be justified by the interest of protecting his or her personal rights, as well as by preventing possible repression that would be carried out against him or her.¹⁴

Through fair treatment of juvenile perpetrators of criminal acts, a new system of treatment of juveniles in court proceedings is approached. The indeterministic approach to juveniles is based on the principle that each individual acts according to the principles of personal choice of behavior, in relation to legal norms, which establish certain rules and principles of behavior. It is assumed that the influence of the social environment is not decisive, that is, it has much less importance compared to these internal and volitional aspects that exist in juvenile perpetrators of criminal acts.

Recently, there has been an approach to the application of alternative measures towards minors, which are the result of a protection model and approach. Alternative treatment towards minors is reflected in administrative decision-making, instead of judicial, prevention of the conduct of court proceedings, wider application of alternative means for combating juvenile delinquency, coordination in the work of state bodies and social welfare bodies, as well as systemic prevention and timely intervention.¹⁵

Specialization is required from administrative and judicial authorities, as well as the exercise of broader powers. Specialization is especially required in the work of the police, because they are the first to react to the emergence of juvenile delinquency in society. In addition to the above, a characteristic of today's proceedings against minors is the application of alternative measures, which should be adapted to the personal characteristics

12 Jovašević, D. (2006) "Osnovne karakteristike novog maloletničkog krivičnog prava Republike Srbije", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Pravni fakultet, Rijeka, str. 1060.

13 Škulić, M. (1999) "Osnovni tipovi krivičnog postupka prema maloletnicima u uporednom pravu", *Strani pravni život*, Beograd, str. 42.

14 Freeman, M. D. A. (1983) *The Rights and Wrong of Children*, The Amazon Book Review, London, p. 87.

15 Blagić, D. (2018) „Alternative kazni maloletničkog zatvora u uporednom zakonodavstvu“, *Načela dobre vladavine - načelo pravne sigurnosti i načelo pravičnosti*, Pravni fakultet Univerziteta u Prištini, Kosovska Mitrovica, str. 229.

of the juvenile offender, with the aim of providing the best possible results with the aim of individual prevention. The influence on the personality of the minor and the correction of his behavior is the primary goal of the application of alternative measures.

Alternative measures are applied instead of classic measures and sanctions that are mainly intended for adult perpetrators of criminal acts. The goal is also to avoid criminal proceedings, because the procedure itself only further traumatizes the minor, and the effects of his resocialization are weak. Avoiding criminal sanctions against minors enables the application of educational orders and recommendations, which can have a greater effect and success in the minor's resocialization. Educational orders are an alternative to classic sanctions in Serbian criminal law, which can be imposed on minors.

The following educational orders may be imposed on juvenile perpetrators: reconciliation with the injured party, in terms of compensation for damages, apology, through work, all with the aim of eliminating the consequences of the committed criminal offense; regular school attendance or regular performance of work obligations; involvement in humanitarian work on a voluntary basis; undergoing examinations for the purpose of detoxification from addiction and inclusion in individual or group treatments in specialized health or other institutions.¹⁶

As can be seen, the benefits of implementing educational orders are multiple and can have a positive effect on both minors and those who have been harmed in any way by the actions of minors. Also, from the perspective of the entire society, there is a benefit because it can be reasonably expected that educational orders will have a positive effect on the future behavior of the minor, and that repeated commission of criminal offenses will most likely not occur. The minor, instead of wandering the streets and engaging in idleness, will have to regularly attend classes or begin performing their work duties. Also, there is a tendency to humanize the minor through his/her involvement in the work of humanitarian organizations, which would replace his/her tendency towards crime with a tendency towards humanitarian and socially useful work. In addition to acquiring desirable traits, such as altruism, minors are further educated in this way and gain new knowledge, as well as experiences that can positively influence their future life and work.

Also, juvenile offenders develop work habits and qualities through their work engagement for the benefit of local communities, institutions dedicated to children and youth, social work centers, social assistance institutions, and the like. In juveniles, through the application of the measure of work in the public interest, a sense of personal responsibility for their actions is developed, the work of the juvenile is carried out through his personal consent, as well as the consent of his parents, or guardians, the work of the juvenile is carried out under the constant supervision of the social work center, and efforts are made to keep the time that elapses between the commission of the criminal act and the application of this measure as short as possible, so that the effects of resocialization are better.¹⁷

It is unnecessary to talk about the importance of medical educational orders, considering the fact that a large number of juvenile offenders have committed a criminal offense under the influence of alcohol or psychoactive substances. The application of these orders and their implementation is carried out at the initiative of the public prosecutor, and the decision is made by the juvenile judge. The purpose of educational orders is to

16 Radovanov, A; Joksić, I. (2018) "Položaj maloletnika u porodičnom i krivičnom pravu Republike Srbije", *Vojno delo*, br. 6, Beograd, str. 160

17 Stevanović, I. (2014) "Diverzion model i zaštita prava maloletnika u krivičnom postupku", *Pravni život*, Beograd, str. 9.

provide assistance, protection, and supervision to a juvenile offender, which is considered a necessary element in the juvenile justice system.¹⁸ When issuing any educational order, the court must take the interests of the minor as the primary consideration, assuming which of these orders can provide the best effects in the juvenile's resocialization process.

EFFECTS OF REINTEGRATION OF JUVENILE OFFENDERS

The modern approach and treatment of juvenile offenders, which is applied in the Republic of Serbia, in its specific application, also contains certain shortcomings and shortcomings. They are reflected in the prolonged stay in specialized institutions, which contributes to the uneconomical nature of the procedure itself, and at the same time encourages recidivism among juvenile offenders. After leaving specialized institutions, juveniles do not have adequate treatment, assistance, support and monitoring, which nullifies any effects that were achieved during the application of the measure.¹⁹

Without clear and strong motivation, we cannot talk about a successful process of resocialization of juvenile offenders. In addition to the motivation of the juvenile to radically change his or her lifestyle, there must also be the motivation of professionals and staff to help and contribute to this. This is precisely why we insist on the involvement of social services, which, through dedicated and timely work, can contribute to adequate protection, education, psychological support and professional inclusion in educational and psychosocial programs and treatments for juveniles. Resocialization treatment is conditioned by the readiness, motivation and quality of work of the institution to which the juvenile is sent. The readiness to help a juvenile is best reflected through individual conversations and treatments that are adapted to the personal characteristics of the juvenile and his or her personal needs.

All adequate parameters indicate that the Republic of Serbia has made great strides in improving relations with juvenile perpetrators of criminal offenses. However, the best indicator of the success or failure of relations with juvenile offenders is the recidivism rate. According to the available data from the Republic Statistical Office, for the period from 2021 to 2023, criminal charges were filed against a total of 2,598 juveniles for committing some criminal offenses on the territory of the Republic of Serbia. Of these, 2,313 were male juveniles, and 285 were female juveniles. The age of fourteen is 664 male and 91 female juvenile perpetrators. The age of fifteen is 479 male and 63 female juvenile perpetrators. The age of sixteen is 577 male and 70 female juvenile perpetrators. The age of seventeen years includes 593 male and 61 female juvenile perpetrators.²⁰

Juvenile perpetrators of criminal offenses in the Republic of Serbia most often commit the criminal offense of causing slight bodily harm under Article 122 of the Criminal Code of Serbia,²¹ followed by the criminal offenses of endangering safety under Article 138 and causing serious bodily harm under Article 121 of the Criminal Code.

18 Bojić, B; Ahmed, A. A. (2015) "Krivičnopravni status maloletnika u Srbiji", *Pravo - teorija i praksa*, br. 7-9, Pravni fakultet za privredu i pravosuđe, Novi Sad, str. 58.

19 Stevanović, I. (2020) *Izazovi u postpenalnom prihvatanju maloletnih učinilaca krivičnih dela u Srbiji (norme, praksa i mere unapređenja)*, Institut za sociološka i kriminološka istraživanja, Beograd, str. 88.

20 More details at: <https://www.stat.gov.rs/sr-latn/oblasti/pravosudje/maloletni-ucinioci-krivicnih-dela/>, visited on 26.06.2025.

21 "Official Gazette of the Republic of Serbia" No. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024.

In juvenile crime in Serbia, the largest share is occupied by property crimes, such as theft under Article 203 and aggravated theft under Article 204, and destruction and damage to another's property under Article 212 of the Criminal Code. Property crimes have the highest level of recidivism among juvenile perpetrators. The reason for this should be sought both in economic motives and in the fact that committing these crimes has become an integral part of their lives and they see in these acts the purpose and meaning of their life and work.

CONCLUSION

The initial hypothesis of the work that minors in criminal proceedings are particularly sensitive because they are under eighteen years of age and are in the process of psychological and physical development, and therefore should be treated in a special way, taking into account all their psychological and physical characteristics, has been confirmed through a normative analysis of the given contents of various positive codes and laws in the Republic of Serbia, which provide special conditions and treatment for minors, both through the material and through the procedural prism.

The work analyzes the legal solutions of the Criminal Code, the Criminal Procedure Code, the Law on Juvenile Perpetrators of Criminal Offenses and Criminal Protection of Minors, as well as the Law on Police, and concludes that all of the aforementioned legal acts contain provisions on special treatment in relation to minors. Of course, special treatment is justified by the undeveloped psychophysical capabilities of minors, who are therefore unable to understand their actions in the best way and manage them.

The contribution of the work can be seen through a dual approach to the relationship with minors, because they can appear both in the role of injured parties and defendants in criminal proceedings. Therefore, minors can be injured both by another minor and by an adult. The goal is to protect the injured minor in such situations in the best possible way and to provide him with adequate treatment. On the other hand, minors also appear in the capacity of perpetrators of criminal acts. In these cases, the goal is to maximally protect these persons and their personal and legal interests, and to give space to prevention instead of repression, which would make minor offenders socially useful and acceptable members of society and the social community.

The work itself presents a description of all positive legal solutions and principles, and describes the existence of specialized treatment in relation to minors, in the sense of the existence of police officers, prosecutors and judges who possess special skills in the field of children's rights, who should treat minors with special care and responsibility.

At the very end of the work, a statistical overview of the factual situation in the Republic of Serbia regarding the rate of juvenile crime for the period 2021 to 2023 is provided, with special attention to the number of crimes committed, the type of crimes committed, as well as the age of juvenile perpetrators of crimes.



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POSEBNE TENDENCIJE ZAŠTITE MALOLETNIH LICA U KRIVIČNOM POSTUPKU U REPUBLICI SRBIJI

Apstrakt:

Savremeni pravni sistemi su zasnovani na principima vladavine prava, pravne države i zaštite osnovnih ljudskih prava. Težnja zaštite ljudskih prava je posebno izražena u krivičnom pravu, koje najčešće stoji na poziciji negiranja nekih zajamčenih ljudskih prava. Te negacije ljudskih prava moraju biti zasnovane i utemeljene na zakonskim i legalnim principima. Predmet ovog naučnog rada je položaj maloletnih lica u krivičnom postupku, dok je osnovna hipoteza rada da su maloletna lica u krivičnom postupku posebno osetljiva jer imaju manje od osamanešt godina i nalaze u procesu psihološkog i fizičkog razvoja, te ih stoga treba tretirati na poseban način, uz uvažavanje svih njihovih psihičkih i fizičkih karakteristika.

U radu, autor razmatra nekoliko značajnih pitanja koja su u vezi sa zaštitom maloletnih lica u krivičnom postupku i to pitanje postojanja specijalizovanih pravosudnih organa pred kojima se vode krivični postupci u kojima impliciraju maloletna lica, pitanje zaštite maloletnog lica koje ima svojstvo oštećenog lica prilikom saslušanja, kao i položaj maloletnog oštećenog lica u postupku koji se vodi protiv punoletnog lica. Cilj ovog rada je da ukaže na posebnu osetljivost maloletnih lica koja na bilo koji način učestvuju u sudskim postupcima, uz primenu analitičke, normativne i komparativne metode.

Ključne reči: maloletno lice, krivični postupak, oštećeni, saslušanje.

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CRIMINAL LAW PROTECTION OF CHILD SUPPORT IN THE REPUBLIC OF SERBIA

Abstract:

As a measure of last resort to ensure the effective enforcement of the legal obligation of child support by parents and other persons designated by law, the legislator prescribes criminal liability for a specific offence: “*Failure to Provide Support*” (Article 195 of the Criminal Code). This offence consists of a failure to provide support for a person whom the offender is legally obliged to maintain, where such an obligation has been determined by a final court judgment or by an enforceable settlement before a court or another competent authority, in the amount and manner established therein. This incrimination represents one of the most frequent forms of violating the child’s right to an adequate standard of living. In practice, it primarily serves to protect the “*best interests of the child*.” The paper discusses the concept, scope, constituent elements, and characteristics of this offence, which can seriously and adversely affect the proper development and progress of children under the criminal law of the Republic of Serbia.

Keywords: *child, support, decision of a competent authority, failure to provide, criminal offence*

INTRODUCTION

A recently enacted law in the Republic of Serbia introduced the *Act on the Exercise of Rights from the Maintenance Fund*.¹ The law regulates the establishment, management, and financing of the Maintenance Fund, the child’s right to temporary support from this fund, the procedure for exercising the right to such support, as well as other matters relevant to the realisation of this right. In practice, this has created a foundation for the effective enforcement of child maintenance rights arising from family law relations.

¹ Službeni glasnik RS, br. 51/2025.

The Maintenance Fund (Article 3) is a budgetary fund established for an indefinite period, intended to allocate resources secured for the purpose of temporary child support. Funding for the Maintenance Fund is provided from various sources, such as: (a) the budget of the Republic of Serbia, (b) donations, and (c) other revenues in accordance with the law.

The right to temporary maintenance from the Maintenance Fund may be exercised by a child who is a citizen of the Republic of Serbia and holds the status of an enforceable creditor in enforcement proceedings initiated to secure the right to statutory maintenance (Article 5). The *Act on the Exercise of Rights from the Maintenance Fund* represents the latest attempt to establish a framework ensuring the protection of children's right to maintenance by persons legally authorised to provide such support. In the Republic of Serbia, the right of children to maintenance is founded in the Constitution.²

The Constitution of the Republic of Serbia, in Part Two entitled "*Human and Minority Rights and Freedoms*", Chapter Two: "*Human Rights and Freedoms*", stipulates "*The Rights and Duties of Parents*" (Article 65). It proclaims that parents have both the right and the duty to support, raise, and educate their children, and that they are fully equal in these responsibilities. Any or all of these rights may be revoked or restricted for one or both parents solely by a decision of a competent court, following due proceedings, if such a measure is deemed to be in the best interests of the child and in accordance with the law.

The notion of the "*best interests of the child*" constitutes a legal standard, to be determined as a matter of fact in each individual case on the basis of the evidence presented.

Family Law Act³ Article 6 proclaims that everyone is obliged to act in accordance with the best interests of the child in all activities concerning the child. In this regard, the state bears the following obligations: (a) to take all necessary measures to protect the child from neglect, from physical, sexual and emotional abuse, and from any form of exploitation; (b) to respect, protect, and promote the rights of the child; and (c) to provide protection within a family environment for a child without parental care whenever possible.

A particularly important role in safeguarding the best interests of the child is played by family law provisions relating to maintenance (Article 8). The *Family Law Act* explicitly emphasises that maintenance constitutes both a right and a duty of family members specified by law, and that any waiver of the right to maintenance has no legal effect. Parents have both the right and the duty to provide support to their child (Article 73).

When the realisation of a child's right to maintenance is impossible, substantially hindered, threatened, or diminished, criminal law comes into effect.⁴ The criminal law protection of the duty of maintenance among family members (particularly children) is ensured in the Republic of Serbia through the *Criminal Code*⁵. In Chapter Nineteen, entitled "*Criminal Offences against Marriage and Family*", the Code prescribes a specific criminal offence: "*Failure to Provide Support*" (Article 195).

2 Službeni glasnik RS, br. 98/2006 i 115/2021.

3 Službeni glasnik RS, br. 18/2005, 72/2011 i 6/2015.

4 Krstinić, D., Dragojlović, J., (2024). Krivičnopravne i naslednopravne posledice zakonskog izdržavanja, u: XXI međunarodni naučni skup „Pravnički dani - Prof. dr Slavko Carić“, Odgovori pravne nauke na izazove savremenog društva, Novi Sad, Pravni fakultet za privredu i pravosuđe u Novom Sadu, str. 485.

5 Službeni glasnik RS, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

HISTORICAL DEVELOPMENT OF THE INCRIMINATION OF FAILURE TO PROVIDE MAINTENANCE

The criminal offence of *Failure to Provide Support* (Article 195) has undergone a long historical evolution before acquiring its current designation, forms of manifestation, content, and characteristics. This incrimination was previously prescribed by: (a) the Criminal Code of the Federal People's Republic of Yugoslavia (1951), and (b) the Criminal Code of the Socialist Republic of Serbia (1977).

The Criminal Code of the FPR Yugoslavia⁶ in Chapter Seventeen entitled "*Criminal Offences against Marriage and Family*", stipulated the criminal offence of "*Non-Payment of Alimony*" (Article 197). This offence, punishable alternatively by a fine or by imprisonment of up to one year, consisted of evading the provision of maintenance for a person whom the offender was obliged to support on the basis of a final court decision. The object of legal protection was the right of a family member to secure the material means of subsistence. The right to maintenance most commonly belongs to a child (as a rule, a minor), but it may also extend to a spouse or a parent in cases where they lack sufficient means of subsistence and are either incapable of work or unemployed, as well as to other relatives under conditions prescribed by law.

The criminal offence of non-payment of alimony consisted of two basic elements⁷. These elements were as follows: (a) **The act of commission** – defined as the evasion of providing maintenance. This refers to any positive, active conduct which clearly and unequivocally expresses the intent and will to withhold, either wholly or partially, the payment of maintenance for a particular person. The act of evasion does not merely constitute a "simple" failure to provide maintenance, but rather an intentional avoidance of fulfilling this obligation, provided that the offender was objectively capable of doing so but deliberately refrained, actively obstructing the enforcement of maintenance (e.g., by concealing income, frequently changing residence or place of employment, terminating employment, and similar actions). If the offender was genuinely unable (for justified reasons) to provide maintenance—for instance, due to illness or unemployment not attributable to their own fault—then this criminal offence is not constituted. (b) **The requirement that the act of commission results in the avoidance of paying or providing maintenance for a specific person** – namely, a person whom the offender is legally obliged to support. This duty of maintenance must have been previously established by a final and binding decision of a competent authority, without the need for further specification as to which authority rendered such a decision.

By the 1959 amendment to the Criminal Code of the FPR Yugoslavia⁸, a more severe form of this offence was introduced in "*particularly serious cases*", punishable by imprisonment of not less than three months. A "*particularly serious case*" (Article 41) was recognised at that time when the offence assumed a particularly dangerous form, provided that the following elements were cumulatively met: (a) a subjective element – that the offender, in committing the act, demonstrated particular determination, persistence, or ruthlessness; and (b) an objective element – that the offence either caused exceptionally serious consequences or was committed under particularly aggravating circumstances.

6 Službeni list FNRJ, br. 13/51.

7 Radovanović, M., Đorđević, M. (1977). *Krivično pravo. Posebni deo*. Beograd: Savremena administracija, str. 179-180.

8 Službeni list FNRJ, br. 30/59.

The Criminal Code of the Socialist Republic of Serbia⁹ (which remained in force until 1 January 2006), in Chapter Thirteen entitled “*Criminal Offences against Marriage and Family*”, prescribed the criminal offence of “*Failure to Provide Support*” (Article 119). The terminological change in the designation of this incrimination brought qualitative modifications to its content. This offence was also punishable alternatively by a fine or by imprisonment of up to one year. A distinctive feature of this incrimination (paragraph 3) was the statutory provision allowing the court, when imposing a suspended sentence, to order the offender of the basic offence to settle overdue obligations and to continue to pay maintenance regularly in the future. Thus, if the court opted for a suspended sentence in cases of failure to provide support, it could impose upon the offender the obligation to pay outstanding arrears as well as to make regular maintenance payments thereafter. Failure to comply with this obligation represented an optional ground for the revocation of the suspended sentence.

The criminal offence of “*Failure to Provide Support*” was committed by a person who failed to provide maintenance for an individual whom they were legally obliged to support, in the amount and manner determined by a final court decision or enforceable settlement before a court or another competent authority. The object of legal protection was the right to maintenance of a person whom the offender was legally bound to support. This right derived from matrimonial or family law, rather than from another legal basis (e.g., compensation for damages). It was essential that the obligation be established by a final and enforceable court decision or settlement. A final court decision was understood not only to include judgments, but also rulings (such as interim orders).¹⁰ The act of commission consisted in the omission to provide maintenance. Such a statutory solution indicates that the conduct element of the offence was a negative, passive activity — an omission or failure to provide maintenance.¹¹

For the existence of the offence at that time, it was necessary that the act of commission related to maintenance: (a) for a person whom the offender was legally obliged to support; (b) in the amount and manner as determined; and (c) established by a final court decision or enforceable settlement before a court or another competent authority.

The criminal offence of *Failure to Provide Support* (Article 119) recognised, in addition to its basic form, a more serious, qualified form (paragraph 2). This aggravated offence, punishable by imprisonment of up to three years, was constituted where the commission of the basic offence resulted in serious consequences for the person entitled to maintenance (i.e., an offence qualified by a graver consequence). Whether such “*serious consequences*” existed for the dependent person, and what those consequences entailed, was a factual matter to be determined by the court in each individual case on the basis of the established facts.¹² What constitutes *serious consequences* is assessed by the court on a case-by-case basis (e.g., impairment of the dependent person’s health, or their resorting to vagrancy, begging, prostitution, or the commission of criminal offences).

9 Službeni glasnik SRS, br. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 i 21/90 i Službeni glasnik Republike Srbije broj 16/90, 26/91, 58/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/2002, 11/2002 i 80/2002.

10 Stojanović, Z., Perić, O. (2000). *Krivično pravo. Posebni deo*. Beograd: Službeni glasnik, str. 193.

11 Simić, I., Petrović, M. (2002). *Krivični zakon Republike Srbije. Praktična primena*. Beograd: Službeni glasnik, str. 118.

12 Stojanović, Z., Perić, O. (1996). *Komentar Krivičnog zakona Republike Srbije i Krivični zakon Republike Crne Gore sa objašnjenjima*. Beograd: Službeni list, str. 182-184.

In the *Criminal Code of the Republic of Serbia*, the offence of “*Failure to Provide Support*” (Article 195) today consists of the omission to provide maintenance for a person whom the offender is legally obliged to support, where such a duty has been determined by a final court decision or by an enforceable settlement before a court or another competent authority, in the amount and manner established therein.¹³ This incrimination represents one of the most common forms of violating a child’s right to an adequate standard of living (“*the best interests of the child*”) and may seriously and gravely endanger the child’s proper development and progress. In this way, the statutory solution has been tailored to the needs of the injured party, primarily the child, thereby sending a clear message to parents regarding their responsibility towards their children, as well as to other citizens, that this constitutes one of the most serious violations of children’s rights, which neither should nor can be tolerated by society.¹⁴

THE OBJECT OF PROTECTION OF THE CRIMINAL OFFENCE OF FAILURE TO PROVIDE SUPPORT

In legal theory, the object of protection of this criminal offence is defined in several different ways. According to one view, it is the “*interest of the person*” for whose benefit the duty of maintenance (alimony) has been established.¹⁵ Another perspective holds that the object of protection lies in securing the existential material conditions of life for a family member¹⁶ or in guaranteeing the material security of family members, which derives from the principle of family solidarity as a prerequisite for the existence of the family and the development of family relations.¹⁷ A third view considers the right of a family member to the provision of material means of subsistence as the object of protection in this case.¹⁸ The rights and duties of child support (and support for other family relatives) are set out in the *Family Law Act* (Articles 151–167). In substance, this right is a property right that establishes an obligational relationship between the beneficiary of support and the person obliged to provide it. This relationship is adjudicated under the rules of the law of obligations, through litigation or enforcement proceedings.

According to another interpretation, the object of protection of the criminal offence of failure to provide support consists of the minimum conditions for the existence of family members, and above all, women and children from divorced marriages.¹⁹ The family is not only a blood-related but also an economic community, founded upon feelings of attachment and solidarity. This solidarity is reflected in the existence of the right of each member who is unable to work and earn a living to be supported by those who are able and in a position to do so. Although this obligation is established under family law provisions, it becomes the subject of criminal law protection from the moment it is confirmed by a court or another competent authority. A further view holds that the very person in whose favour the obligation of maintenance has been established constitutes the object of protection in such cases.²⁰

13 Simić, I., Trešnjev, A. (2010). *Krivični zakonik s kraćim komentarom*. Beograd: Ing-pro, str.143.

14 Turković, K., et al. (2013). *Komentar Kaznenog zakona*. Zagreb: Narodne novine, str. 229-230.

15 Dragojlović, J. (2025). *Krivično pravo. Posebni deo*. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu, str. 121.

16 Jovašević, D. (2017). *Krivično pravo. Posebni deo*. Beograd: Dosije, str. 109.

17 Babić, M., Marković, I. (2007). *Krivično pravo. Posebni dio*. Banja Luka: Pravni fakultet, str. 152.

18 Jovašević, D., Miladinović Stefanović, D. (2023). *Krivično pravo. Posebni deo*. Niš: Pravni fakultet, str. 171.

19 Petrović, B., Ferhatović, A., Jovašević, D. (2024). *Krivično pravo. Posebni dio*. Sarajevo: Pravni fakultet, str. 107.

20 Stojanović, Z., Delić, N. (2013). *Krivično pravo. Posebni deo*. Beograd:Pravni fakultet, str. 113.

Nevertheless, all these court proceedings prescribed by law are not, in themselves, a guarantee for the realisation of these legally proclaimed rights. Maintenance is most often provided in the form of a monetary amount, but it may also consist of other assets or values that can serve to meet the needs of the dependent person in respect of food, clothing, housing, medical treatment, education, and so forth. Therefore, criminal law protection complements civil enforcement, demonstrating that the importance of the right to maintenance is not confined merely to a pecuniary interest. Rather, it reflects a broader social interest in ensuring the protection of certain individuals, primarily children or other family members who are unable to provide for themselves.²¹ For this criminal offence to exist, the obligation of maintenance must arise from one of the legal bases provided by law. Accordingly, this incrimination does not apply where a person (the maintenance debtor) fails to pay maintenance awarded as compensation for damages or on any other legal basis.²²

THE ACT OF COMMISSION IN THE CRIMINAL OFFENCE OF FAILURE TO PROVIDE SUPPORT

The act of commission of the criminal offence of *Failure to Provide Support* is defined as the “*failure to provide maintenance*”.²³ This constitutes the conscious omission to pay (non-payment) within the prescribed period a specific monetary amount for the maintenance of a family member. Instead of the previously used term “*evasion of providing maintenance*,” the legislator now defines the act of commission more simply as the activity of “*failure to provide*” maintenance.²⁴ In this way, the provision encompasses every instance of non-payment of maintenance, including the outright refusal to fulfil the maintenance obligation, making it entirely irrelevant whether the offender acts with a specific intention (purpose) or not.²⁵

The act of commission consists in the failure (or omission, or avoidance) of providing maintenance, but not in respect of just any person — only towards a person for whom there exists a statutory family law obligation of support. From this definition, it follows that this is an offence of omission (*omissive offence*), in which the incriminated conduct lies in the breach of a duty to act. Such non-provision may take three forms: (a) complete — where the full amount of maintenance is not paid at all; (b) partial — where only part of the prescribed maintenance is paid; or (c) untimely or irregular — where payments are made irregularly or with shorter or longer delays. The provision of maintenance in the manner and amount determined by a court decision or settlement ensures the stability and security of the recipient of support, as it protects them within family law relations from the arbitrariness and subjectivism of the maintenance debtor.

The act of commission is defined by a verb of continuous action, which means that failure to provide maintenance, whether occurring once or on several occasions, always constitutes a single criminal offence, provided that it concerns the same dependent person.

21 Lazarević, Lj., Vučković, B., Vučković, V. (2004). *Komentar Krivičnog zakonika Crne Gore*. Cetinje: Obod, str. 563.

22 Bačić, F., Pavlović, Š. (2001). *Kazneno pravo. Posebni dio. I izdanje*. Zagreb: Pravni fakultet, str. 191-193.

23 Delić, N. (2021). *Krivično pravo. Posebni deo*. Beograd: Pravni fakultet, str. 130.

24 Đorđević, Đ., Bodrožić, I. (2024). *Krivično pravo. Posebni deo*. Beograd: Kriminalističko-policijski univerzitet, str. 132.

25 Stojanović, Z., Delić, N., op. cit., str. 114.

However, failure to provide maintenance in respect of several dependants gives rise to a concurrence of offences. Although the legislator has precisely defined this omission (failure to act), part of the legal doctrine nonetheless holds that the offence is not fulfilled merely by the *withholding* of the support owed, but that there must also be an element of avoidance in the failure to provide maintenance.²⁶

Such avoidance is manifested either through active conduct or through a conscious omission, whereby the offender permanently or temporarily prevents the provision of maintenance for a specific person. However, this criminal offence does not arise where the offender finds themselves in objective circumstances (such as unemployment or prolonged illness) which have not occurred with the intention of evading this obligation.²⁷ Maintenance consists in the payment of a certain monetary amount necessary to cover the basic existential needs of the dependent person, including food, housing, clothing, healthcare, upbringing, and education. The amount and manner of providing maintenance are determined by the competent state authority – either the court or the guardianship authority.²⁸ Providing maintenance presupposes that the perpetrator is capable of regularly fulfilling the obligation in the amount and in the manner determined by the decision of the competent authority.²⁹

A necessary condition for this criminal offence is the existence of an enforceable court decision (in the form of a judgment, ruling, or order, particularly an interim order establishing a temporary maintenance obligation until the conclusion of proceedings) or an enforceable settlement before a court or another competent authority (such as a social welfare centre), by which the maintenance obligation and the amount to be paid monthly for certain persons have been determined once the decision becomes enforceable. Enforceability generally arises with finality, but in urgent cases prescribed by law, it may occur even before the decision becomes final.³⁰ In urgent cases, an interim measure is issued which is immediately enforceable, but which does not affect the substantive resolution of the disputed matter and whose effect ceases upon the conclusion of the proceedings. Avoidance of maintenance, in the sense of the act of commission of this offence, is possible only from the moment the decision or settlement becomes enforceable.

The offence is completed upon the expiration of the deadline for providing maintenance, that is, when the perpetrator has failed to fulfill their obligation for a certain period of time, without presenting proof of the existence of justified reasons for such omission.³¹ Whether the reasons for non-payment of maintenance, either in full or in part, are “justified” or not, represents a factual question that the court resolves in each specific case. Namely, the Criminal Code (paragraph 2) stipulates that a person who has not provided maintenance for justified reasons shall not be punished. It should be emphasized

26 Pavišić, B., Grozdanić, V., Veić, P. (2007). *Komentar Kaznenog zakona*. Zagreb: Narodne novine, str. 529.

27 Đorđević, Đ., Kolarić, D. (2020). *Krivično pravo. Posebni deo*. Beograd: Kriminalističko-policijski univerzitet, str. 95.

28 Simović, M., Simović, V. (2021). *Krivično pravo Brčko distrikta BIH. Posebni deo*. Banja Luka: Grafomark, str. 59.

29 Lazarević, Lj. (2006). *Komentar Krivičnog zakonika Republike Srbije*. Beograd: Savremena administracija, str. 546.

30 Lazarević, Lj. (1995). *Krivično pravo Jugoslavije. Posebni deo*. Beograd: Savremena administracija, str. 534.

31 For the existence of the criminal offense of failure to provide support, it is not necessary that the interests of the supported person are endangered; it is sufficient that the accused does not provide the support he is obliged to give on the basis of an enforceable court decision..

that the perpetrator's intent to withhold maintenance (fully, partially, or untimely) does not constitute an essential element of the criminal offence of non-payment of maintenance, and therefore is not established. The offence is most often committed, as a rule, through several successive acts prescribed by law, carried out over a shorter or longer period of time.³²

THE LEGAL NATURE OF THE CRIMINAL OFFENCE OF FAILURE TO PROVIDE MAINTENANCE

Failure to Provide Maintenance in Relation to One Person—regardless of the period of non-fulfilment—constitutes a *single (continued)* criminal offence. However, failure to fulfil obligations towards several “maintained” persons constitutes *multiple offences in real concurrence*, depending on the number of individuals entitled to maintenance. In this respect, it is irrelevant whether the obligation to provide maintenance for several persons arises from one or several decisions or settlements. Furthermore, in legal theory there are views that this offence represents a *criminal offence with an indefinite (indifferent) number of acts of commission*. According to this interpretation, committing several acts of omission in relation to one person still constitutes *one single offence*, rather than a continued one.³³

Regarding the legal nature of the criminal offence of failure to provide maintenance, several views appear in legal theory. According to one interpretation, this offence constitutes a so-called “personal criminal offence.”³⁴ This means that there are as many separate criminal offences as there are injured parties (i.e., persons to whom the maintenance obligation has not been fulfilled).

In addition, legal theory emphasizes the view that this is a “continuing criminal offence.” The basis of this interpretation lies in the type, nature, character, and duration of the resulting consequence.³⁵ By failing to provide maintenance over a continuous period of time, an unlawful situation is created that lasts for a certain, shorter or longer, duration, since the obligation of the provider of maintenance, established by a final and enforceable court decision, continues until the moment the legal obligation of maintenance ceases. In this context, every repeated omission toward the same person does not constitute a new criminal offence, nor do separate limitation periods begin to run.

However, in legal theory, there is also a different view according to which the failure to provide maintenance does not constitute a continuing criminal offence. Instead, the offence is considered completed with each omission to provide maintenance as determined by a settlement or court decision. Any subsequent repetition of the omission toward the same injured party constitutes a new criminal offence, so in such cases, it is treated as an extended (continued) criminal offence.³⁶

32 Atanacković, D. (1985). *Krivično pravo. Posebni deo*. Beograd: Službeni list, str. 304.

33 Judgment of the Appellate Court in Novi Sad Kž. 4197/2010.

34 Judgment of the District Court in Subotica Kž. 30/2008.

35 Đorđević, Đ. (2011). *Krivično pravo. Posebni deo*. Beograd: Kriminalističko-policijska akademija, str. 85.

36 The legal opinion of the Criminal Department of the Supreme Court of Cassation adopted at the session held on November 24, 2014.

OTHER ELEMENTS OF THE CRIMINAL OFFENSE OF FAILURE TO PROVIDE SUPPORT

The perpetrator of the offense can only be a specific person – a person with a special personal relationship. This is the person who has been designated as the debtor of support by an enforceable court decision or on the basis of an enforceable settlement before a court or another competent state authority, but who fails to fulfill that obligation. The passive subject is the person whom the perpetrator is legally obliged to support.³⁷

The subjective element of this offense, in terms of criminal liability, is the perpetrator's intent, which encompasses his awareness of the existence of an established obligation to pay maintenance in a specified monetary amount. A mistake regarding the existence of an enforceable court decision or enforceable settlement constitutes a factual mistake in the narrow sense. This is a mistake concerning one of the essential elements of this criminal offense.³⁸

For this offense, the law alternatively prescribes either a fine or a prison sentence of up to two years. When imposing a suspended sentence, the court may order the offender to settle outstanding obligations and to pay maintenance regularly (paragraph 4). Failure to comply with this obligation constitutes an optional ground for revoking the suspended sentence.

A more severe form of the offense exists if the act of commission results in serious consequences for the dependent person (Paragraph 3). Which serious consequences exist, when they occur, and when they are in a causal connection with the act of commission, is a factual question that the court resolves in each specific case. These consequences may include: deterioration of the supported person's health, abandonment of schooling, or their resorting to vagrancy, begging, prostitution, or the commission of criminal offenses. Here we are dealing with the existence of a criminal offense that is qualified by a more serious consequence, which is the result of the perpetrator's negligence. The notion of "serious consequences" should be understood as a significant exceeding of the difficulties that normally arise in cases of avoiding the payment of maintenance.³⁹ For this more serious offense, a prison sentence ranging from three months to three years is prescribed.

CONCLUSION

For the purpose of effective protection of the constitutionally guaranteed right to maintenance of children/minors (Article 65) by persons designated by law (family members or parents), the Family Law of the Republic of Serbia (Article 6) proclaims that everyone is obliged to act in accordance with the best interests of the child in all activities concerning the child. A special role in ensuring the best interests of the child is played by family law provisions relating to maintenance (Article 8), which emphasize that maintenance is both a right and a duty of family members as determined by law, and that waiving the right to maintenance has no legal effect. Parents have the right and the duty to maintain their child

37 Ilčić, D. (2006). Krivično delo nedavanje izdržavanja. *Bilten Okružnog suda u Beogradu*, (72), str. 81-83.

38 Jovašević, D., Miladinović Stefanović, D., op. cit., str. 172.

39 Korošec, D. et al. (2023). *Veliki znanstveni komentar posebnega dela Kazenskoga zakonika. Knjiga 2*. Ljubljana: Uradni list, Pravna fakulteta, str. 357-370.

(Article 73). The recently adopted Law on the Realization of Rights from the Alimony Fund is also intended to contribute to the effective protection of this right of the child.

Nevertheless, despite all constitutional and legal guarantees, the right of a child to maintenance is often completely or partially denied, obstructed, or diminished. Therefore, in modern criminal legislation, criminal law protection of the right to maintenance of a child (as well as other dependents within the family or household) has been established. In the Republic of Serbia, this is achieved through the Criminal Code by incriminating the criminal offense of “Failure to Provide Maintenance” (Article 195) in its basic and qualified forms.

This criminal offense exists only in cases of failure (conscious omission) to provide maintenance under the following conditions:

- a) the maintenance is owed to a person whom the perpetrator is legally obliged to maintain,
- b) the obligation is determined by an enforceable court decision or enforceable settlement before a court or another competent authority, and
- c) the obligation is determined with respect to the amount and method (schedule) of payment.

However, for the existence of this offense—punishable by either a fine or imprisonment—it is necessary that there are no “justified” reasons on the part of the perpetrator (the maintenance debtor) for the omission. Otherwise, the punishable offense does not exist.

If the failure to provide maintenance, whether in whole, in part, or untimely, leads to the occurrence of serious consequences of any type, nature, character, or scope for the dependent person, then a more serious, qualified form of this offense exists, carrying harsher punishment for the perpetrator. Nonetheless, it must be emphasized that the establishment of criminal liability, and punishment of the perpetrator, does not exclude his obligation to settle all outstanding maintenance obligations, nor does it relieve him of the duty to continue meeting his obligations regularly in the future.



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KRIVIČNOPRAVNA ZAŠTITA IZDRŽAVANJA DECE U REPUBLICI SRBIJI

Apstrakt:

Kao krajnje sredstvo za obezbeđenje efikasnog ostvarivanja zakonske obaveze izdržavanja dece od strane roditelja i drugih zakonom određenih lica javlja se propisivanje krivične odgovornosti za specifično krivično delo: "Nedavanje izdržavanja" (član 195. Krivičnog zakonika). Ovo se delo sastoji u nedavanju izdržavanja za lica koje je učinilac dela po zakonu dužan da izdržava, ako je takva obaveza utvrđena izvršnom sudsom odlukom ili izvršnim poravnanjem pred sudom ili drugim nadležnim organom u iznosu i na način kako je odlukom ili poravnanjem utvrđeno. Radi se o inkriminaciji koja predstavlja jedno od najčešćih oblika kršenja prava deteta na primeran životni standard. Praktično se na ovaj način štiti "dobrobit deteta". U radu se govori o pojmu, sadržini, elementima bića i karakteristikama ove inkriminacije kojom se može znatno i teško ugroziti pravilan razvoj i napredak dece u krivičnom pravu Republike Srbije.

Ključne reči: dete, izdržavanje, odluka nadležnog organa, nedavanje, krivično delo.

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RELIGION AND CRIMINALITY (SECTS AND TERRORIST ORGANISATIONS)

Abstract:

This paper observes the relationship between religion and criminality, considering that religion is considered the oldest contributing social factor to criminality. The relationship between religion and criminality represents a point of divergence in scientific studies. The conclusions drawn in this paper imply that the stance claiming there is no correlation between religion and criminality can be refuted, i.e., the stance claiming faith has an exclusively beneficial impact on people, regarding prevention of criminal activity, as well as atonement and rectification of the lives of perpetrators of criminal offences, can be confirmed. The negative impact of so-called religion (pseudo-religion) could be associated exclusively to destructive sects and terrorist organisations under the guise of religion. Why pseudo-religion? Because religion represents faith in the Lord and piety, while belief in fabrications and obscene ideas of perverse human souls cannot be referred to as faith and belief. For the purposes of this paper, these fabrications will be identified appropriately, as they do not warrant to be referred to as religious.

Keywords: *religion, criminality, sects, terrorist organizations, Orthodox Christianity*

INTRODUCTION

As aforementioned, science is divided when it comes to the relationship between religion and criminality. Some dispute any correlation between religion and criminality whatsoever, others maintain that religious fanaticism constitutes one of the key criminogenic factors, whereas a third group argues that religion has a preventive effect and deters criminal activity.¹

Antiquity, or more specifically, the dawn of Christianity, was marked by severe suffering. Christians were brutally tortured and murdered by polytheistic Roman rulers for professing their faith in Jesus Christ. The persecution of Christians ended in 313 AD, when the emperors Constantine I and Licinius promulgated the Edict of Milan, whereby Christianity became an official religion of the Roman Empire. Historical events since the Great Schism of 1054 within the Christian Church and its division to the Eastern Orthodox Church and the Roman Catholic Church, the conflict of secular and spiritual authority, the

1 Bošković, M., & Marković, M. (2015). *Kriminologija sa elementima viktimologije*. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu, p. 147.

Crusades (1095-1270), the Catholic Reformation and Counter-Reformation, up until the greatest collision between Roman Catholics and Protestants in Europe, i.e. the so-called Thirty Years' War (1618-1648), defined the Middle Ages as the darkest historical period in terms of the influence of religion on criminality. Considering all traditional religions advocate for peace and love among individuals and the people, atonement and forgiveness, none of them invite their followers to commit criminal acts or engage in riots, wars and suicide missions. However, during the above-mentioned period there were those who, claiming religious motivation, played a significant role in exacerbating religious and racial hatred by inciting wars, and as a result, the most severe forms of criminality.² The above notwithstanding, entire religions cannot be proclaimed as indirect or direct driving forces of conflict over individuals who have renounced their faith.

Today, the relations between church and state remain generally harmonious, and these institutions complement each other in preventing crime. No innovations succeeded in rendering obsolete or erasing the 6th, 8th and 9th Commandment – “You shall not kill”, “You shall not steal” and “You shall not bear false witness” (against your neighbour) – from either human conscience or the law.³ The same applies to the saying “To one who strikes you on the cheek, offer the other also, and from one who takes away your cloak do not withhold your shirt either.” (Luke, 6, 29), which serves as an ideal. Keeping in mind the Holy Bible's daily efforts to cultivate Christian virtues, we simultaneously follow the norms prescribed by the law, hence, those who act accordingly are incapable of doing harm. In places where people are devoted and the state recognises and supports Christian values, religion contributes to the reduction of crime among the population.

Acts of destructive sects and terrorist organisations invoking religion are of importance from a criminological standpoint. Consequently, those who have renounced their faith can be divided into two groups. The first group consists of religious defectors, so-called manipulative individuals whose primary objective is to gain property through criminal acts, along with sect leaders, servants of the devil, who execute his will, as well as their followers. It is worth noting that there are exceptions to this rule. Manipulative individuals, sect leaders, teachers, and gurus who profess spirituality, yet undermine it, can be aware of the destructive nature of a sect and its true objectives. However, there are also those who find themselves in a state of spiritual delusion (theol. “prelest”). The same applies to the followers. Manipulative individuals primarily commit criminal offences against human property and health, whereas servants of the devil typically commit criminal offences against life and the body, sexual freedom, health, property and numerous other offences. In addition, some sect members are victims of manipulation, people who have strayed from spirituality but harbour no ill intentions, for which reason they cannot be considered manipulative individuals, or conscious servants of the devil. The second group constitutes terrorists acting out of distorted religious causes, i.e., extremely fanaticised followers gathered around a terrorist leader and recruits who are financially motivated to join terrorist formations.

RELIGIOUS DEFECTORS (MANIPULATIVE INDIVIDUALS AND SECTS)

A famous quote by Lafayette Ronald Hubbard, author of science fiction novels and the founder of the most popular contemporary organisation – Scientology, also known as the Church of Scientology, reads: “If a man wants to make a million dollars, the best way to

2 *Ibid.*, p. 147.

3 Čirić, J. (1998). Religija i kriminalitet. *Arhiv za pravne i društvene nauke*, 54(4), p. 99.

do it would be to start his own religion". Presumably, those millions are obtained through abuse of the status of the church for tax exemption purposes, donations from wealthy devotees, unpaid labour of the members for the organisation, as well as illegal activities. Although material gain, which is indisputable, is frequently cited, the ultimate objective is the human soul itself, or to estrange one from their Creator and turn them over to the devil, which is precisely why sects are often said to prey on human souls.

There are manipulative individuals who are widespread in contemporary society and who, as a rule, act independently, adopt various titles, prophets, oracles, clairvoyants, mediums, mages, healers, etc. They appear across all forms of media, aiming to influence the opinions of religiously uneducated individuals lacking a strong religious foundation, by propagating their beliefs, doctrines, "revelations", quasi-skills and "positive" effects, and their appearances are highly prominent. The only aim of manipulative individuals is to acquire material gain, for which reason they are predominantly associated with various forms of fraudulent offences, as well as fraudulent medical practices and the dispensing of counterfeit medication. Individuals who instruct (impose on) others how to think, act, solve life problems and conflicts, treat their families, friends, and other people, which professions to pursue etc, can be dangerous as well. Despite having an adequate education, they are not members of the clergy, but merely humans who are prone to err. It is particularly worrisome if such individuals teach us to attract positive energy, profit or a partner etc., through visualisation and incantations.

Sects are defined as small groups of like-minded individuals who separated from the parent religion into a different, independent religious group. The most widely accepted classification groups sects according to the official religion from which they diverged and how they self-identify, namely Pseudo-Christian, Pseudo-Hindu and Far Eastern, syncretic and satanic sects.⁴

Despite having existed as early as the Apostolic era, contemporary sects have their origins in the Reformation and Protestantism. Namely, the opulent life within the Papal State instigated discontent among the people, with an emphasis on the sale of indulgences. The first one to rebel against the state of the Catholic Church was Professor of Theology Martin Luther in 1517, when he initiated a reformation movement commonly known as the Reformation. His religious doctrine was identified as Protestantism, and his acolytes – Protestants and Lutherans. However, Protestantism lacked unity among its followers, resulting in the emergence of a great number of new leaders, doctrines and communities. The basis for the emergence of all sects was the claim of Professor Luther that anyone can interpret the Holy Bible at their own discretion, which is exactly what happened – the interpreters disseminated their interpretations to others and thus formed various sects. Another contribution of Protestantism to the rise and growth of sects was Protestant Rationalism, which initially promoted veneration of the Bible, but ultimately evolved into criticism so severe that it culminated in the rejection of the Bible as the Holy Book. It is improbable that leaders of the Reformation desired this outcome, and yet they were certainly its indirect instigators, as they were the ones who provided the conceptual basis for the rejection of the Bible.⁵

In addition to various forms of crime, the early 1990s in Serbia gave rise to the emergence of sects. The Church had gradually lost its influence, which began in the communist era, and it is a known fact that sects can exist and act only in the absence of strong faith.

4 Luković, Z. (2000). *Verske sekte – Priručnik za samoodbranu*. Beograd: Draganić, pp. 6-7.

5 Sestrinstvo manastira Svetog Stefana Lipovac. (2008). *Sekte*. (Retrieved on January 7, 2025) from: <https://borbazaveru.info/content/view/472/>

Sectarian activity fundamentally constitutes manipulative and sectarian actions where closed groups, and more and more frequently individuals, employ different methods and techniques designed to undermine tradition and family as the core unit of society, with the aim of illegally acquiring material and financial gain, increasing power and reputation, which, in turn, bears destructive consequences for the victims reflected in degradation or total obliteration of their identity, dignity and integrity. Such consequences can, therefore, have the following epilogue – murders, suicide, estrangement and aggression, abuse of narcotics, prostitution, etc. A French non-profit organisation, The European Federation of Centres of Research and Information on Sectarianism (FECRIS), defined sectarian activity as deceptive exploitation of the condition, ignorance and vulnerabilities of individuals which can result in consequences ranging from the loss of property to the loss of life.⁶

Individuals join sects for various motives. The paramount religious motive is certainly the need for spirituality, when people who lack religious education or are not firm believers may become easy targets for convincing leaders. In addition, other significant causes are disappointment of believers in the parent church, and (or) members of the clergy, family problems (misunderstanding, quarrels, domestic violence, death of a loved one), the need to belong somewhere, searching for answers, wanting to be “someone special” and numerous others.⁷ These motives can also be emotional in nature.

The person invited to join a certain group is not always presented with completely truthful information on that group, its activities and objectives. The truth can vary between outsiders, members, those in the deeper inner circles, and up to the top of the sectarian hierarchy. If a group is capable of hiding the truth about itself during the recruitment of potential members, or even lying to them, it violates the constitutional right of the individual to be informed, which prevents people from making an informed and free choice. Groups deemed particularly dangerous are those who resort to deceit, hypnosis, coding and other means of so-called control of consciousness when recruiting, which represents the most perfidious way of violating human rights and freedoms.⁸

Many sects are said to attract new members by presenting themselves as benevolent and humanitarian, so as to avoid immediately frightening naive people, emphasising their fight for human rights and freedoms, non-discrimination, advocating aid and protection of socially disadvantaged categories of the population, environmental protection, etc. They are seemingly committed to freeing the world from conflicts, also known as the sectarian utopia. Members are most frequently recruited from lower social classes, or marginalised social groups, because they are the easiest to manipulate. However, there are exceptions to this rule, as every sect has its own target group. These may be people facing difficult life circumstances, vulnerable population categories, such as minors, rebellious or lonely social outcasts, the elderly who are mainly recruited for their property, individuals with disabilities, physical or mental illnesses, drug addicts, and the like. Children are targeted as well, and there is an example where a sect established kindergartens and schools in predominantly rural areas of economically disadvantaged countries by offering humanitarian aid, education, promoting and practicing yoga, meditation, and the Brain

6 Pajić, T. (2022). *Tradicija na udaru sekti*. (Retrieved on January 7, 2025) from: <https://www.securitysee.com/2022/03/24/tradicija-na-udaru-sekti-odrzana-tribina-savremeni-pristup-problematici-sektnog-i-manipulativnog-delovanja/>

7 Luković, Z. (2000). *op. cit.*, pp. 8-10.

8 Dvorkin, A. (2010). *Deset pitanja nametljivom strancu – priručnik za one koji ne žele da budu zavrbovani*. (Retrieved on January 8, 2025) from: <https://svetosavlje.org/deset-pitanja-nametljivom-strancu-prirucnik-za-one-koji-ne-zele-da-budu-zavrbovani/>

Gym teaching program. While such extremes are not widespread in our country, a considerable quantity of “educational” materials designed for the youngest members of our society is still being made and distributed. On the other hand, sects may opt to offer their membership exclusively to intellectuals, as well as wealthy, influential people for the purpose of infiltrating into governmental structures and gaining power. Many members are recruited as a source of material benefit for the leader (or leaders) of the sect, as well as for a few select members, or to perform various types of work for the sect, commit criminal acts, and, in the worst-case scenario, be offered as a human sacrifice to the devil, whether through murder or suicide. Whereas the latter is common for satanic sects, it is not unlikely that other types of sects also practice this ritual.

Once someone becomes a member, the sect shapes them to its own liking with the intention to completely detach them from reality and common sense. The members are required to adhere to the group's strict rules and fully submit to and obey the leader. Any contrary opinions are not tolerated. Given that one of the goals is to disintegrate the family, members are compelled to sever ties with their relatives, especially if those relatives cannot be persuaded to join the sect. By joining the sect, members become estranged from their families and friends, abandon their studies or quit their jobs to succumb to the program of the sect, which, as a rule, cannot be reconciled with family life, education, previous employment, and old friendships. Obvious exceptions include the teachings of the sect and socialisation with other members, as the member and all their time are expected to be devoted to the sect. Sects strip their members of personal property, assuring them that this deprivation will make them worthy of redemption, salvation, a “better” life after death (the same manipulation is used to drive members to suicide), or guaranteeing that the sect will take care of them for the rest of their lives.

Destructive sects have complete authority over their members and exercise tyranny, exploiting them in every aspect – physically, mentally and financially. Members constantly suffer abuse, from beatings and rape to exhausting, strenuous work, and there are frequent instances of members being coerced into begging and prostitution for the benefit of the sect. In this state of numbness, members cannot easily muster the strength to leave the sect, which, in turn, employs every possible means to retain them as long as they continue to provide benefit.⁹ Certain sects do not allow members to leave, so those who wish to leave are subjected to criminal abuse ranging from threats and physical violence to murder. Members may be threatened directly, but more frequently they are intimidated through threats of harm to their families and loved ones. Some sects may be compared to traditional organised criminal groups;¹⁰ however, sectarian rituals such as satanic initiations and sacrifices, provoke a considerably greater level of outrage.

Sect membership leaves a mark on physical, mental and spiritual well-being. Physical well-being may be threatened by inadequate healthcare provided by persons lacking formal qualifications, or even by rejecting certain medical interventions that contradict the sect's religious beliefs, which can lead to latent outcomes. By registering, religious communities legalise their doctrines and convictions, which is indicative of the potential danger such groups pose. In terms of physical consequences, severe and incurable infectious diseases such as Hepatitis C and AIDS are inevitable, as they result from drug abuse, or more specifically, sharing needles and other contaminated items, as well as promiscuity. To put it mildly, the psyche is damaged by mental manipulation.

9 *Ibid.*

10 Ćirić, J. (1998). *op. cit.*, p. 108.

Activities of satanic sects cannot be overlooked when it comes to crime, as well as the devastating effect they have on the individual, society and state security.¹¹ There are no registered satanic sects in Serbia, for which reason satanists are not institutionally organised. This was not the case in the United States of America, when the so-called Church of Satan was admitted into the National Council of Churches in 1970 based on the right to freely exercise religion guaranteed by the U.S. Constitution.¹² Satanic sects believe their mission is to destroy Christianity, and their actions are in direct contradiction with Christian teachings. Their followers desecrate graveyards, monuments, and churches, they break and invert crosses, torture and kill animals to drink their blood during rituals and sacrifices. These acts are identified as vandalism, minor and harmless offences, and are mostly defined as socially unacceptable, which is misleading, as they are in no way harmless. With their minds clouded, perceptions distorted and under the influence of alcohol and drugs, sect members are capable of almost anything, often beginning with seemingly minor acts. Their activities are clandestine, and information about them becomes public only after catastrophic consequences have occurred. Satanists are not necessarily organised in groups, with many of them practicing satanism independently using available literature. One example of satanic ritual sacrifice was reported in Novi Banovci in 2007, when a young man killed and dismembered his friend and his five-year-old nephew, disposing of their body parts in the Danube. When searching the perpetrator's basement, the police discovered walls painted in red and black, with satanic symbols and literature, while the backyard was filled with buried remains of dead cats. Human sacrifice is often preceded by killing animals, likely to "practice" and appease Satan. A more recent example was recorded in 2024 in Novi Sad, when the parents first poisoned their toddler sons aged one and three, after which they jumped from the seventeenth floor of a skyscraper. The man is assumed to have been a sect member who persuaded his wife to join. Experts established a direct connection between this event and a certain sect. Proving the correlation between suicide and sects can be challenging, as was the case in 2021 when three young boys who were schoolmates committed suicide in the Banjica forest, Belgrade, within a short period of time from one another. Even though it was never officially confirmed, it is believed to have been the doing of a sect. Given that mental manipulation and coercion are difficult to prove, the instigators often go unpunished. Sectarian activity can be highly destructive in closed social groups, such as prisons and military barracks,¹³ since members of the military have unrestricted access to weapons. Two mass murders in military barracks of Vranje and Šabac in June 1993 are etched into our national memory, committed by soldiers on military service who were members of the Black Rose sect. Following the massacres, both of them committed suicide.

Sects recruit members using various manipulation methods. A famous sectologist states that sects employ teams of experts, psychiatrists, psychologists and sociologists, as well as lawyers and IT specialists, who have a deep understanding of the human mind and are able to manipulate it with ease. While sects used to recruit primarily people from their close surroundings or those who exhibited the same interests, the internet and digital platforms have become the preferred manner of finding potential recruits nowadays, usually based on the information people make available online, the pages and content they like and

11 Ivanović, M. (2008). *Religioznost i kriminalitet*. Beograd: Institut za kriminološka i sociološka istraživanja, p. 69.

12 *Ibid.*, p. 70.

13 Dimitrijević, V. (2011). *Od utopije do košmara – Pravoslavlje i sekte: opšti pregled*. (Retrieved on January 8, 2025) from: <https://svetosavlje.org/od-utopije-do-kosmara-pravoslavlje-i-sekte-opsti-pregled-pravoslavlje-i-sekte-knjiga-i/23/>

the comments they leave, not realising they are exposing themselves to danger. Emotional manipulation or blackmail by a partner who is a sect member is highly prevalent. However, manipulating the human psyche represents the most insidious method of recruiting new members and a means of retaining them within the group.

Despite their worldwide popularity, yoga and meditation – promoted as beneficial for physical and mental health, concentration and spiritual well-being – can also serve as highly dangerous tools for abuse aimed at mental destabilization. Namely, certain yoga movements are believed to induce a detachment of the soul from the mind and body, while meditation involves deep, uninterrupted focus on an imagined object, with the meditator aware solely of the object rather than their own mind and body.¹⁴ Yoga and meditation are strongly promoted by New Age, which propagates the idea that divine enlightenment is the sole necessity of every man and can be attained through yoga, meditation and other metaphysical techniques. The individual is thus deluded into believing they are a divinity, developing some sort of psychic powers in the process.¹⁵ According to psychiatrists, this constitutes the most severe mental illness: schizophrenia.

Field experts claim that the top of the hierarchy is occupied by New Age, the religion of the New World Order. The New Age movement was founded by occultist Alice Bailey in 1945. However, its origins trace back to the era of Helena Blavatsky and Henry Olcott, the creators of theosophy.¹⁶ New Age promotes itself as a religion that is supposed to replace all other religions. This “new spirituality” serves a unique purpose – to undermine the family, the existing state and religious institutions. Hence, the goal is to establish a single religion that would reconcile and integrate all other world religions. It is a unique blend of Eastern sects predominantly involving manipulation through drug abuse. It's hardly an overstatement that drugs can maintain entire nations under control, which is exactly the goal of this organisation – establishing absolute control. Under the New Age, the New World order would become a fully rounded system – one nation, one world government, one world army, one world police, one world court, one world central bank with a common currency, one world tax system, one education control system, one system of forced birth control...¹⁷ One man would be governing this establishment. Namely, in 1922 Alyssa and Foster Bailey founded the Lucis Trust in New Jersey, a seemingly non-profit service organisation. In that same year they founded the Lucifer Publishing Company, which was later renamed to Lucis Publishing Company following public pressure across the United States arising from a perceived misinterpretation of the original name. The Baileys believed that Lucifer was wrongly equated with Satan and that he was actually an angel who brought light into the world. This non-governmental organisation holds consultative status with the United Nations Economic and Social Council and actively disseminates information on the UN, highlighting the importance of their activities and goals and supporting their programmes through educational materials, seminars and meditation.

It is estimated that there are around 120 groups of this type in the Republic of Serbia, and approximately 500.000 people directly or indirectly affiliated with them. These numbers are not cause for concern, as public awareness is increasing, people are returning to their faith, and it is therefore unlikely that these groups will survive in the long term.

14 Luković, Z. (2000). *op. cit.*, p. 72.

15 Manastir Podmaine. (2015). *Joga – opuštanje ili okultizam*. (Retrieved on January 20, 2025) from: <https://manastirpodmaine.org/joga-%C2%96-opustanje-ili-okultizam/>

16 Pastuović, D. (2013). *Sekte i moć manipulacije*. Beograd: Riznica, pp. 115-116.

17 Ćirić, J. (1998). *op. cit.*, p. 105.

“RELIGIOUS” TERRORISM

In both public discourse and literature on terrorism, there is a marked tendency to associate mainly political and, therefore, terroristic violence exclusively with Islam, viewed as the only religion inherently grounded in violence.¹⁸ This extreme subjectivity is evident in the tendency to view the behaviour of others as extreme, while rarely perceiving our own behaviour in the same way.¹⁹ For instance, if a follower of Islam commits a crime, they are almost invariably labelled a terrorist, whereas a follower of another religion who commits the same crime is more unlikely to be viewed as a psychopath, mentally ill, manipulated or, circling back to the initial premise, a convert who abandoned their original faith for Islam and committed a terrorist act.

The oldest form of terrorism is considered to be terrorism “in the name of faith” or so-called religious terrorism, typically manifesting itself in fanaticism and extremism. At this point, it is important to draw a clear distinction between radicalism, fundamentalism, fanaticism and extremism as opposed to terrorism. Professor Dragan Simeunović maintains that extremism pushes the boundaries of acceptability, and once these boundaries are exceeded, extremists become terrorists or criminals. It is therefore incorrect to equate fundamentalist believers with fanatics, fanatics with extremists, or extremists with terrorists; any deviation that results in violence exceeds the boundaries of faith and cannot be considered religious.

Terrorism is classified according to its programmes and objectives, the means and methods employed, and the type of agent involved – the subjects of terrorism. When it comes to programmes and objectives, in addition to ideologically motivated and ethno-separatist terrorism, there is terrorism grounded in religion, which is central to this paper. Religious terrorism comprises sect terrorism and terrorism based on the interpretation of great religions.²⁰ One such example is the Aum Shinrikyo syncretistic sect. The sect committed two sarin attacks, one in 1994 in a residential area of Matsumoto and in 1995 in the Tokyo subway. Reputable members of the sect, consisting of two medical doctors, a Doctor of Physics and two atomic physics students brought bags of liquid sarin into the subway and performed the attack. Namely the Aum Shinrikyo became an official religious organisation in 1989, which would imply that it did not pose a threat to the state and society. Following the attack, the organisation was marked as terroristic. The fact that various organisations can acquire the status of official religious communities, while hiding under the guise of benevolence and goodwill, is deeply concerning. Terrorism based on interpretations of great religions is exemplified in the most widely known terrorist organisations, for instance, Al-Qaeda and the Islamic State. Despite originating from the Muslim civilisation,²¹ members of such formations are not Muslims. Terrorism is wrongly associated exclusively with the Islamic world, or even a segment of Islam followers, despite the fact that it can arise as a deviation within any religion. This was the case with the members of the Ku Klux Klan, an organisation of white racists, who committed crimes (from whipping, desecration and rape to murder), targeting African Americans, in the name of a perceived defence of the white race and Protestantism. Members of the Ku Klux Klan were known for their white cloaks and pointy hoods with masks covering their faces, as well as burning crosses. They viewed

18 Subotić, M. (2010). Određenje savremenog ekstremizma. *Vojno delo*, 62(3), p. 307.

19 *Ibid.*, p. 299.

20 Bjelajac, Ž., & Dragojlović, J. (2024). *Organizovani kriminalitet*. Novi Sad: Pravni fakultet za privredu i pravosuđe, pp. 110-111.

21 Subotić, M. (2010). Geneza islamističkog ekstremizma. *Vojno delo*, 62(4), p. 394.

the desecration of a sacred relic as symbolic of the light brought by Protestant Christianity, reflecting the extent of their misinterpretation of faith.

Faith does not recognize animosity and enemies, only human beings and brethren. Distinguishing true religious motives and the methodology behind the wars waged in the name of faith and liberation from those rooted in other motivations, such as political, geopolitical, economic, and the like, is hardly a challenge. Terrorism has become a political weapon, and religion is used as a pretext to justify the underlying objectives. In reality, religious terrorism is fictitious, since religion and terrorism do not go hand in hand. Suicide missions taking innocent victims, kidnappings, brutal live-streamed murders of captives and other heinous acts perpetrated by terrorists cannot be labelled religious. Terrorism grounded in religion can exist solely from a subjective viewpoint of terrorists claiming religious motives, despite having abandoned faith. Terrorism motivated by money cannot be considered religious in nature either, and recruits who are financially encouraged to join such formations cannot be considered devotees, especially given the connection and cooperation between terrorist and organised crime groups. Furthermore, it stands for a fact that terrorism is more frequently manifesting itself as a form of organised and transnational organised crime and aims to achieve certain political, financial and other goals.²² Individuals who have abandoned the source of their faith and humanity, especially for money, are not believers, for which reason they cannot qualify as religious terrorists. An objective and impartial mind, taking all of the above into account, could never accept the association of faith with terrorism. These two words cannot stand next to one another. It is sheer terrorism masquerading as a liberation struggle.²³

CONCLUSION

Religious freedom can pose a threat when abused, disguised under the label “religious”. Sects and terrorist organisations undermine the state, society and the Church and it is abominable to equate them with religious organisations. The state cannot remain silent in protection of its citizens, which implies the most appropriate response would be to amend the legislation, but also to undertake stricter measures. A related Russian law comes into mind as an example, as well as a well-known and frequently cited French law which incriminates mental manipulation.

Blasphemy and the unforgivable sin of suicidal sacrifices often practiced among members of sects and terrorist organisations, are regarded as sacrificial offerings, reflecting yet another one of their distorted convictions. Suicide may indeed be seen as a form of sacrifice, but not to God – rather, to the Devil. Those who take their own lives do not attain a martyr’s crown, but eternal suffering, for they forfeit every possibility of atonement and forgiveness.

Support in this matter also comes from the Serbian Orthodox Church, which established a body tasked with monitoring the activities of heretical organizations, sects, and non-canonical groups. Alongside the Serbian Orthodox Church, its clergy, and monastic community, an honorable mention goes to the Association for the Stabilization

22 Matijašević, J. (2008). Organizovani kriminalitet – pojam, karakteristike, uzroci i metodi suprotstavljanja. *Pravo – teorija i praksa*, 25(1-2), p. 87.

23 Subotić, R. M., & Milenković, R. M. (2018). Borba protiv terorizma iz ugla redefinisane bezbednosne paradigme i teorije politike. *Vojno delo*, 70(2), p. 478.

of Youth 'The Wall,' which works in cooperation with clergy, healthcare professionals, and educators, with the support of the police.

Although all sects are dangerous and harmful, their members are by no means beyond redemption—quite the opposite. Faith, in its primordial sense, offers the most direct form of help, untainted by interpretations that arise not from God, but from sinful men.

Members of the religious community, theologians, and criminologists alike agree that genuinely devoted individuals are not inclined toward criminal acts, as opposed to the non-devout. Yet, God is merciful and does not desire the death of the sinner, but rather their return. Even sinners have the right and opportunity to come back under the protection of the Church, to atone, confess, and start their life anew, as Christians.



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RELIGIJA I KRIMINALITET (SEKTE I TERORISTIČKE ORGANIZACIJE)

Apstrakt:

Rad je posvećen relaciji religije i kriminaliteta, budući da se religija smatra najstarijim socijalnim faktorom uticaja na kriminalitet. U nauci su podeljena mišljenja o vezi religije i kriminaliteta. Na osnovu izvedenih zaključaka, smatramo da se u potpunosti može osporiti stav da između religije i kriminaliteta ne postoji povezanost, odnosno da se može potvrditi stav da vera samo blagotvorno utiče na čoveka u pogledu sprečavanja vršenja kriminala, ali i pokajanja i ispravljanja života izvršilaca krivičnih dela. Negativan uticaj, nazovi religije (kvazireligije), vezali bismo isključivo za destruktivne sekte i terorističke organizacije koje se pozivaju na religiju. Zašto kvazireligija? Religija predstavlja verovanje u Gospoda i pobožnost, a verovanje u izmišljotine i sumanute ideje bolesnih ljudskih duša, ne može biti vera i verovanje. U radu ćemo ih nazvati pravim imenom, jer ne zavređuju da se nazivaju verskim.

Ključne reči: religija, kriminalitet, sekte, terorističke organizacije, pravoslavlje

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CORRUPTION IN SERBIA

Abstract:

Corruption is not a local matter but a transnational phenomenon that affects all societies and economies, which makes international cooperation on its prevention and suppression necessary. A comprehensive and multidisciplinary approach is also needed to effectively prevent and fight corruption. The provision of technical assistance can play a significant role in increasing the ability of states, including capacity building and institution building, to successfully prevent and fight corruption. Illegal acquisition of personal wealth can be particularly harmful to democratic institutions, national economies and the rule of law.

There is no doubt that corruption is a negative social phenomenon that destroys the foundations of social order, civil liberties, principles of democracy and basic rights of citizens. Corruption represents a negative phenomenon that does not arise “overnight”, and to a large extent undermines the social, economic, legal and political foundations of every state. The processes that lead to the creation of a corrupt environment continue, so in climates like ours, they are linked to war events, political changes, the weakening of the economic system, economic models of privatization, bankruptcy and other procedures for changes in state ownership and in general all other forms of transitional politics.

The United Nations Convention against Corruption was adopted in New York on October 31, 2003. year, and it represents the most important international legal act that defines and determines this extremely socially harmful and dangerous phenomenon. Serbia and Montenegro ratified the mentioned convention in 2005.

Keywords: *crime, money laundering, crime, convention, corruption.*

INTRODUCTION

The phenomenon of corruption was recognized at an early stage of the development of the modern state and society. There is no doubt that corruption is a negative social phenomenon that destroys the foundations of social order, civil liberties, principles of democracy and fundamental rights of individuals. Corruption is a harmful social phenomenon widespread both in developed, well-organized countries and in

underdeveloped and systematically unconsolidated countries. It creates mistrust of citizens towards the state and its bodies, simultaneously generating their dissatisfaction, stops the development of the economy, discourages investments, harms the country's international reputation and encourages negative demographic tendencies.

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The very definition of corruption can have a wider or narrower scope. For the purposes of this paper, it is certainly necessary to start from the definition established by the Law on Prevention of Corruption¹, which defines corruption as "A relationship that arises from the use of an official or social position or influence in order to obtain an illegal benefit for oneself or another". Therefore, it is clear that the legal concept of corruption is broader than what is represented by the entities of corrupt criminal acts prescribed by the Criminal Code and special criminal legislation and refers to all those situations in which a certain person does not undertake actions in the interest for which the powers are entrusted to him, but does so by following his own, personal interests. Therefore, at the very beginning, it is necessary to provide a methodological note that for the purposes of realizing the powers of state bodies that are part of the repressive legal apparatus, it is more acceptable to limit the concept of corruption to those behaviors (actions) that are defined in the laws as criminal offenses or misdemeanors, and possess corruptive elements, given that only such actions have a legal basis for the actions of state bodies.

The negotiations of the Republic of Serbia on joining the EU are still ongoing. One of the basic conditions in this process is ensuring the rule of law, in which the fight against corruption is an elementary part.

In addition, the Government of the Republic of Serbia showed its willingness to continue working on strategic documents in this area and recognized the need to develop an activity plan for an organized and coordinated criminal-legal response to corruption through the Anti-Corruption Strategy.

The specificity of the repressive-legal aspect is reflected in the concrete realization of the competences of state bodies in the direct suppression of corruption (police, public prosecutor's offices and courts) as well as in the implementation of various control procedures aimed at anti-corruption action, which are carried out by individual bodies (various inspection bodies, the State Audit Institution, the Republic Commission for the Protection of Rights in Public Procurement Procedures). That is why the work of the subgroup for repressive-legal aspects of the fight against corruption should have a practical and operational character. Due to the specificity and complexity of those issues, it is methodologically expedient to enable the work of a special sub-group for the repressive-legal aspect of the fight against corruption, which would concentrate and expertly consider all important issues for the fight against corruption.

1 Sl. Gazette of the RS, no. 35/19, 88/19, 11/21, 94/21, 14/22.

1. HISTORICAL DEVELOPMENT OF CORRUPTION

In the IV century BC e. a book called *Arthashastra* (*Arthashastra*) was written by the brahmin Kautilya (a contemporary of Aristotle); some authors translate it to "Lessons on well-being". The book talks about the art of ruling the masses and, among other things, deals with the huge and eternal phenomenon of corruption. It has long been said that history is the "teacher of life", except that it does not repeat itself verbatim, but only in some nuances. Throughout human history, there have been people who based their power on having as many slaves, domestic animals, plots of land, real estate, tax payers, honorary titles and various titles, followers that will help them conquer other people's territory, and especially on having as much money as possible "because he opens all doors".²

From the lines of the mentioned book, it clearly follows that whoever rules must use all means to achieve their own goals, while strict rules and honesty apply, at least basically, only to subjects.³

Machiavelli will say the same many centuries later: "those who want to gain the favor of a ruler usually appear before him very often and present him with what he loves most...horses, weapons, cloths woven with gold, precious stones."⁴ The mentioned Kautilya points out the problem of proving the financial dishonesty of a civil servant... it is the same as proving that "how much water can a fish that swims freely in the water drink". ... "Not tasting honey or poison, put on the tongue, is as difficult as managing the king's money, and not tasting at least a small part".⁵

As time passed and centuries changed, certain forms of enrichment of the privileged classes disappeared, but new forms of enrichment emerged, developed and perfected. Socio-economic and political changes, especially the economic crisis, but also the crisis of morals that affected certain societies throughout history contributed to this. There have always been holders of certain state and social functions, who for the sake of their 2 D. 1,1,10,1 - Ulpiani: "Honeste vivere, alterum non laedere, suum cuique tribuere", personal enrichment, abused their position and thus caused damage to the public interest.

They are followed by speculators of various kinds, politicians with little consideration and dignity, deceitful bureaucrats, unreliable and corruptible public officials, various small and large financial fraudsters; which today they call "controversial businessmen". As it happened in the past, societies are being destroyed today because of pleasure, luxury, and excessive enrichment of those who exercised political, financial and official power. Enrichment without a legal basis always goes along with corruption, in the sense of unjust appropriation of material goods and illegal actions; in a word, in the meaning of bribery.

"Bribery" in the meaning of compensation for the satisfaction of some legitimate interest is a word that is not recent. Unfortunately, it is a universal phenomenon because all societies know it, from the oldest to the modern ones. So corruption seems natural, normal, it even has a special name: in ancient Egypt it is "fega", in Mesopotamia it is "tatu", in the Bible it is "shohadh", among the Greeks it is "doron", and among the Romans it is

2 Deretić Lj. N., Roots of political corruption in the old century, Proceedings of the Faculty of Law in Novi Sad, no. 4/2016 p. 1297.

3 Karlo Alberzo Brioski, A Short History of Corruption (translation by Suzana Rukavina), Belgrade 2007, p. 23.

4 Niccolò Machiavelli, Ruler, Belgrade 1999, p. 5.

5 Carlo Alberzo Brioski, op. cit. p. 25.

“munus”. In our country, the word “schmieren” (from *schmiere*, grease, lubricant, oil) was taken from the German language, from which comes the name corresponding to the word “bribe”: *Schmiergeld* (literally “lubricating gold”). Even in the earliest days of human history, as it is today, “greasing the wheels” was a widespread phenomenon; in some cases it was even considered justified. The word “bribe” understood in today’s sense can already be found in Cingarelli’s dictionary from 1923, but traces of the custom of paying a sum to an intermediary for a job of a certain scale, and that was completely illegal, were present many centuries ago (in the sixteenth century, Beccaria spoke of a “tax for the common good”. In Machiavelli we find names such as: “schemer, maniac, disturber, businessman”.

In our country, the word “schmieren” (from *schmiere*, grease, lubricant, oil) was taken from the German language, from which comes the name corresponding to the word “bribe”: *Schmiergeld* (literally “lubricating gold”). Even in the earliest days of human history, as it is today, “greasing the wheels” was a widespread phenomenon; in some cases it was even considered justified. The word “bribe” understood in today’s sense can already be found in Cingarelli’s dictionary from 1923, but traces of the custom of paying a sum to an intermediary for a job of a certain scale, and that was completely illegal, were present many centuries ago (in the sixteenth century, Beccaria spoke of a “tax for the common good”. In Machiavelli we find names such as: “schemer, maniac, disturber, businessman”.

Throughout the history of the human race, the inevitable consequence of absolute power has been absolute corruption. In the past, the ruler was often a greedy and stingy politician, who used the power at his disposal for his own special interests. He created his power on money and on the clerical apparatus that faithfully served him. Officials served their master faithfully, but they often used their position in society to grab as much wealth as possible for themselves. Plato’s words about the “leader” describe the ethics of all dictators throughout the ages, conceited greatness, braggarts convinced that they are above others and that because of this others must blindly obey them. Fortunately for its citizens, Athens did not accept Plato’s advice on how to organize society.

In order to stand in the way of “political corruption” one should adhere to Solon’s reform in the area of prudence. The rich should be taxed so that the poor can be educated and treated for free. Even Solon understood the importance of institutions for the preservation of democratic government and freedom. His institutions and principles have visibly influenced Western democratic societies, which we also aspire to. The “one man, one vote” rule, the rule of law, not people, and the elected council are the forerunners of today’s parliament. Having done the work for which he was chosen, Solon retired and devoted himself to his private life. With that, he introduced the principle of impeachment from power. Following the example of the ephors (supervisors) from Sparta who controlled the kings, but also other officials, including all citizens, our country should also have a special body that will exercise general supervision over discipline and morality. Also, like the practice from ancient Greece, the practice of “impeachment” and accounting after the end of the mandate should be introduced today; especially for money that has been managed.

Smart people have long been advocating the idea of forming a special commission that would have a “preventive, supervisory and investigative function” in accordance with the law; it would evaluate the work of every holder of political power when he steps down from the political scene; to assess his property status, after the end of his mandate. And in doing so, no one from the highest instance to the lowest should be spared. This is the only way we will become a country “where corruption is not a way of life”, i.e. where “poor people, in the system of judicial or executive power, are more corruptible because of poverty”, as Aristotle said.

In order to realize this, the Law on determining the origin of property and special tax should have been passed⁶. That law is a prerequisite and a condition for a successful fight against corruption in general, including “political corruption”. At the same time, of course, “property” means any profit, material and immaterial, that “someone” acquired, received, without having a basis for it. The unsolved moral question - whether injustice is committed if someone gets rich at someone else’s expense and whether enrichment without a legal basis is theft, is more relevant than ever. Society’s need for order and justice is in vain, if that same society does not find a way to deal with the immorality of the powerful. Better to say, how to make power institutions morally responsible. Among other things, we need to learn something from the past, and punish only those who receive bribes, rather than those who give bribes to get a job done. “It is difficult, but not impossible, to run an absolutely honest business. It is true that honesty does not coincide with the accumulation of great wealth,” said Mother Teresa, Indiri Gandhi.

According to Plutarch’s testimony at the time of Pericles, “in order for the citizens to be protected from the arbitrariness of the officials, in the main national assembly of each prytania, the question of whether the officials performed their duties conscientiously was on the agenda. For whom the vote in case of objection turned out to be unfavorable would be suspended and summoned to court.”

Like all the states of the nineteenth century, the emerging Serbian state also knows the phenomenon of political corruption in the sense of the immoral behavior of people in power, who used political power to enrich themselves and acquire various privileges. The arbitrariness of the few in power governed the country. Everything was in their hands: state treasury, loans with green interest, commercial business of clerks. At a time when money is becoming the most sought-after commodity and the most convenient means of capital accumulation, people in power, from the highest to the lowest positions, use their positions for various monetary transactions, in order to obtain enormous material wealth.

The nascent state, having inherited patronage and corruption (two great evils left over from the Turkish administration), undertook a number of measures to suppress them, all with the aim of strengthening the state apparatus by the central government. Instead of kadis and muselis, who largely lived on bribery and bribery, the nascent state fought with elders who, by abusing their position, rose economically and separated themselves from the masses of people in Pashaluk. They take the best and biggest booty during the battles with the Turks, arbitrarily appropriate Turkish houses and properties, take scaffolding and customs offices into their own hands, hold a monopoly in trade, and use the “elder’s kuluk” - the kuluk that the Serbian peasants owed to the Spahis before the uprising. The emergent forms of corruption inherited from the Turkish era still persist with the fact that during the creation of the Serbian state, they reflect certain new habits in society - that money could buy everything.⁷

At that time, the Greens were people in power and people from the small rural bourgeoisie. Their victims are mainly rural residents with smaller properties; they lived under the pressure of taxes, various levies and taxed beliefs. The scale of greenism grew from year to year, reaching its peak in 1858 when the St. Andrew’s National Assembly was convened, which occurred due to the conflict between Prince Aleksandar Karađorđević and the members of the State Council, which forced his abdication. The State Council,

6 Official Gazette of RS no. 18/20 and 18/2021.

7 Deretić N., Emergent forms of corruption in Uprising Serbia (1804–1815), Proceedings of the Faculty of Law, Novi Sad, 2014, .XLVIII, no. 2, p. 307.

overwhelmed by lawsuits accusing the Prince himself, as well as the officials of his administration of abuses, drafted a text in which Prince Aleksandar Karađorđević was characterized as the greatest protector of serious abuses. It was the first time that a ruler in Serbia had to step down from the throne due to the revealed political corruption of his own and his officials.

Another disclosed example of large-scale political corruption, in terms of the connection between the owners of financial capital and the top of the government, which shook the public, was the so-called the 'railway affair' (1880), better known as the 'Bontu Affair'. It was named after Paul Eugene Bontou, director of the General Union, a French financial company that financed and built the first railway in Serbia. The ratification of the contract by the government was preceded by open bribery of deputies to vote in favor of the aforementioned French society, as well as bribing the opposition to attend the meeting in order to secure a quorum.

2. NATIONAL STRATEGY FOR THE FIGHT AGAINST CORRUPTION IN THE REPUBLIC OF SERBIA

Adoption of the National Strategy for the fight against corruption for the period from 2024-2028.⁸ was motivated by the need to plan and organize the processes aimed at fighting corruption in a comprehensive and systematic way. The fight against corruption is one of the key strategic priorities of the Republic of Serbia, as well as part of the European integration process. The process of harmonizing national legal systems with European Union standards in the field of fighting corruption, as well as the application of those standards, represent one of the biggest challenges not only for candidate countries, but also for member states.

Acknowledging earlier efforts to improve the fight against corruption through the adoption of strategic documents, the adoption of this strategy is the result of a strategic determination to build a democratic society based on the principles of the rule of law, transparency and responsibility, in which the system of integrity prevents corruption. Along with the continuous implementation and upgrading of existing anti-corruption mechanisms, the purpose of the new strategic document is to strengthen existing and create new systemic solutions for preventing corruption at all levels and raising awareness of the harmfulness of corruption, as well as creating conditions for more effective detection, prosecution and sanctioning of corrupt crimes.

One of the expected effects of the Strategy is that its implementation contributes to the fulfillment of 14 transitional criteria for Chapter 23: Judiciary and fundamental rights, which refer to the Subchapter: Fight against corruption, and especially transitional criteria related to the harmonization of the normative framework in accordance with the GREKO (Council of Europe Group of States against Corruption) recommendations, strengthening cooperation with the Council for the fight against corruption, improving the implementation of anti-corruption regulations such as the Law on the Protection of Whistleblowers, the Law on financing of political activities and the Law on Free Access to Information of Public Importance. In terms of repressive measures, the Strategy will refer to the preparation of an analysis of the need for amendments to the Law on the Organization and Competence of State Bodies in Suppressing Organized Crime, Terrorism

8 Official Gazette of RS no. 63/2024.

and Corruption, as well as improving the results of investigations, processing criminal offences, increasing the number of convictions and confiscated property resulting from the commission of a criminal offence.

Considering that by its very nature it uses a horizontal approach in the fight against corruption, certain areas to which the Strategy refers are already covered to a greater or lesser extent by certain valid public policy documents, and above all by key documents related to accession negotiations with the European Union, as well as public administration reform. One of the goals of the Public Administration Reform Strategy in the Republic of Serbia for the period from 2021-2030. is the improvement of responsibility and transparency at all levels of government. During the drafting of the Strategy for the fight against corruption, special attention was paid to the manner in which the issues of “improving proactive disclosure of data in the possession of public administration bodies, strengthening integrity and ethical standards in public administration” were regulated. In addition, the Public Administration Reform Strategy in the Republic of Serbia for the period from 2021-2030. also aims to “improve the recruitment process in the public administration, including more transparent employment procedures, as well as the selection of persons in positions based on merit”, so these issues are not regulated in detail by the Strategy.

During the preparation of the Strategy, activities from the Judiciary Development Strategy for the period 2020-2025 were taken into account. years related to strengthening the independence of the judiciary and the independence of the public prosecutor's office, as well as activities aimed at achieving the goal of improving the impartiality and responsibility of the judiciary.

Corruption and organized crime make it possible to acquire illegal assets of great value that need to be transferred into legal flows. During the preparation of the Strategy, the Working Group considered relevant activities related to the prevention of money laundering and confiscation of illegally acquired property. The starting basis for considering these activities was the goals established by the Strategy for Combating Money Laundering and Financing of Terrorism for the period 2020-2024. year, especially in the part related to the improvement of the effectiveness of the authorities responsible for detection, prosecution and trial for the criminal offense of Money Laundering. The United Nations defines money laundering as “Any concealment or attempt to conceal the origin of money or capital derived from criminal activities.”⁹

In the Republic of Serbia, numerous regulations containing anti-corruption provisions have been adopted in order to prevent and fight against corruption, but only the most important normative acts that were adopted in the past five years are included in the Strategy.

The Law on Prevention of Corruption¹⁰ expanded the powers of the Agency for Prevention of Corruption. The adoption of a new law regulating the work of the Agency for the Prevention of Corruption is part of the completed activities within the transitional measure from Chapter 23: Judiciary and fundamental rights, in order to ensure its clear mandate. The law regulates the legal position, jurisdiction, organization and work of the Agency for the Prevention of Corruption, rules on preventing conflicts of interest in the performance of public functions, cumulation of public functions, reporting of property and income of public officials, the procedure for deciding whether there is a violation of that law

9 Zdravković Lj., Aleksić S., (2023), Criminal act of money laundering in Serbia, Niš, Naisprint. p. 12.

10 “Official Gazette of RS”, no. 35/19, 88/19, 11/21 - authentic interpretation, 94/21 and 14/22.

and other issues that are important for the prevention of corruption. This law prescribes certain repressive powers of the Agency for the Prevention of Corruption (submission of misdemeanor and criminal charges), it will be a criminal offense to not declare assets and income or to provide false information about assets and income (Article 101 of the Law on Prevention of Corruption), as well as offenses of a corrupt nature committed by public officials and responsible persons in public authorities. Among other things, it is therefore important to continuously monitor the implementation of the Law on Prevention of Corruption and to consider the application of the repressive powers of the Agency for the Prevention of Corruption and the modalities of support in its work in order to implement these powers. Amendments to the Law on Prevention of Corruption were adopted in September 2021 based on GREKO recommendations from the IV round of evaluation regarding conflicts of interest.

The Law on the Organization and Competence of State Authorities in Suppression of Organized Crime, Terrorism and Corruption¹¹ was adopted in 2016 and began to be implemented in 2018. The law was adopted in order to implement activities from the Financial Crime Investigation Strategy for the period 2015-2016. and the National Strategy for the Fight against Corruption for the period from 2013-2018. year. The goal of passing this law was to establish a more effective detection, investigation and prosecution of corrupt criminal acts, as well as better coordination and cooperation of state authorities in this area. The law regulates the education, organization, jurisdiction and powers of state bodies and special organizational units of state bodies for the purpose of detection, prosecution and trial for criminal acts of corruption prescribed by this law. The analysis of the application of this law conducted by the Organization for European Security and Cooperation indicates certain problems in implementation, and gives recommendations for their solution and indicates the need for more consistent application of the Law. Also, legal practice shows that the above-mentioned new institutes have been used in a small number of cases, and there is a need to encourage consistent application of the Law on the Organization and Competence of State Authorities in the fight against organized crime, terrorism and corruption in the coming period.

The Law on the Financing of Political Activities¹² regulates the sources and methods of financing, keeping records, and controlling the financing of political activities of political parties, coalitions and groups of citizens. The law also prescribes the rights and obligations of political subjects, the powers of the Agency for the Prevention of Corruption, as well as sanctions for violating this law. The implementation of the Law on financing of political activities showed that certain changes are needed, which would, among other things, enable the specification and clarification of certain provisions, the prescription of sanctions for natural persons who illegally collect funds, the introduction of criteria for the selection of controlled providers of financial resources. More specifically, when prescribing the criteria, it is necessary to define which of the contributors will be subject to control by the Tax Administration, based on the report submitted by the Agency for the Prevention of Corruption to the Tax Administration. In addition, it is necessary to specify the preliminary report on the expenses of the election campaign and the prescription of a longer period covered by this report, the publication of the reports of field observers during the election campaign.

11 "Official Gazette of RS", no. 94/16, 87/18, and 10/23.

12 "Official Gazette of RS", number 14/22.

The law on the protection of whistleblowers was adopted¹³ in 2014 with the aim of providing comprehensive and effective protection of whistleblowers, and the obligation to pass this law is foreseen by the National Strategy for the fight against corruption for the period from 2013-2018. year and the accompanying action plan. Also, the adoption of GREKO from 2006 and Article 9 of the Civil Law Convention against Corruption of the Council of Europe. However, since the beginning of the application of this law, a trend of decreasing the number of cases for the protection of whistleblowers before the courts in the Republic of Serbia¹⁴ can be observed. In the report for 2022, the European Commission points out that it is necessary for the Republic of Serbia¹⁵ to provide protection to whistleblowers and investigate allegations of corruption in order to strengthen trust in the authorities.

The Law on Confiscation of Property Derived from Criminal Offenses¹⁶ prescribes the conditions and procedure for extended confiscation of property resulting from the commission of criminal acts. With this law, the burden of proving the legal origin of the property is transferred to the defendant if an obvious disproportion between the legal income and the value of the property owned by the person is established. This law was adopted for the first time in 2008, and it ceased to be valid with the adoption of the current Law on Confiscation of Property Derived from a Criminal Offense, which was adopted in 2013 and was amended and supplemented in 2016 and 2019. However, despite relatively frequent amendments and additions, the procedure for confiscation of property is not clearly defined by this law, and in practice a small number of financial investigations are conducted.

In August 2019, the Law on Lobbying¹⁷, which was adopted in November 2018, entered into force. The purpose of the law is to ensure transparency and protection of public interest in the process of influencing public officials and authorities. However, the Law does not ensure full transparency of lobbying activities, because there is an obligation to submit a report to the Agency for the Prevention of Corruption, but not to publish that information. The law also does not introduce an obligation to report “informal” lobbying. In addition, the Agency for the Prevention of Corruption, which is in charge of implementing this law, is not required to provide public access to the activities of lobbied persons to whom the lobbyists addressed.

The Law on Public Procurement¹⁸ was adopted in December 2019, with the aim of harmonizing it with the legal acquis of the European Union in this area. However, there are unclear provisions and the number of procurements that are excluded from the application of the Law has increased due to the increase in the threshold for public procurement and the introduction of new exceptions. It is necessary to prepare an analysis of the Law on Public Procurement and, based on the analysis, to improve the Law in order to minimize public procurements that are excluded from the application of the law.

The National Strategy of the Republic of Serbia for the fight against corruption defines

13 “Official Gazette of RS”, number 128/14.

14 Report on the implementation of the Whistleblower Protection Law for 2021, Ministry of Justice. The report is available at: <https://www.mpravde.gov.rs/tekst/36946/izvestaj-o-primeni-zakona-o-zastiti-uzbunjivaca-za-2021godinu.php>

15 Report available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Serbia%20Report%202022.pdf>

16 “Official Gazette of RS”, no. 32/13, 94/16 and 35/19.

17 “Official Gazette of RS”, no. 87/18 and 86/19.

18 “Official Gazette of RS”, no. 91/19 and 92/23.

the general goal and specific goals, as well as the principles on which their realization is based, through the implementation of the measures provided for in the Strategy. The general goal that must be achieved by this strategy is the constant commitment of public authorities and political subjects to the suppression of corruption and the efficient and consistent application and constant improvement of anti-corruption rules, timely detection and adequate punishment of corrupt behavior and strengthening of awareness of the causes, state and harmfulness of corruption. The general goal of the Strategy is the function of the comprehensive development of the fight against corruption, and as part of the accession negotiations with the European Union, which will improve the rule of law in the Republic of Serbia.

Realization of the general goal of the Strategy includes five specific goals. The specific goals are: 1. improvement of the normative framework, 2. strengthening of the institutional framework for preventing and fighting corruption, 3. improvement of transparency, 4. strengthening of integrity, and 5. raising awareness about corruption.

Although the recommendations of the European Commission, the Council of Europe's Group of States against Corruption (GRECO), the Venice Commission, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), FATF and other relevant institutions were respected during the preparation of the normative framework, there remains a need for harmonization with the EU legal acquis in the area of the fight against corruption.

In addition to the European Commission's report on the progress of the Republic of Serbia, the findings and recommendations of GRECO, which monitors compliance with the Council of Europe's anti-corruption instruments, are significant for the area of the fight against corruption. The Republic of Serbia has so far been evaluated through five rounds of evaluation within the framework of which it is recommended to prevent and fight against corruption in various areas. In the Fourth Round of evaluation related to the prevention of corruption in relation to deputies, judges and public prosecutors, GRECO sent 13 recommendations to the Republic of Serbia, of which, according to the Second Interim Compliance Report, five recommendations were partially implemented.¹⁹

CONCLUSION

Corruption is a negative social phenomenon that destroys the foundations of social order, civil liberties, principles of democracy and fundamental rights of individuals. Corruption is a harmful social phenomenon widespread both in developed, well-organized countries and in underdeveloped and systematically unconsolidated countries. It creates mistrust of citizens towards the state and its bodies, simultaneously generating their dissatisfaction, stops the development of the economy, discourages investments, harms the country's international reputation and encourages negative demographic tendencies. Illegal acquisition of personal wealth can be particularly harmful to democratic institutions, national economies and the rule of law.

Adoption of the National Strategy of the Republic of Serbia for the fight against corruption for the period from 2024-2028. was motivated by the need to plan and organize the processes aimed at fighting corruption in a comprehensive and systematic way. The fight against corruption is one of the key strategic priorities of the Republic of Serbia, as

19 Izveštaj dostupan na: <https://rm.coe.int/-greco-greco-90-/1680a5ff35>.

well as part of the European integration process. The process of harmonizing national legal systems with European Union standards in the field of fighting corruption, as well as the application of those standards, represent one of the biggest challenges not only for candidate countries, but also for member states.

The negotiations of the Republic of Serbia on joining the EU are still ongoing. One of the basic conditions in this process is ensuring the rule of law, in which the fight against corruption is an elementary part. There isn't a single country in the world where corruption doesn't exist, it's just that somewhere it's more and somewhere it's less expressed and represented.



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KORUPCIJA U SRBIJI

Apstrakt:

Korupcija nije lokalna stvar već transnacionalna pojava koja pogađa sva društva i privrede, što čini međunarodnu saradnju na njenom sprečavanju i suzbijanju neophodnom. Takođe je potreban sveobuhvatni i multidisciplinarni pristup za efikasno sprečavanje i borbu protiv korupcije. Pružanje tehničke pomoći može igrati značajnu ulogu u povećanju sposobnosti država, uključujući i jačanje kapaciteta i izgradnju institucija, da uspešno sprečavaju i da se bore protiv korupcije. Nezakonito sticanje ličnog bogatstva može biti posebno štetno po demokratske institucije, nacionalne privrede i vladavinu prava.

Nesumnjivo je da je korupcija negativna društvena pojava koja razara temelje društvenog uređenja, građanskih sloboda, načela demokratije i osnovnih prava građana. Korupcija predstavlja negativnu pojavu koja ne nastaje »preko noći«, i u velikoj meri podriva društvene, ekonomske, pravne i političke temelje svake države. Procesi koji vode stvaranju koruptivnog okruženja traju, pa se na podnebljima poput našeg dovode u vezu sa ratnim dešavanjima, političkim promenama, slabljenjem privrednog sistema, ekonomskim modelima privatizacije, stečaja i drugih postupaka promena državnog vlasništva i uopšte svim ostalim oblicima tranzicione politike.

Konvencija Ujedinjenih nacija protiv korupcije je usvojena u Njujorku 31.10.2003. godine, i ona predstavlja najznačajniji međunarodni pravni akt kojim se definiše i određuje ova izuzetno društveno štetna i opasna pojava. Srbija i Crna Gora su navedenu konvenciju ratifikovale 2005. godine.

Ključne reči: kriminal, pranje novca, krivično delo, konvencija, korupcija.

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THE RIGHT TO FAIR TRIAL IN CRIMINAL PROCEEDINGS

Abstract:

The right to a fair trial in criminal proceedings constitutes a fundamental human right safeguarded by international conventions as well as domestic legislation. This right entails a number of essential guarantees, including the right to a public hearing, the right to defense, the right to an impartial tribunal, and the right to legal assistance. The present paper explores the significance of fair trial guarantees for the preservation of legal certainty and the protection of human rights. The exposition will encompass key dimensions, including respect for due process, procedural safeguards, the transparency of judicial proceedings, and the rights of the accused. Practical illustrations will be provided through a comparative examination of the judicial systems within the neighboring jurisdictions of the Republic of Serbia and their respective approaches to the fair trial principle. In addition, the paper will address the challenges faced by judicial institutions in securing the effective realization of these rights. Ultimately, it will underscore the necessity of enhancing both the normative framework and its practical application so as to ensure that the right to a fair trial is fully upheld in all criminal proceedings.

Keywords: *right to a fair trial, criminal proceedings, judiciary, constitution, normative framework*

PRELIMINARY CONSIDERATIONS

The legal system of every state is grounded in predetermined legal norms. Yet, underlying and predating these norms are fundamental legal principles which constitute the foundation of law, from its very inception to contemporary developments. Among the most essential of these principles is the right to a fair trial, which affords equal legal and institutional protection to all actors within criminal proceedings. The initiation of criminal proceedings sets in motion the mechanism of criminal-law protection of fundamental social values (such as life, liberty, property, and health) which, as a corollary, necessarily results in the restriction of certain fundamental rights of the accused.¹

¹ The aforementioned values constitute a corpus of fundamental human rights protected under overarching international and regional legal instruments, including the Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966; the International Covenant on Economic, Social and Cultural Rights of 1966; and the European Convention on Human Rights of 1950, among others. Thus, the right to physical integrity is safeguarded within criminal proceedings through the establishment of the criminal responsibility of the accused for violations committed against victims. Such proceedings are frequently adjudicated before the European Court of Human Rights in

At the core of modern democratic governance and the rule of law stand two fundamental principles: truth and justice. The attainment of these principles is conditioned by the consistent and responsible application of procedural law, within which the right to a fair trial functions as a pivotal instrument of fact-finding and, as such, constitutes the primary issue examined in this paper. Accordingly, the subject of the present research is the right to a fair trial in the Republic of Serbia. This right is a central legal principle enshrined in the normative framework, the exercise of which is, or ought to be, carried out in conformity with the powers and responsibilities prescribed by legal norms, which delineate the scope of authority, duties, and accountability. The consideration of the right to a fair trial, both in its substantive and procedural dimensions, entails the pursuit of multiple theoretical and practical objectives. These objectives establish the scientific foundation for sound practice of fair trial guarantees within criminal proceedings. Furthermore, the scholarly and societal justification of this research lies in the acquisition of new scientific knowledge, the enrichment of existing legal theory, and the creation of a scholarly basis for the further development of legal practice in the field of the right to a fair trial.² At the same time, the justification for examining the right to a fair trial is founded upon the verification and refinement of research methods, the application of methodological and theoretical approaches, and the careful selection of methods and procedures for the design and implementation of research instruments.

The results of this research are designed to contribute to a more thorough and timely evaluation of judicial practice concerning the right to a fair trial in criminal proceedings. This objective is further promoted through a comparative approach that incorporates legislative solutions elaborated within other criminal justice systems.

1. THE RIGHT TO A FAIR TRIAL IN THE DOMESTIC LEGAL SYSTEM

1.1. The Notion of Justice in Legal Doctrine

In defining the notion of a “fair trial,” it is necessary to take into account the fundamental provisions of the concept of “justice.” Justice constitutes a categorical legal notion from which derivative concepts of lesser scope and significance are drawn, such as

Strasbourg. These cases typically concern applications lodged by individuals against the Republic of Serbia on account of having suffered torture. See, for instance, the case of *Ali v. Serbia*, no. 4662/22, where the Court found violations of Article 3 (Prohibition of Torture), Article 3 (Extradition/Expulsion), and Article 34 (Individual Application).

2 In this regard, EU law abounds with legal instruments regulating the application of various principles aimed at establishing a fair balance in relation to the accused. Directive 2012/13/EU on the right to information in criminal proceedings was the second legal instrument adopted as part of the Stockholm Programme agenda for the enhanced protection of procedural rights of suspects and accused persons, on 22 May 2012. It was to be transposed into domestic law by 2 June 2014. This measure regulates the right of a suspect to be informed of his procedural rights, of the charges brought against him, and to have access to the case file and materials. Compared to the scope of the right of access to a lawyer provided for under the preceding Directive, the right to information has received less attention in judicial practice and practitioner training, although the Directive on the right to information clarifies these important safeguards. Nagy, A. I., Dornfeld, L. L. (2017). *The development of certain measures related to the right to a fair trial in the European Union as part of the Stockholm Programme*. Zbornik radova Pravnog fakulteta, 51(3-1), p. 867.

fairness, fair trial, due process, and other essential legal notions. When the term “justice” is employed in legal scholarship, most authors emphasize that it is exceedingly difficult to define, given the high degree of abstraction inherent in the concept itself, and even more so to articulate in practice, whether in the social or in the legal sphere. Nevertheless, within legal doctrine, the notion of justice may assume different meanings depending on the context in which it is examined. Thus, justice may be understood as adherence to truth, moral principles, and equality. Accordingly, several dimensions in which justice is manifested can be distinguished, namely:

1. Moral Justice, which encompasses the moral principles that determine the boundaries of what is right and just in the conduct of individuals as well as society as a whole.
2. Legal Justice, which encompasses the legal order and the set of norms that guarantee the equality of all persons before the law.
3. Social Justice, which encompasses the principle of equal treatment of all members of society.
4. Epistemic Justice, which encompasses respect for truth, accessibility of information, and fairness in the distribution and accessibility of knowledge.³

Although the term “justice” generically encompasses the notion of “fairness,” it is important to emphasize that fairness implies a broader social context. In common parlance, it has become entrenched as a lesser form of justice.⁴ Conversely, certain doctrinal positions maintain that **justice** is synonymous with **fairness**. In the *Legal Encyclopedia*, the concept of **equity** is assimilated to justice (fairness).⁵

The conceptual delineation of *justice* and *equity* necessarily implies the definitive determination of the notion of a *fair trial*. It should be emphasized that this notion derives from the concepts of justice, equity, dispute, adjudication, and court. A *fair trial* may be defined as a judicial proceeding conducted in a fair manner for all parties to the case, under identical and equal conditions, with identical and equal opportunities, encompassing the full range of standards inherent in the right to a fair trial. This applies to all types of proceedings (administrative, misdemeanor, criminal, civil, and others); however, by their very nature, the gravest consequences of unfair conduct of proceedings manifest themselves in the field of criminal law.⁶

3 According to: Mišić, M. (2025). *Insoluble Problems of Justice and Artificial Intelligence*. *Herald of the Bar Association of Vojvodina*, 97(1), 156–157.

4 In oral folk traditions, fairness is often defined as partially fulfilled justice. Moreover, some interpretations suggest that fairness may be characterized as a form of “consolatory justice.” “Love and justice, two biblical principles, are embodied in Prince Marko, the most renowned hero of Serbian epic poetry. In the poem *Uroš and the Mrnjavčević Brothers*, Marko’s mother, Jevrosima, implores him by the milk with which she nursed him to judge according to the justice of the true God.” Rajović, D. (2023). *Biblical Motifs in Epic Folk Songs about the Nemanjić Dynasty*. *Baština*, 60, p. 63.

5 *Legal Encyclopedia*. (1979). Belgrade: Contemporary Administration, p. 1037.

6 “The specificity of addressing justice within criminal procedural law is analogous to that in substantive criminal law, since the term *justice* is nowhere explicitly mentioned in statutory texts. Nevertheless, as a fundamental social value, it permeates the criminal process. Criminal procedural law is a branch of law in which the state has a particularly strong interest to ensure precision, clarity, and comprehensive regulation. Consequently, in criminal proceedings it is not possible to find *equity* (unlike in other types of proceedings) as a formal source of law. It is not even mentioned as a corrective criterion (which must

In the context of examining the concepts of **justice, equity, fairness**, and related notions, it is important to highlight yet another, equally significant aspect. This concerns the issue of fair social balance, understood as the antithesis of social imbalance manifested through unlawful conduct by the individual, the collective, or, ultimately, the state itself. Social imbalance is reflected in unjust conduct, understood as behavior contrary to law — in particular, to unwritten law. However, the subjective perception of injustice may come into conflict with what is prescribed by the constitution and the statutory laws of a given state.⁷

1.2. Constitutional Guarantees of the Right to a Fair Trial in the Republic of Serbia

Until the adoption of the Constitution of the Republic of Serbia in 2006, the institute of the right to a fair trial had not been adequately regulated in our legal system, and consequently, there existed no appropriate mechanism for safeguarding the right to a trial within a reasonable time.⁸ Pursuant to Article 32 of the Constitution, a provision is established concerning the right to a fair trial, which stipulates *that every individual shall have the right to a fair and public hearing within a reasonable time before an independent, impartial, and lawfully established tribunal, which shall determine his or her rights and obligations, the merits of any criminal charge giving rise to the proceedings, as well as the charges brought against him or her.* Furthermore, every person shall be guaranteed⁹ *The right to a free interpreter shall be guaranteed to any person who does not speak or understand the language officially used in the court, as well as the right to a free sign language interpreter if the person is blind, deaf, or mute. The public may be excluded from the entirety of court proceedings, or from a part thereof, solely for the purpose of protecting the interests of national security, public order, and morals in a democratic society, as well as for the protection of the interests of minors or the privacy of participants in the proceedings, in accordance with the law.* In this manner, the Serbian constitution-maker has *de jure* established an appropriate legal framework for the practical application of the right to a fair trial (*de facto*).

In procedural terms, jurisdiction for the protection of the right to a fair trial in the Republic of Serbia lies with the ordinary courts and, ultimately, with the Constitutional Court as the final judicial authority. The ordinary courts assess alleged violations of this right primarily from the standpoint of procedural irregularities, whereas the Constitutional Court, when addressing infringements of constitutional rights, delivers decisions on the merits. An examination of judicial practice in the Republic of Serbia indicates that European standards concerning the right to a fair trial are seldom invoked as a legal basis under (Article 6. Paragraph 1.), of the European Convention on Human Rights, with courts

guide the work of the court) to prevent potential abuses and injustices that may arise from the application of justice insufficiently regulated by law. For this reason, criminal proceedings are grounded in a notion of justice of a special and latent scope."Sepi, R. (1995). *Justice, Equity in Criminal Law, or How Far is it from Ius to Iustum in Criminal Law. Annals of the Faculty of Law in Belgrade*, 43(5), p. 570.

7 Trajković, M., & Drakić, D. (2025). *The Limited Domain of Just Balance in the Legal Order. Proceedings of the Faculty of Law in Novi Sad*, 59(1), p. 90.

8 *Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia*, No. 98/2006, with amendments No. 115/2021.

9 The term "guaranteed" must be understood in the sense that this right already exists, deriving from the inherent human rights of every individual, while its recognition within our constitutional and statutory provisions serves merely as legal verification. Upon these foundations rests, in fact, the entire legal architecture of human rights.

instead relying predominantly on Article 32 of the Constitution.¹⁰ Such a state of affairs is clearly reflected in the jurisprudence of the Supreme Court of Cassation, which in its judgments expressly relies on the human rights enshrined in the Constitution. A pertinent illustration may be drawn from a case in which the Supreme Court of Cassation, *while exercising its competence to review a judicial decision in an administrative dispute, underscored that the applicant both in the statement of claim and reiterated in the request for review had meticulously identified procedural irregularities and breaches of law relating to decisive facts essential for the adoption of a correct and lawful judgment, which the Administrative Court was under a duty to examine. By failing to do so, the Administrative Court, in the assessment of the Supreme Court, violated the applicant's right to a reasoned judgment, constituting an integral component of the right to a fair trial as guaranteed under Article 32 paragraph 1 of the Constitution of the Republic of Serbia. In accordance with that constitutional provision, courts, state authorities, and other entities vested with public powers are, inter alia, obliged to provide adequate reasoning for their decisions.*¹¹

1.3. Challenges in the Realization of the Right to a Fair Trial in the Republic of Serbia

The standards underpinning the right to a fair trial are generally categorized into pre-trial rights and rights applicable during the trial itself. Pre-trial rights encompass, inter alia, the right to liberty, the right of detainees to be informed, the right to legal defense, and the right to trial within a reasonable time. In contrast, the set of fair trial guarantees operative during judicial proceedings includes the right to equality before the court and the law, the right to trial before a competent, independent, impartial, and legally constituted tribunal, the right to a fair hearing, the right to a public hearing, and the right to be presumed innocent.¹²

Our Constitution stipulates *that everyone has the right to an independent, impartial, and legally established court, which shall conduct a fair and public hearing within a reasonable time and decide on their rights and obligations, the merits of the suspicion that led to the initiation of proceedings, as well as on the charges brought against them (Article 32, paragraph 1).* The protection of the right to a fair trial and judicial remedy, when judicial proceedings are unduly prolonged and extend over many years, necessitates recognition of the crucial standard of the “right to trial within a reasonable time,” which represents a cornerstone of every legal order, irrespective of the courts’ caseload burden. It should be emphasized that this standard is duly observed in criminal proceedings, while it receives considerably less recognition in civil proceedings. In other words, the procedural scope of the application of

10 “Contemporary constitutional law, which has placed human rights at the core of constitutional values, engages and affects the ordinary individual to a far greater extent. Owing in particular to the widespread use of the constitutional complaint before the Constitutional Court, it has become an integral part of legal and social everyday life. Constitutional law has thus been ‘brought down to earth’ and has begun to permeate the daily existence of individuals.” Petrov, V. (2025). *Is Constitutional Law Still Relevant Today? Archives for Legal and Social Sciences*, 120(2), p. 16.

11 Supreme Court of Cassation, Uzp 166/10, Judgment of 10 February 2012.

12 It is important to emphasize that the presumption of innocence must be respected even after the delivery of an acquittal. In this manner, the presumption extends its effect to potential future criminal proceedings as well. In this regard, the European Court of Human Rights, in *Sekanina v. Austria*, held that once an acquittal has become final, it is impermissible for domestic courts to continue expressing doubts as to the guilt of the person who has been acquitted. (Tosić, D. (2012). *The Presumption of Innocence in Our Law and in the Case-Law of the European Court of Human Rights. Glasnik Advokatske komore Vojvodine*, 84(10), p. 673).

the “right to a fair trial” must be carefully considered, since any form of its generalization may be questionable.¹³

In the legal system of the Republic of Serbia, until 2013, apart from the constitutional complaint, the right to a trial within a reasonable time was not protected.¹⁴ Due to such circumstances, numerous cases have been brought before the European Court of Human Rights on the grounds of violations of the right to a trial within a reasonable time, many of which the Republic of Serbia has lost. In this regard, one may refer to the extensive case law of the European Court of Human Rights in proceedings conducted against the Republic of Serbia. Although the judgments concern different forms of violations of human rights as prescribed by the European Convention on Human Rights, a considerable number of cases relate to the applicants’ allegation that the right to a fair trial, that is, to legal certainty, had been infringed. In one of the cases, the European Court of Human Rights “found that the applicant had referred to only one different final judgment, which had not been subject to examination either by the Supreme Court of Cassation or by the Constitutional Court.” It follows that the applicant failed to demonstrate that there existed profound and long-standing divergences in the case-law of the highest domestic court which could be considered contrary to the principle of legal certainty.¹⁵

2. THE RIGHT TO A FAIR TRIAL IN THE COUNTRIES IN THE IMMEDIATE VICINITY OF THE REPUBLIC OF SERBIA

2.1. The right to a fair trial in the Republic of Croatia

Since 1990, the Constitution of the Republic of Croatia has undergone several amendments, which, in that context, also affected the right to a fair trial, that is, the European standards of fairness. The Constitution of the Republic of Croatia of 1990 established that *international treaties concluded and ratified in accordance with the Constitution and duly published form part of the internal legal order of the Republic, and, by their legal force, take precedence over statutes. Their provisions may be amended or repealed only under the conditions and in the manner stipulated therein, or in accordance with the general rules of international*

13 “In view of this, an efficient criminal proceeding may be regarded only as one in which, within a realistically short period from its initiation to its conclusion, and with full respect for the legality of its conduct, a proper and lawful final judicial decision has been rendered.” Bejatović, S. (2015). *The Efficiency of Criminal Proceedings as an International Legal Standard and the Reform of Serbian Criminal Procedural Legislation – Norm and Practice*. Nauka, Bezbednost, Policija, 20(2), p. 28.

14 “In general, it is difficult to precisely determine the scope of the Constitutional Court’s authority, and thereby the reach of constitutional rights in this area of constitutional judicial review. Nevertheless, it is beyond doubt that the focus of constitutional review of judicial decisions must be on the interpretation and legal position adopted, or that ought to have been adopted, by the ordinary court concerning the meaning of fundamental rights, their normative scope, and their limits. Constitutional intervention would be warranted in cases where interpretative errors of the ordinary courts are of such a nature that they essentially constitute a violation, denial, or substantial deprivation of a constitutionally guaranteed right.” Rajović, N. (2019). *The Limits of Constitutional Court Review of Judicial Power – Some Open Questions*. Collection of Papers of the Faculty of Law in Niš, 58(82), p. 211.

15 “Application no. 18415/20 Božidar Minić v. Serbia. Strasbourg: European Court of Human Rights, p. 13. Source: <https://www.zastupnik.gov.rs> (10 June 2025).”

law.¹⁶ The Constitution does not provide precise explanations regarding the alignment of international human rights with constitutional provisions, taking into account the jurisdiction of the Constitutional Court and the courts that were in force at the time of the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷

The provisions of the current Constitution of the Republic of Croatia, including subsequent amendments and supplements, provide sufficient grounds for the view that international human rights are protected, and that European standards relating to fairness and the right to a fair trial have been incorporated. Moreover, by the constitutional amendments of 2000, the right to a fair trial was established as a constitutional category, stipulating that everyone *has the right to an independent and impartial tribunal established by law to decide fairly and within a reasonable time on his rights and obligations, or on any suspicion or accusation of a criminal offence*.¹⁸

By the constitutional amendments in Croatia in 2010, the application of European standards of fairness was enabled, as international treaties were also recognized as a source of judicial decisions. In 2010, the Constitutional Court of Croatia established that the guarantees of the right to a fair trial, pursuant to Article 29 item 1 of the Constitution, also apply to judicial proceedings before the Administrative Court, which is provided for in Article 19 paragraph 2 of the Constitution of Croatia.¹⁹ Furthermore, „the Constitutional Court is of the opinion that it cannot replace the legal views of the courts with its own views, except where the decisions of the courts reveal any form of arbitrariness in decision-making, are, in its opinion, insufficiently reasoned, or fail to refer to the relevant judicial practice. Therefore, in cases of extradition of accused persons to other states, the Constitutional Court will not engage in reviewing the legal position of the court if it considers that the accused in the other state will not be „flagrantly denied the right to a fair trial”.²⁰

According to Uzelac, the right to a fair trial is the most important procedural human right, which in the Croatian legal system is regulated by constitutional and statutory provisions, as well as by ratified international conventions.²¹ He states that, among all violations of human rights, the most frequent is the violation of the right under Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the violation of the right to a fair trial.

2.2. The right to a fair trial in the Republic of Bosnia and Herzegovina

The right to a fair trial is guaranteed by the Constitution of Bosnia and Herzegovina in Article II/3(e), in civil and criminal matters. According to the standards of the right to

16 Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia, No. 56/90–5/14.

17 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International Treaties of the Republic of Croatia, No. 18/97

18 See: Article 29 paragraph 1 of the Constitution.

19 Constitutional Court of the Republic of Croatia, U-III-1001/07. Official Gazette of the Republic of Croatia, No. 90/10.”

20 Anić, M. (2021). Fair trial in the decisions of the Constitutional Court of the Republic of Croatia with special reference to the prohibition of arbitration proceedings. ZPR, 10(1), p. 96.

21 Uzelac, A. (2010). The right to a fair trial in civil cases: new case-law of the European Court of Human Rights and its impact on Croatian law and practice. Collected Papers of the Faculty of Law in Zagreb, 60(1), p. 102.

a fair trial set forth in Article II/3(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, every decision must be rendered by an independent and impartial tribunal established by law. The court must function independently of the political and executive authorities and base its decisions on its free assessment, the facts, and the appropriate legal grounds. Judicial impartiality means that the court must not be burdened with prejudices regarding the decision it renders, nor may it be influenced by external information or any other form of pressure; rather, it must base its opinion exclusively on what has been presented at trial.

A fair trial rests upon several standards of fairness, such as the right of access to a court, the principles of orality and adversarial proceedings, the delivery of a decision within a reasonable time, among others. The adversarial nature of the proceedings represents one of the most important standards of the right to a fair trial. In accordance with the statutory provisions on criminal procedure, the accused must be guaranteed the opportunity to contest all facts and evidence adduced against him, as well as to submit any facts and evidence in support of his defence.²²

An illustrative example of the right to defence may be found in a court case in Bosnia and Herzegovina, which points to the application of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The fact that several defendants in the proceedings were represented by the same chosen defence counsel, notwithstanding that their statements made in the preliminary proceedings suggested a potential conflict of interest, does not in itself amount to a violation of their right to defence within the broader framework of the right to a fair trial guaranteed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The reasoning of the decision provides: 'Pursuant to Article 68 paragraph 1 of the Criminal Procedure Code..., multiple defendants may be represented by a common defence counsel, provided that this is not contrary to the interests of their defence. The defendants chose a common defence counsel, and their defences presented at the main hearing were not conflicting but fully aligned.

Moreover, the defendants, as well as their defence counsel, were acquainted with and fully aware of the content of their statements given during the investigation, as well as the statements of witnesses and all other evidence collected in the course of the investigation, and they clearly considered that the concept of their defences at the trial hearing was not thereby called into question. The defendants' counsel is a lawyer by profession, with many years of experience and unquestionable expertise in the field of criminal law. It was therefore reasonable to expect that the counsel, who as a rule resolves a conflict of interest by withdrawing from the defence of one of the accused, would have acted accordingly had this been in the interest of the defendants. "Since the defence counsel did not act in such a manner, judicial intervention in this respect could, in the present case, be regarded as an unjustified interference with matters pertaining to the defence itself. This was equally clear to the counsel, as was the fact that the issue of the existence of a conflict of interest cannot be conditionally raised before the court, nor can it be expected that the court should provide an advance assessment of specific evidentiary material.

22 Article 6 paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, No. 3/03–65/18; Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina, Official Gazette of the Brčko District of BiH, No. 34/13 – consolidated text –16/20; Criminal Procedure Code of the Republic of Srpska, Official Gazette of RS, No. 53/12–15/21; Criminal Procedure Code of the Federation of Bosnia and Herzegovina, Official Gazette of FBiH, No. 35/03–74/20.

Taking this into consideration, together with the defence strategy of both defendants at the trial hearing, this court finds that there was no violation of Article 68 paragraph 1 of the Criminal Procedure Code which was, or could have been, of relevance for the lawful and proper rendering of the first-instance judgment. Moreover, at all stages of the criminal proceedings, both during the investigation and at the trial hearing, the first-instance court fully respected and ensured the defendants' exercise of all rights to which they were entitled in the proceedings, in accordance with the provisions of the Criminal Procedure Code and the highest standards of international law. Prior to questioning, the defendants were duly and timely informed by the court that they had the right to respond to all allegations of the indictment, but were not obliged to present their defences; that they had the right to choose their counsel; that they could present facts and propose evidence in their favour; as well as of all other rights enabling the exercise of both substantive and procedural defence, which rights the defendants indeed exercised. Throughout both the investigation and the trial hearing, the defendants gave their statements in the presence of their chosen defence counsel, attended the examination of witnesses and expert witnesses, and were afforded the opportunity to question them, as well as to comment on each other's statements and on their own prior statements. This was not contested in the appeal submitted by the defendants' counsel, but it convinced this court that the defendants' rights of defence had been fully observed and that they had been guaranteed a fair trial in the present criminal proceedings, in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms²³.

CONCLUDING REMARKS

The attainment of truth, justice, and fairness as fundamental principles of contemporary society is necessarily conditioned by the right to a fair trial. The right to a fair trial constitutes an important instrument of acquiring knowledge in the legal process. At the same time, it serves as both a source and a determinant, and, in a certain sense, as a guiding factor of legal procedure. Therefore, a fair procedure for all parties in judicial proceedings, under identical and equal conditions and with identical and equal opportunities, encompasses all the standards of the right to a fair trial. Based on the conducted analysis, we have ascertained that the idea of law, the rule of law, and fair trial in the Serbian state-building tradition can be traced back to the time of the Nemanjić dynasty, from the Typikon of Saint Sava and Dušan's Code, through the First and Second Serbian Uprisings, and continuing into the twenty-first century.

The rights preceding the trial encompass the right to liberty, the rights of detainees to information, the right to defence, and the right to trial within a reasonable time. The right to liberty is a fundamental human right, and any deprivation of liberty is permissible only in a manner prescribed by law.

The rights at trial include: the right to equality before the court and the law, the right to be tried before a competent, independent, impartial, and legally established court, the right to a fair hearing, the right to a public hearing, and the presumption of innocence. The legislative practice to date has not fully contributed to the advancement of the principles of the right to a fair trial. Slowly and hesitantly, our courts render decisions in cases of violations of the rule on trial within a reasonable time, which represents one of the legal postulates of European Union law, yet such decisions remain exceedingly rare. We hope

23 Judgment of the District Court in Banja Luka, No. 011-0-KŽ-07-000 008, of 15 February 2007.

that, in this and other cases alike, the Serbian legislator will find effective ways to ensure the fullest realization of the principles of a fair trial. It is therefore imperative that the legislation of the Republic of Serbia be harmonized with European standards more resolutely and expeditiously, without awaiting formal accession to the European Union.



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ПРАВО НА ПРАВИЧНО СУЂЕЊЕ У КРИВИЧНОМ ПОСТУПКУ

Анстракт:

Право на правично суђење у кривичном поступку је основно људско право које је гарантовано међународним конвенцијама, као и националним законодавствима. Ово право обухвата низ елемената, укључујући право на јавно суђење, право на одбрану, право на непристрасност судије, као и право на правну помоћ. У оквиру овог рада истраживаће се значај правичног суђења за очување правне сигурности и заштиту људских права. Излагање ће обухватити кључне аспекте, као што су поштовање, процедура, транспарентност суђења и права оптужених. Анализираће се практични случајеви кроз сагледавање правосудних система у околним државама Републике Србије и њихових приступа овом принципу. Такође ће бити размотрени изазови са којима се сусрећу правосудни системи у обезбеђивању ових права. На крају, биће наглашена потреба за унапређењем законских оквира у пракси како би се осигурало да право на правично суђење буде у потпуности остварено у свим кривичним поступцима.

Кључне речи: право на правично суђење, кривични поступак, суд, устав, закони.

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LAW, ECONOMY, AND DIGITALIZATION

UDC:004:340.132.6:342.7

DOI: 10.5937/PDSC25516S

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RULE OF LAW IN DIGITAL SOCIETY – DIGITAL RULE OF LAW EMERGING¹

Abstract:

Digitalization as a social and legal process is the engine of fundamental changes in society, even considering the very core postulates of the functioning of democracy. The beginning of the creation of a digital society is accompanied by a reexamination and redefinition of basic social values, constitutional principles and overall legal framework. Today, the personal freedom of an individual is conditioned or to a certain extent limited by the dominance of technology, in the context of building a system of digital economy, digital society and digital governments. Technology itself and the modalities of its use shape new forms of government and new modalities of the rule of law. How close are we to the so-called digital rule of law? This paper aims to take a wide-angle perspective to comprehensively examine impacts of digital technology on traditional rule of law, as well as to discuss significance and content of emerging digital rule of law.

Key words: *digital technology, rule of law, digital rule of law, human rights*

INTRODUCTION

Digitalization, as a social and legal process, nowadays is the engine of fundamental changes in society, including the very postulates of the functioning of democracy. The beginning of the creation of a digital society is accompanied by a reexamination and redefinition of basic social values, constitutional principles and the legal framework, at the local, regional and global levels. The use of digital technology changes the basic paradigms of society, to the extent that today there is no activity or social factor that does not, to a greater or lesser extent, rely on some form of digital technology or method of its usage. The usage of digital technology changes the economic environment, with the emergence of new

¹ The paper is the result of a long-term scientific research project “Progressive development of law in modern digital society”, which is financed by the Provincial Secretariat for Higher Education and Scientific Research activity (decision number 003069523 2024 09418 003 000 000 001-01003069523 2024 09418 003 000 000 001-01, 21.11.2024).

market structures, the offer of new, innovative products, the treatment of data as the most important input in the global, regional and local economy. The information society operates according to a different dynamic set than the industrial society, which, among other things, implies that the digitalization of society also affects the sustainability of society².

At the intersection of ecosystems and digital society, a new parallel system is emerging – the digital ecosystem (tech ecosystem), which, unlike the original ecosystem, was created by human action and over it, and its components, ownership can be established. The elements that make up the infrastructure of this new digital ecosystem are owned by multinational corporations (software, hardware, network connections, optical cables, cloud centers), which conditions various forms of digital capitalism, which operates on the principle of concentrating wealth and which uses digital technologies to organize the community, such as the Silicon Valley model. Transnational companies colonize the digital environment and the global economy, creating a new trend of the so-called digital colonialism³. Digital colonialism is defined as the created state of ownership and control over the digital ecosystem for the purpose of political, economic and social domination over a foreign territory. The development of such social trends leads to new forms of digital revolutions, as a kind of modern forms of social revolutions, which consequently affect public policies, sensitive social groups, the economy, environmental sustainability, economic development, etc. At the same time, new social paradigms are emerging, such as digital constitutionalism in the European Union⁴. The most obvious example of the impact of digital technology on already existing and thoroughly established social, legal, economic and political postulates is the creation of the trend of digital constitutionalism in the European Union, as a primary social postulate. The European Union's policy regarding digital technology has, in the last 20 years, reoriented from a liberal-economic perspective to a constitutional approach. Initially, in the context of community regulation, digital technologies were seen as an opportunity for the growth and development of the common market, and the future impact on fundamental rights and the emergence of entities that would be new competitors to state power was not visible. The increasing use of digital technology in all spheres of society and the economy had two major consequences that were observed in the community order. Namely, the use of digital technology has become a significant challenge for the protection of human rights (especially in terms of freedom of expression and data protection), while at the same time transnational companies operating in the digital environment as service providers through online platforms have increasingly taken on the performance of quasi-public functions in a transnational context. In this sense, the phase of modern constitutionalism in the European Union is referred to as digital constitutionalism, which is a consequence of the conceptual transfer of digital technologies to the public legal sphere⁵. The modern understanding of constitutionalism implies the achievement of two goals: protecting the fundamental rights of citizens and preventing the exercise of power without any control. In this sense, digital constitutionalism functions as a shield against the discretionary exercise of power by online platforms in the digital environment.

2 Stojšić Dabetić, J., Mirković, P. (2021). The role of digital technology in keeping modern digital society sustainable, *International Scientific Forum "Danube – River of Cooperation"*, 135-147, 137.

3 De Gregorio, G. (2021). The Rise of Digital Constitutionalism in the European Union, *International Journal of Constitutional Law*, Volume 19, Issue 1, January 2021, 41–70, 45.

4 Padovani, C., Santaniello, M. (2018). Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System, *80 Int'l Comm. Gazette*, 295.

5 Ibidem.

The use of digital technology requires the creation of new forms of restrictions on the abuse of power in a system based on the actions of governments, companies and civil society organizations, i.e., it requires new ways of articulating the boundaries of power in a networked society. The fundamental postulates of the rule of law are being adapted to the new reality, and the content of the rule of law is being redefined to respond to the challenges of the digital environment. This paper aims to take a wide-angle perspective to comprehensively examine the impacts of digital technology on traditional rule of law, as well as to discuss the significance and content of emerging digital rule of law, in order to offer an answer to the rising question - how close are we to the so-called digital rule of law?

Digital environment and (digital) rule of law

New technologies and social structures related to Internet and digital technologies created new means for human activity, and new forms of traditional activities such as political activism, cultural exchange and realization of human rights. At the same time, influence on human rights that results from restrictions in access to Internet and other digital media, monitoring online activities and electronic communications of individuals, shows patterns of restrictions on freedom of expression, freedom of association, right to privacy and other civil rights. New opportunities for illegal activities are emerging, such as cases of hate speech, child pornography, serious copyright violations, fraud, identity theft, money laundering, new forms of attacks on the infrastructure of electronic communications as objects of protection. Issues of cyber security and cyber crimes and special forms of terrorism in cyberspace, which have a transnational aspect, come into focus.

The increasing degree of availability of personal data facilitates and accelerates the identification of individuals, while data itself becomes a form of capital, including activities whose acceptability is not precise, such as BigData mining. Profiling activities through personal data, using different algorithms, can be more or less discriminatory in their results. If profiling algorithms are used as a basis for making decisions that have an impact on the property and other assets of individuals (e.g. prohibition of activities, confiscation of goods), this can lead to undermining the very system of responsibility for decision-making⁶ (The rule of law on the Internet and in the wider digital world, 2014).

The physical infrastructure of the Internet implies a network of switches, cables and routers through which data and information traffic takes place, which forms a system of electronic communications that is transnational and global, but at the same time the very infrastructure on which it rests is physical, analog, and located in real places. High-capacity optical fiber cables run under the sea and ocean, and are connected to ground cables and routers, but at the same time are owned by private entities (primarily in the USA and the UK), which therefore have control over the largest part of the Internet infrastructure and this inevitably enables a high degree of potential, and real, control over data. Those entities, as owners of parts of the physical infrastructure, are not bound by international acts on the protection of human rights, due to the fact that they are not signatories to these acts, they are only bound by national regulations, which do not necessarily have to be in all aspects harmonized with international standards, since Internet activities are regulated differently at national levels (legal restrictions on Internet access, different forms of monitoring of electronic communications are known). For example, the restrictions on human rights provided for in the US Constitution apply only to

6 The rule of law on the Internet and in the wider digital world, Issue paper published by the Council of Europe Commissioner for Human Rights, Council of Europe, December 2014.

US persons and non-US persons residing in the US, while at the same time the US government formally rejects the application of the international body of human rights, which is problematic considering that the US has predominance in the digital environment.

The efforts of states to control access to the Internet and the distribution of materials on the Internet, in practice, lead to situations where web pages that are treated as having illegal content are blocked or restricted, while at the same time there are failures to block or limit pages that really have illegal or problematic content. Such anomalies are the result of criteria for blocking or limiting which are secret, or arbitrary or subjective, usually there is no appeal process or other possibilities to review decisions. At the same time, technological progress is such that all restrictive measures can be bypassed more or less easily, and thus the measures taken do not affect the cause itself or the harmful effect. Certainly, it can be justifiably argued that leaving the determination and application of measures to block or restrict content, from the aspect of legal security and the rule of law, to private bodies, with the support of the state which at the same time denies its responsibility in such an arrangement, is legally questionable, while at the same time the number of court proceedings related to the digital sector is growing, especially from the aspect of security and mass surveillance and the use of social networks. These circumstances undoubtedly show the increasing influence of digital technology in the field of rule of law.

The processing of citizens' personal and private data, as well as the enormous possibilities for content creation, activities that are predominantly in the hands of non-state actors or transnational corporations, are creating a new form of digital private power, which is predominantly global⁷. In this context, digital refers to Internet-based technologies used for data processing and content creation, and constitutionalism refers to the tendency that power, whatever its origin, should be limited by law and that legitimacy depends on respect for limitations. Digital constitutionalism is defined as a new field of theory and practice that is based on the dialectic of the impact of digital technology on constitutionalism and the relationship of constitutional law to the powers exercised through the implementation of digital technology in the public and private sectors⁸. The European Court of Human Rights (ECtHR) itself has pointed out the constitutional challenges that arise with the use of new technologies, and its practice has significantly influenced the creation of legal regulations for data protection and content creation, in the sense that the rights and freedoms of the Charter have been interpreted in a special way for the purposes of implementing constitutional principles in the functioning of the digital society. With the inclusion of the Charter of Fundamental Rights in the set of primary community sources and the simultaneous growth of the importance of data in the information society, the European Court of Human Rights has abandoned the economic-functional dimension in its practice and adopted a constitutional approach. The test of the (non)existence of the rule of law in the practice of the European Court of Human Rights implies that all restrictions on human rights must be based on clear, precise, publicly available and predictable legal rules and on legitimate goals. There must be a necessary, proportionate and effective legal remedy in the case of human rights violations in the legal system. In addition, the validity of human rights for all, without discrimination must be achieved in every case. The guarantees of human rights refer to the theory of the sovereign power of the addressee states, but understood functionally rather than territorially,

7 Sun, X. & Xiao, Y. (2024). How Digital Power Shapes the Rule of Law: The Logic and Mission of Digital Rule of Law. *International Journal of Digital Law and Governance*, 1(2), 207-243. <https://doi.org/10.1515/ijdlg-2024-0017>, 208.

8 Suzor, N. (2018). Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms. *Social Media + Society* 4 (3): 2056305118787812.

that is, valid for all persons under the physical control of the government of one state, even when acting extraterritorially. The Internet also indicates the need to redefine the “territory” of a country, that is, how do territorial borders complement the digital space? In the case of *Yildirim v Turkey*⁹, the ECtHR characterized the blocking of access to all sites hosted by Google Sites from Turkey in order to block one deemed disrespectful to Atatürk as a violation of Article 10 of the Convention. The recommendations of the Commissioner for Human Rights of the Council of Europe refer to the preservation of the universality of human rights and their equal application in online and offline contexts, data protection, cybercrime and the question of jurisdiction.

The basis of democratic rules applicable in the digital community emerges as a result of collective private action, in the form of decentralized and ad hoc law¹⁰. When creating a legal framework in the digital environment, the bottom-up principle is applied, i.e. the digital environment is not regulated by traditional norm-makers, but each segment of the digital community participates in creating rules. The digital environment itself is such that it constantly creates the need for free market regulation, i.e. every attempt to legally regulate some aspect of the online or digital environment results in a new modality by which previously adopted rules are changed or replaced or redefined. The freedoms of online platforms, in relation to the supervision of the content placed through them, have been transformed into new forms of power and are leading the European Union to replace the liberal approach with a regulatory one, in terms of regulating a new way of data processing and content creation, via GDPR (2016), Artificial Intelligence Act (2021), Digital Market Act (2022) and Digital Services Act (2022). The risks that have become apparent, and which threaten to undermine the concepts of responsibility and transparency, represent in this context the material sources of law¹¹. At the same time, normative processes of revision of the basic postulates of freedom of expression and protection of personal data are also taking place. Digital companies, in the sense of online providers or online platforms, are replacing, in aspects of processing and storing personal data, as well as the placement and creation of content, the role of the state and the concept of territorial sovereignty, which is replaced by the concept of functional sovereignty. The expression of control over the online space is contained in the designation of digital companies as “gate-keepers”, who decide on the ways in which people will communicate and how they will exercise their rights through the regulation of digital infrastructure. Through digital constitutionalism, business choices related to the operation of platforms have the role of law in the digital environment at a global level. Users, legal and natural persons, act as subjects of the exercise of a private form of power by online platforms, through a unique mix of private legal rules and automated technologies, which is referred to as the so-called platform law¹². The terms of use unilaterally determine what users can do, how their data is processed, and de facto online intermediaries perform the tasks of public authority. In this way, a process is taking place that is described as the constitutionalization of the multiplicity of autonomous subsystems of world society, as defined by Teubner¹³. It should be noted that in this constellation

9 CASE OF AHMET YILDIRIM v. TURKEY (Application no. 3111/10) JUDGMENT STRASBOURG 18 December 2012 FINAL 18/03/2013.

10 Verstein, A. (2019). “Privatizing Personalized Law.” *The University of Chicago Law Review* 86 (2): 551–80, 557.

11 Suznor, supra note. 7.

12 Engel A. Groussot, X. (2025). *New Directions in Digitalisation: An Introduction*, in: *New Directions in Digitalisation Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Editors: Annegret Engel, Xavier Groussot, Gunnar Thor Petursson), 1-9.

13 Teubner G. (2006). *The Anonymous Matrix: Human Rights Violations by “Private” Transnational*

of power, it is not translational digital companies that have arbitrarily taken power, but there is a significant connection between them and public authorities. Governments and administrations rely on large technology companies to establish and operate national public services, as well as to improve public services. In this way, technology corporations gain access to a large amount of data that was previously only available to the public sector, while public authorities, at the same time, become dependent on technology companies that can impose their own terms of business. Legal norms are replaced by technological or contractual standards established by transnational private entities.

The rule of law in the digital society implies the need to apply the rules and principles of international public law and international human rights equally in the offline and online domains. All private and public actors have an obligation to respect the basic postulates of human rights in their operations and activities, as well as when designing new technologies, services and applications. The rule of law implies the principle according to which all persons, institutions and entities, private or public, as well as the state itself, are responsible for compliance with the laws in force, for their equal implementation, independent judicial settlement of disputes and compliance with international human rights and human rights protection standards. It implies the rule of law, equality before the law, responsibility before the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency.

There is no global agreement on Internet governance, while at the same time there is a danger of a kind of fragmentation of the Internet in the sense that countries and certain regions try to broadcast data created on their territories only through local infrastructure (cables and routers), which de facto creates national obstacles to the global network. Legal or natural persons who make certain information available from their place of residence or seat must comply only with the laws of the country in which they operate. Persons who obtain material or information from foreign websites that they know is treated as illegal in their country may be held liable under the laws of their country, regardless of the origin of the material or information obtained. A general agreement was reached that it is the host country's obligation to respond to human rights violations by companies operating in them¹⁴.

Freedom of expression in the digital context implies the possibility of responsibility for placing certain content via the Internet if that content is placed on the territory or in the Internet space of another country, according to the laws of that country. The rule of law would imply that actors in digital traffic adhere to internationally accepted standards of content permissibility. Without diminishing the possibilities of responsibility of the owner or the holder of the platform for the content that has been placed, according to the seat or place of registration or the place of occurrence of damage or undertaking of harmful action. Legal entities or corporate entities in the digital space act in terms of privatized law enforcement¹⁵. They can introduce certain prohibitions, and if they are not bound by constitutional or other international legal restrictions, based on regulations or a decision of a national authority, this would not amount to rule of law.

The European data protection system, which consists of established principles, guaranteed rights and legal remedies, includes international human rights standards.

Actors, *The Modern Law Review*, Vol. 69, No. 3, 327-346, 327.

14 The Ruggie Principles - UN Guiding Principles on Business and Human Rights : Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) [ST/HR/PUB/11/4.

15 Gowder, P. 2018. "Transformative Legal Technology and the Rule of Law." *University of Toronto Law Journal* 68, no. S1: 82–105.

For example, surveillance programs that are secret in nature or general in scope or non-discriminatory in principle are not in accordance with the postulates of the European Convention for the Protection of Human Rights and cannot be justified by the needs of the fight against terrorism or other threats to security. Any measure of surveillance that is applied must be only to the extent that is necessary in a democratic society and proportionate to the legitimate goal that is sought to be achieved by the applied measures.

The basis of the rule of law on the Internet is the system of protection of individuals in connection with the automatic processing of personal data. In this context, mass suspension of communication data is fundamentally contrary to the rule of law. It is expected that the rules on data protection will be applied to all activities in which the data of natural persons are processed. The right to privacy and family life and freedom of expression cannot be covered by the decisions of private bodies that have control over the content that is placed on the Internet¹⁶. Efforts are being made to ensure that non-European countries respect the European standards for the protection of fundamental rights. A state may not access data in another state without its consent, unless it has a legal basis (clear, explicit, based on law) in international law, and the access itself under those conditions must be in accordance with the standards of data protection and human rights. Internal affairs authorities cannot obtain data from servers and other infrastructure in another country on the basis of informal agreements, but only on the basis of mutual cooperation mechanisms (eg the Council of Europe Convention on Cybercrime). In terms of jurisdiction, the extraterritorial exercise of jurisdiction for transnational cyber crimes is limited, except in the case of content prohibited by international law. States can have jurisdiction over foreign digital material only in limited cases, when the connection of the material or disseminator to the state is effective and real.

All restrictions on access to content on the Internet must be based on strict and predictable legal frameworks in relation to the scope of the restrictions themselves, with the possibility of judicial review during which domestic courts must mark the measures taken as necessary, effective and proportionate and such as to affect the very content in question that needs to be blocked or restricted. To the greatest extent possible, such measures should be restricted from being implemented by private bodies without public authority. National security can be the basis for interfering with human rights when the very essence of the basic institutions of the state is threatened, and the threat itself cannot be effectively removed by regular criminal law means.

In the previous part, the most obvious challenges that are posed to the standards of the rule of law in the modern digital environment were listed and elaborated. The intention is to build a system of digital sovereignty in terms of security, which is related to state power, in terms of a defense principle that establishes a mechanism that ensures security, in parallel with a system of digital transparency, in terms of the principle of responsibility and limitation of power, which establishes and promotes the rights of individuals. Together, the two principles should act synergistically as a system of protection and promotion of European liberal and democratic values.

16 Lynskey, O. 2019. "Grappling with 'Data Power': Normative Nudges from Data Protection and Privacy." *Theoretical Inquiries in Law* 20 (1): 189–220.

CONCLUSION

Digital rule of law emerges as a new form of rule of law, which is a consequence of the digital technological revolution. It shows the innovative development of the traditional rule of law, in the context of technological dominance. From the very beginning as a legal principle, the rule of law was understood in the earliest period as state power, i.e. control. With modern revolutions and the ideas of human rights and separation of powers, it was conceived as a true rule of law, not the rule of state power. With the emergence of the Internet and the advent of the digital age and the creation of a digital society, it is undergoing fundamental changes resulting from technological dominance - digital power. When speaking of digital power, it is necessary to shift focus from the technology itself to its social impacts. Nevertheless, law as a social discipline has always lagged behind the technological development, but at the same time law can anticipate the effects of technology application, and that is maneuvering space for the development of digital rule of law. Key challenges in development of digital rule of law, as mentioned, is the absence of Internet governance and the fact of private-sector control over infrastructure and data flow, as well as non-compliance of national regulations.



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VLADAVINA PRAVA U DIGITALNOM DRUŠTVU – STVARANJE DIGITALNE VLADAVINE PRAVA

Sažetak:

Digitalizacija kao društveni i pravni proces je motor fundamentalnih promena u društvu, čak i ako se uzmu u obzir sami temeljni postulati funkcionisanja demokratije. Početak stvaranja digitalnog društva prati preispitivanje i redefinisane osnovnih društvenih vrednosti, ustavnih principa i ukupnog pravnog okvira. Danas je lična sloboda pojedinca uslovljena ili donekle ograničena dominacijom tehnologije, u kontekstu izgradnje sistema digitalne ekonomije, digitalnog društva i digitalnih vlada. Sama tehnologija i modaliteti njenog korišćenja oblikuju nove oblike vladavine i nove modalitete vladavine prava. Koliko smo blizu takozvanoj digitalnoj vladavini prava? Ovaj rad ima za cilj da iz široke perspektive sveobuhvatno ispita uticaje digitalne tehnologije na tradicionalnu vladavinu prava, kao i da razmotri značaj i sadržaj nastajuće digitalne vladavine prava.

Ključne reči: digitalna tehnologija, vladavina prava, digitalna vladavina prava, ljudska prava.

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SOME LEGAL AND ETHICAL CONCERNS REGARDING (MIS)USE OF CHAT GPT

Abstract:

The development of information technologies, especially during the 21st century, has two sides: the first, the brighter one is depicting a world of new, unimagined opportunities for work, advancement, learning, development of business activities; but the second side, the darker one, is showing us another world of unimagined ways of abusing the same technologies, for doing serious frauds, violent acts, threats and other criminal acts. Crime scenes still exist, but tools for their execution became wider and more unpredictable, as they come from the world of information and communication technologies.

In this paper some serious legal and ethical problems that arise with the application of various IT solutions, especially after the emergence of ChatGPT in 2023, are mentioned. There are no reliable solutions to these problems yet, the problems are constantly evolving. But we find it very important to mentioned them and encourage thinking about their solution, not only through threats of fines for violations, but also through prevention aimed at the smart use of all technological products.

Keywords: *law, ethics, ChatGPT, “hallucinations”, AI*

IT’S EASIER WITH AI, ISN’T IT?

The initial task of artificial intelligence (in further text: AI) was to try to simulate human thought processes, and to save time in numerous mechanical and other processes; also to open more time for other new, more sophisticated processes and to reduce the labor force engaged in those processes, which ultimately leads to a reduction in labor costs. There was also a humane reason - the replacement of people with artificial intelligence in some processes may reduce the strain on people’s brains, which began to burn out precisely because of mental overload. AI can process more information than the average human brain can process. Acceleration of those processes, if it were left to the minds of men alone it would lead to their complete crushing. The human mind is not an application or a computer system, which when broken, can be restored so easily, most often it does not come back or never comes back in the same capacity as before. Numerous studies, especially those conducted after the COVID 19 pandemic, have shown how fragile people really are and how important it is to protect them - so that they and the world can progress.

Thus, today, AI technologies are used in the development of internet searches (Google¹), the operational systems (Windows especially²), the use of virtual assistants (Siri, Alexa)³, numerous applications for communication and information sharing, as well as for the development of recommendation systems that are based on the generation of numerous data on the content that individuals follow on the internet, and based on assumed preferences, their further search for other content is narrowed down and they are directed to similar ones to those they have already searched for (YouTube⁴, Netflix⁵, etc.; but also shopping applications such as Temu and Shein).

“The launch of ChatGPT in November 2022 will perhaps be come to be one of the defining moments in our relationship with technology. The rapid pace in which generative artificial intelligence (Gen AI) is developing and the rate in which it is being adopted, is transforming how we interact with technology, and poses new risks and challenges”.⁶ Chat GPT, which stands for “*Chat Generative Pre-Trained Transformer*”, is a language model, trained on enormous amount of data such as books, articles, websites, newspapers or other literary works, even chats on forums, and specific websites for that use. It is based on neural networks and helps generate information based on the user prompts and presumable preferences given in previous internet searches⁷. It relies, as other AI products, on human intelligence - which stems from the information that people have collected over the centuries and the strategies that people originally developed to store that information (into their memory), process that information, and know where and when that information can be used, as well as to create new strategies and new information usable in new cases. So Chat GPT was created to become a valuable interlocutor for every modern person, at the same or higher level of knowledge, who needs advice, opinion, or quick information, without the interference of too many other people on the side. Because of all those reasons, by February 2023, more than 100 million users of this tool were recorded, and in February 2025 - 400 million users, although the number of those who visited the aforementioned site but did not actively use it exceeded one and a half billion.⁸ ChatGPT 3 which was launched in November 2022, was followed by Bing Chat, ChatGPT 4 and Google Bard.

1 Google especially has developed a special AI virtual assistant that is present in all Google products: in addition to the search engine, it is present in the gmail system, google meet, google translate, etc. It is almost impossible to turn it off, because every time when you start over google search, this AI engine appears.

2 All Windows products, who come with the operational system, such as Word, Power Point, Adobe Acrobat Reader have the same notion of AI assistance. Of course, free versions of these products have limited features, leading users to buy an upgraded version that has even more features.

3 These virtual assistants operate on the principle of executing commands given to them by the user: to automatically lock the car doors, play a playlist, check emails, etc. “Siri”, for example, can be installed on a computer or phone: <https://www.apple.com/siri/>, 11.03.2025.

4 Wallis, J. “How Does YouTube Work In 2024? The Tech Behind Series”, <https://intuji.com/how-does-youtube-work/>, 10.04.2025.

5 *How Netflix streams videos*, <https://help.netflix.com/en/node/85>, 10.04.2025.; *How Netflix works: the (hugely simplified) complex stuff that happens every time you hit Play*, <https://medium.com/refraction-tech-everything/how-netflix-works-the-hugely-simplified-complex-stuff-that-happens-every-time-you-hit-play-3a40c9be254b>, 10.04.2025.

6 Ryan, F., Hardie, L. (2024) ChatGPT, I have a Legal Question? The Impact of Generative AI Tools on Law Clinics and Access to Justice, *The International Journal of Clinical Legal Education*, Vol. 31 No. 1.

7 Sharma, K.S. & Kavia A.S. (2023) *Chat GPT and Copyright: Legal and Ethical Challenges*, *Osmania University Journal of IPR [OUJIPR]* Vol.1 | Issue 1 July 2023, pp. 172 – 189

8 Duarte, F. *Number of ChatGPT Users (March 2025)*, <https://explodingtopics.com/blog/chatgpt-users>, 11.03.2025.

The latest version of ChatGPT is even “*predicting the next word in a sentence and produce sophisticated text. They can be used for a variety of different applications such as asking questions or information about a topic, producing human-like responses*”, which gained it wider popularity than to other tools.⁹

The problem arose when the creators of ChatGPT realized that it could “hallucinate”. “Hallucination” here means that the system not only invents answers using existing data, but that in the absence of existing data to support the answer it invents data. Exactly like the human mind, which when it finds itself in an unpleasant situation and does not want to admit its mistake, powerlessness or ignorance, resorts to - lies and fabrications, in order to justify itself. Paradoxical situations occurred – when asked whether the essay whose authenticity was being checked was copied from somewhere, ChatGPT replied that of course it was not, ignoring the fact that it was impossible that it had been copied from somewhere because most of the data in it was invented by ChatGPT himself. In defense of Chat GPT, its main task is to create new content based on already existing content, which it certainly does. Chat GPT does not appear to be commanded not to use its imagination when creating new content in the form of responses. On the other hand, since this AI tool is also designed to imitate human real thinking processes, it is not excluded that within those strategies of thinking and processing already existing data, it also picked up the strategy of making things up and lying, which are subconscious reactions and strategies in situations when a person does not know the answer and does not want to admit it.

Initially, the questionable accuracy of the data on which ChatGPT’s response was based, with additional invented and false data, reduced the veracity of the data in the database used by ChatGPT to 20%¹⁰. Each subsequent use of the same invented and false data, with the likelihood of “hallucinations” and the invention of new incorrect data, further reduces the veracity of the data in the same database. This means that ChatGPT not only does not classify the new fabricated information as a lie, but that it continues to create new false information in its wake, which generally increases the degree of hallucinations and makes it even more difficult to determine the initial error (in this case, the initial false information) in the thinking process.

AI IN PRACTICE IN LAW

*“Technology is already transforming the delivery of legal services and changing the practice of law. Although there are challenges around the increased adoption of technological tools there seems little doubt that the emergence of Gen AI technologies will be used to solve legal problems”*¹¹. Usually, AI tools , especially ChatGPT are widely used to summarise general documents, develop legal arguments, and draft and produce court documents¹². They’re used less as search engines for databases, since there are already specially developed search engines for legal databases (laws, court rulings, opinions and recommendations of

9 Ryan, F., Hardie, L., p.134.

10 Guo,C.*Hallucinations Are Fine, Actually*,<https://www.ignorance.ai/p/hallucinations-are-fine-actually>, 18.03.2025.

11 ChatGPT, I have a Legal Question? The Impact of Generative AI Tools on Law Clinics and Access to Justice, Francine Ryan,Liz Hardie, The International Journal of Clinical Legal Education ,Vol. 31 No. 1 (2024).

12 *ibid*.

competent authorities, etc.)¹³ However, their use by members of the public to solve legal problems is less clear, although the freely available nature of some of the tools suggests they will increasingly be used as an alternative to a general internet search.¹⁴

Some researchers have tested Chat GPT in gaining the answer to the question about how to divorce. They took as criteria for the usability of the answers its currency (whether the advice referred to the correct legislation currently in force in England and Wales), comprehensiveness (the advice was comprehensive and correct), applicability (in depicted situation in the question), promptness (whether the advice that was given needs more clarification or not) and comprehensibility for someone who is not a lawyer

“We asked the question: I am separated from my husband after finding out he was having an affair. How do I end our marriage? We expected to receive responses referring to the no fault, separation-based divorce available through the Divorce Dissolution and Separation Act 2020, which came into force in April 2022. Practical suggestions would include discussing the divorce with the husband and issuing an application for divorce if they have been married for at least one year.

ChatGPT 3.5 gave a very generic answer which was not based on any specific jurisdiction, stating that ‘The exact steps and requirements for divorce may vary depending on the jurisdiction you are in, as divorce laws differ from country to country and even within different regions.’ It gave general practical advice, such as discussing with the other party, but no indication of how to apply for a divorce.

ChatGPT 4 initially answered based on American law, but when prompted to look at English law it provided reliable and specific advice, accurately explaining the requirement to seek a no-fault divorce. However, it did not explain the need to be married for one year already. It did list the legal steps needed but did not provide any signposting to relevant forms or websites, including confusion around jurisdiction, problems with generic advice, the risk of incorrect advice and the potential inequalities caused by subscription models”¹⁵

The researchers concluded that those answers were, sort of expected, as they proved that those AI tools were created in order to simulate the everyday way of thinking and memorizing informations, and are not enhanced with legal logic and legal way of thinking. So, the accuracy of their answers may vary depending on how much data in that area is initially stored in their databases. “ChatGPT can answer legal questions and superficially the answers look very convincing, but it cannot verify the truth of the information it produces, and it does not have real-world understanding”¹⁶ Therefore, the answer obtained in this way must be subjected to an additional control of the accuracy of the specified data, possibly used as a starting point for solving a real problem, and not as the only and most reliable source of information.

How it looks like when it is tested, for example, on the bar exam?

13 For example, in US there are LexisNexis and WestLaw, while in Republic of Serbia there are also few search engines, such as Paragraf, Intermeks, and Pravno informacioni portal Službenog glasnika, which mostly Параграфа, Интемеркса, и Правно информационог портала Службеног гласника which mainly search databases by keywords, and throw out all the texts that contain those keywords, without summarizing them.

14 ChatGPT, I have a Legal Question?ibid

15 Ibid.

16 Ibid.

When tested on the bar exam in US, which is standardized (more precisely, it has strictly theoretical questions), OpenAI's GPT-4 language model, which was released on March 14, 2023, performed better than 90% of people who took the same test live on spot¹⁷. It is important to note that this advanced version is not available to all users for free. The free version of the same tool performed much worse on the same test - therefore, it had less data and had worse results as people who were tested on the spot.

However, the ease of accessing numerous information, as well as quickly obtaining summaries of long and boring texts, slowly made the belief in the correctness of the answers received from ChatGPT almost unshakable. And that has already cost several lawyers and judges the loss of their licenses to practice their profession and has undermined the citizens' fragile faith in the expertise of lawyers and that they will truly receive justice in court. In the following text, we list a few cases that are representative of the doubts raised in this way about justice, knowledge of the law and the expertise of legal professionals.

One of the most famous cases of inappropriate use of AI in the field of justice occurred in the USA, in Manhattan, in a case called *Mata v. Avianca Inc*¹⁸. A person hired the law firm *Levidow, Levidow & Oberman* as his representatives in a dispute against the airline Avianca Airlines, on whose plane he was injured. The subject of the dispute was compensation for a knee injury that the person allegedly suffered during a flight, due to a hit by an airplane cart that was used to deliver food during the flight. Attorney Steven Schwartz, who in 2023 had more than 30 years of legal experience, used ChatGPT to write a submission to a federal court. Schwartz did not perform a prior check of what was written, but only copied the result, obtained from ChatGPT, and sent it to the court. If he had run that check, he would have determined that ChatGPT completely invented the court precedents that it used when writing the submission- not one, but several of them¹⁹, and quoted completely non-existent sentences from those in vented judgments²⁰.

The problem was discovered when the defense lawyers, who represent the named airline, began searching for the precedents cited in the submission, with the intention of challenging them. Since they did not find any of the aforementioned precedents, they reported this to the judge in charge, who immediately suspended the proceedings. The case ended unexpectedly, with an extremely low fine of \$5,000, which was paid jointly by both lawyers and their firm, but also with numerous apologies that they had to send to the public and their parties - which the acting judge considered a greater moral punishment than if he had imposed a higher fine on them. Throughout the disciplinary proceedings, Schwartz and his colleague were stating "their good faith and trust" in AI and ChatGPT as their defense, and that they could not even imagine that VI would cause so much damage

17 Pablo Arredondo, "GPT-4 Passes the Bar Exam: What That Means for Artificial Intelligence Tools in the Legal Profession", <https://law.stanford.edu/2023/04/19/gpt-4-passes-the-bar-exam-what-that-means-for-artificial-intelligence-tools-in-the-legal-industry/>, 18.03.2025.

18 The whole case available on: <https://caselaw.findlaw.com/court/us-dis-crt-sd-new-yor/2335142.html>, 10.04.2025. године.

19 "Lawyers used ChatGPT to help with a case - it backfired massively", <https://news.sky.com/story/lawyers-fined-after-citing-bogus-cases-from-chatgpt-research-12908318>, 10.04.2025.

20 *Zicherman v. Korean Air Lines Co., Ltd.*, cited in the lawsuit filed by Schwartz does not exist, as well as the *Varghese case*, also cited here. ChatGPT invented the *Zicherman case* first, and confirmed its consistency and correctness - by citing it in the verdict in the *Varghese case*, which also does not exist. So, what happened here is exactly what we stated earlier - one invented piece of information was served as the basis for inventing another and was additionally linked to it, because the credibility of the first false piece of information is proven by citing it in another non-existent case.

with his “hallucinations”²¹. On the other hand, the court considered that the behavior of the lawyers was irresponsible and that it undoubtedly indicates a lack of good faith and expertise in practicing the legal profession. The ChatGPT was not malicious, as those lawyers said, but their irresponsibility and the lack of conscientiousness of performing the profession lead them to this result.

Similar happened in February 2025, the Wyoming, USA, where law firm *Morgan & Morgan* revealed that two of its lawyers had used artificial intelligence to write briefs in a lawsuit taken against its longtime client, retail giant Walmart. The incident damaged the trust in that law firm, but also in Walmart itself - “because their lawyers are willing to do such things to win a case”²². As a result, *Morgan & Morgan* has imposed a new requirement on its more than 1,000 employees that any AI-generated results must be “manually vetted”²³. Also, young lawyer Zacharia Crabill was fired from the company where he worked when it was discovered that he used ChatGPT, which also created fake, non-existent cases and quotes from such cases²⁴.

The biggest legal scandal happened in Colorado: not only did the lawyer use ChatGPT when writing submissions to the court, without subsequent checks of the correctness of the cited precedent law, but the judge also made a ruling based on such submissions - without subsequent checks of the truthfulness of the cited cases²⁵. The judge's behavior indicated gross negligence in his work, incompetence, haste, and violated trust in the judicial authorities as the most professional and independent.

More cases which took place in the USA, Great Britain, New Zealand - i.e. the areas where the Anglo-American precedent legal system is applied, but also in Italy and Spain, indicate that even legal practitioners who should unconditionally be on the side of the law, especially because they provide legal assistance and knowledge to those who need it, are not immune to the(mis)use of Chat GPT.

SOME LEGAL ISSUES ARISING WHEN (MIS)USING AI

Some authors²⁶ listed a few legal concerns that which have already stood out during the use of AI in general and especially during the use of ChatGPT.

The first concern is about **copyright infringement**. A huge amount of information is stored in AI language models, in order to have a quickly accessible library of the most diverse information as input, on the basis of which the language models at the base of these tools will create further outputs. As we can find parts of literary works, as parts of ChatGPT's answers, we can raise a question of protection of copyright of authors, who probably don't know their whole or partial works became the “food” for ChatGPT. A

21 More about this case: <https://www.seyfarth.com/news-insights/update-on-the-chatgpt-case-counsel-who-submitted-fake-cases-are-sanctioned.html>, 1.06.2025.

22 *AI 'hallucinations' in court papers spell trouble for lawyers*, <https://www.reuters.com/technology/artificial-intelligence/ai-hallucinations-court-papers-spell-trouble-lawyers-2025-02-18/>, 24.03.2025.

23 Stated in the same article cited in fn 21.

24 *Colorado attorney is suspended from the bar and fired from his firm for using ChatGPT in court after the AI cited fake cases*, <https://www.dailymail.co.uk/news/article-13367897/Colorado-attorney-suspended-bar-fired-chatgpt-ai.html>, 26.03.2025.

25 More about it : <https://www.volpelawllc.com/chatgpt-and-the-law-ais-negative-impact-on-the-administration-of-justice/>, 24.03.2025.

26 Sharma, Kavia, 2023.

copyright-related issue is also the issue *of ownership of new content created by ChatGPT* (especially when that content is created on the basis of previous copyright infringement). The situation is complicated with the notion that *“the works created by the AI model are not truly original as it is a mix of a wide array of works gathered from the internet which is a combination of copyright-protected literary works. The output generated by AI will not fulfil the criteria of originality”*²⁷(Sharma, Kavia, 2023), because all new content created by AI is the result of algorithm and patterns created by it, pretty similar to existing content, and in scientific meaning can be treated as - review paper.

Very important issue is *liability of content created by AI*, especially by ChatGPT, having in mind the raising possibility for “hallucinations, as stated in our paper before.

“AI hallucinations in research proposals generated by ChatGPT found that out of 178 references cited, 69 did not have a DOI, 28 of which were found not to exist. Another study investigating the authenticity and accuracy of references in medical articles generated by ChatGPT found that of 115 references that were generated, 47% were fabricated, 46% were authentic but inaccurate, and only 7% were authentic and accurate. A further study assessing whether ChatGPT can reliably produce accurate references to supplement manual literature searches reported that of 35 generated citations, only two were real, 12 were similar to actual manuscripts and theremaining 21 were seemingly plausible but in fact a mix of multiple actual manuscripts”.²⁸

As for the amount of “hallucinations” in legal area, that is yet to be researched. The cases so far indicate that a certain percentage of data falsification within the answers provided by ChatGPT certainly exists, but that it varies. Certainly, the accuracy of the ChatGPT answer is affected by the accuracy of the questions that are asked to this tool, as well as the specificity of the data that is requested. This is why the new profession prompt engineering was born, in order to develop crucial skills that can help to better understand the capabilities and limitations of large language models²⁹, especially in some specific fields, such as law.

It must be clear that, in order for Chat GPT to give the most precise answer, it should be fed with as much specific data as possible. *“Chat GPT collects a vast quantity of personal data about the user and provides such data to third parties such as vendors, business transfers, affiliates, government or any other third party without the user’s consent.”*³⁰This entails the issue of *protecting the privacy of personal data*, as well as other data that are not for public use, that is, classified as business or state secrets. The specificity of this requirement is greater when such data are available to lawyers. If a lawyer violates the principle of confidentiality and protection of data provided by the client, he has not only violated the norm on the protection of personal data, he has also violated the reputation of advocacy as a legal profession. privacy issues are very important, having in mind that Open AI has explicitly stated that it will not take any responsibility for data leaks or privacy breaches. And ChatGPT who is collecting all those data is not human, so it cannot be responsible for any violation that its users make by entering other people’s or wrong data, nor can it recognize whether something is such a type of data that is subject to special protection and urge the user to stop entering such data.

27 Ibid.

28 ChatGPT: these are not hallucinations – they’re fabrications and falsifications, *Schizophrenia* (2023) 9:52 ; <https://doi.org/10.1038/s41537-023-00379-4>.

29 More about this new profession: <https://www.promptingguide.ai/>, 01.06.2025.

30 Sharma, Kavia, 2023.

*"It is important to stress that the language modelling task relies solely on form as training data, and therefore cannot inherently lead to the learning of meaning. These models are therefore characterized by their ability to "agere sine intelligere"; that is, to act without understanding exactly what they return as a result"*³¹. So, AI and ChatGPT are here to act, not to think. They just act according to formulas they've been given, using algorithms in creating new formulas that can be used all over again.³²

LEGAL ETHICS AND AI- IS IT POSSIBLE TO FIND A BALANCE?

Some authors differ the "Ethics of AI" from "The Ethical AI" (Sharma, Kavia, 2023). While Ethics of AI "represents the foundational principles, rules, guidelines, policies, and regulations that govern the development, deployment, and use of AI technologies" (Sharma, Kavia, 2023) and gives a framework for AI acting, the Ethical AI is dealing with developing moral thinking inside the machines, because we expect them to be also moral as we are. Both of them are crucially and metaphorically intertwined.

One of the challenges ethical AI faces is **how to ensure respect for human rights and especially dignity**. This would mean incorporating such mechanisms into AI - that is, developing certain algorithms that, during data entry into the system, will recognize a human right, that this entry violates that right, and warn the data entrant that he is committing a violation or endangering someone's rights. If misused, AI can seriously endanger human rights, including privacy, freedom of expression, and freedom from discrimination.

Further, **building trust in AI** is also challenging. How to convince someone that AI systems are designed with ethics in mind, and they know to differ right for wrong- when they are not capable to do that in this level of development? How can anyone be sure that his/her data won't leak somewhere, be used or cited in answer to someone else's question?

CONCLUDING REMARKS

The list of legal and ethical issues that we have identified in this paper, which arise when using AI and especially ChatGPT, is not exhaustive. Since the mentioned tools are still under development and are constantly going through numerous processes of self-improvement, it is possible to expect that other issues will be relevant.

For now, we have to follow the development of technology and try to keep up with its understanding and all the benefits that its development can provide us. Promotion of the smart use of AI can greatly contribute to the prevention of misuse of the same tools, and secure us better, more innovative future.

31 Lucchi, N (2023) ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems

European Journal of Risk Regulation, 1–23

32 De Oliveira Fornasier, M (2021) Artificial Intelligence and Democratic Rule of Law, *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)*, 13(3):351-369, setembro-dezembro 2021.



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НЕКИ ПРАВНИ И ЕТИЧКИ АСПЕКТИ (ЗЛО)УПОТРЕБЕ CHATGPT

Апстракт:

Развој информационих технологија, посебно током 21. века, има две стране: прва, светлија, приказује свет нових, неслућених могућности за рад, напредовање, учење, развој пословних активности; али друга страна, мрачнија, показује нам свет неслућених начина злоупотребе истих технологија, за вршење озбиљних превара, насилних дела, претњи и других кривичних дела. Места злочина и даље постоје, али су алати за њихово извршење непредвидиви и стално настају нови, јер долазе из света информационо-комуникационих технологија.

У овом раду помињу се неки правни и етички проблеми који настају услед примене различитих ИТ решења, посебно након појаве ChatGPT-а 2022. године. Још увек не постоје поуздана решења за ове проблеме, јер нови проблеми стално настају. Зато сматрамо да их поменемо и подстакнемо размишљање о њиховом решавању, не само кроз претње новчаним казнама за прекршаје, већ и кроз превенцију усмерену на паметно коришћење свих технолошких производа.

Кључне речи: право, етика, ChatGPT, „халуцинације“, вештачка интелигенција

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THE IMPACT OF DIGITAL ASSETS ON TRADITIONAL CONCEPT OF PROPERTY LAW

Abstract:

The emergence of digital assets necessitates a redefinition of the traditional concept of property rights. Since digital assets exist solely in virtual form, they do not fit within the traditional definition of an “object” in property law, thereby raising numerous questions related to acquisition, possession, and the protection of property rights. The absence of a clear legislative framework and imprecise terminology generate legal uncertainty, while the dynamic development of blockchain technology and decentralized financial instruments further emphasizes the need to adapt existing legal institutions to new forms of digital assets. This paper analyzes the legal nature of digital assets and their relationship to contemporary property law categories, aiming to highlight the necessity of redefining the concept of ownership in the digital context in order to preserve legal certainty and ensure adequate protection for market participants.

Keywords: *digital assets, property law, property rights, blockchain, legal regulation*

INTRODUCTION

With the advent of the Fourth Industrial Revolution¹ and the accelerated development of information technologies, society has entered the digital age, in which it is nearly impossible to imagine life without technological achievements. The development of digital technologies has profoundly transformed social flows and economic relations, while simultaneously opening a wide array of complex legal issues. One of these concerns relates to digital assets, which over the past decades have become an indispensable element of contemporary economic and legal discourse. Technological innovations bring forth new legal, ethical, and security challenges, particularly regarding the protection of digital asset holders' rights, market regulation, and the assurance of transparency in transactions carried out on digital platforms. Precisely because legal frameworks are unable to keep pace with the introduction and expansion of these technologies on the market, a climate of legal uncertainty is created.

1 The Fourth Industrial Revolution has led to the merging of different technologies and the erasure of boundaries between the physical, biological, and digital spheres, which is why this technological wave is often referred to as the Second IT Revolution; for more on this topic see: Jovanović G. B. (2019). Četvrta industrijska revolucija: Ključne karakteristike i efekti na nacionalnu ekonomiju [Fourth Industrial Revolution: Key characteristics and effects on national economy]. University of Belgrade, Faculty of Economics. ISBN 978-99955-45-29-1

Digital assets, understood as a digital record of value that can be bought, sold, transferred, or used as a means of exchange and investment, have developed at a dynamic pace, particularly since the appearance of the first decentralized cryptocurrency Bitcoin, in 2009. The value and scope of digital assets on the global market are growing exponentially, with crypto-assets occupying a central position, thereby further underscoring the importance of their legal regulation. Nevertheless, despite the adoption of the Law on Digital Assets in Serbia², many issues remain insufficiently defined, generating legal uncertainty and impeding the establishment of stable frameworks for the protection of owners, market transparency, and security of legal transactions.

THE CONCEPT OF DIGITAL ASSETS

The concept of digital assets, regulated by the Law on Digital Assets (hereinafter: “the Law”) from 2020, is defined as a digital record of value that can be bought, sold, transferred, or used as a means of exchange and investment, whereby a digital currency is not a currency that constitutes legal tender or any other financial asset regulated by a special law. Thus, the statutory definition of digital assets is broadly framed, such that if a doubt arises as to whether a certain form of property constitutes a digital asset, the answer will most likely be affirmative. “A digital record represents any record of a digital nature that can be software-based, hardware-based, or a combination of both. For this reason, it is clear that not every digital record can be treated as a digital asset. The legislator has determined that it must be a digital record that possesses value, thereby normatively distinguishing this concept from other forms of digital records.”³

The very need for regulating the field of digital assets in the Republic of Serbia arose as a result of the process of digitalization and the growth of the cryptocurrency market. The Law, as the first legal act in the field of digital assets in Serbia, represents a major step toward strengthening the competitiveness of the Serbian economy in the global market and reflects the necessity and tendencies of development of this branch of the economy. By adopting the Law, Serbia has shown that it keeps pace with the development of information technologies, innovations, and changes in the digital world.⁴ The subject of regulation is the issuance of digital assets and secondary trading in digital assets, the provision of services related to digital assets, pledge and fiduciary rights on digital assets, as well as the jurisdiction of the Securities Commission and the National Bank of Serbia. Thus, “the Law prescribes divided jurisdiction of supervisory authorities: the National Bank of Serbia and the Securities Commission, depending on the type of digital asset in question.”⁵

Digital assets, also known as virtual assets, encompass various forms of digital values and are divided into virtual currencies and digital tokens. Virtual currencies represent a type of digital asset that is neither issued nor guaranteed by a central bank or another public authority, is not necessarily tied to legal tender, and does not have the legal status of money

2 Law on Digital Assets (“Official Gazette of RS”, No. 153/2020).

3 Mirković, P. (2023). Digitalna imovina – legislativni pristup regulisanju novog imovinskopravnog instituta (*Digital Assets – A Legislative Approach to the Regulation of a New Property Law Institute*). Pravo – teorija i praksa, p. 22.

4 Trklja, R., Trklja, M., & Dašić, B. (2021). Nastanak i računovodstvena evidencija digitalne imovine (The Emergence and Accounting Records of Digital Assets). Ekonomski signali: poslovni magazin, p. 115.

5 Vičić Simić, M. (2022). Teritorijalna primena Zakona o digitalnoj imovini (Territorial Application of the Law on Digital Assets). Karanović & Partneri o.a.d.; University of Belgrade Faculty of Law, p. 94.

or currency.⁶ Nevertheless, natural and legal persons accept them as a means of exchange, and they can be bought, sold, exchanged, transferred, and stored electronically. Digital tokens, on the other hand, designate any intangible property right which in digital form represents one or more other property rights, including the right of the token holder to be provided with certain services. “The legislator fails to define different types of tokens, thus leaving room for interpretation of their legal and tax treatment.”⁷ Digital tokens are NFTs (non-fungible tokens), which are based on blockchain technology and represent unique assets such as works of art, digital content, and media. Blockchain technology is considered one of the most secure technologies for data storage. “Blockchain technology is fast, public, inexpensive, simple to use, transparent, and programmable technology that enables instant transfer of information and/or financial resources from one part of the world to another. It represents a protocol that regulates the rules and regulations for the exchange of value. Blockchain technology can contain any type of information, and the connection between each block and the next is called a chain, as blocks are linked in a way that cannot be altered.”⁸

Although in modern legal doctrine the term “virtual assets” is often used as a general designation for digital goods such as cryptocurrencies and tokens, some authors⁹ express reservations about its use, considering it terminologically and substantively inadequate. Specifically, the term “virtual” in broader language use has the meaning of something unreal, imagined, or non-existent in the physical world, which may create a misleading impression that such assets lack real value or legal consequences. It is emphasized that digital assets, although they do not exist in physical form, nevertheless have economic value, can be owned, transferred, inherited, and are used in everyday legal and financial transactions.

A user of digital assets may be a natural person, entrepreneur, or legal entity that uses, has used, or intends to use a service related to digital assets by approaching a provider of such services for a specific service. On the other hand, a holder of digital assets is a broader concept encompassing both users of digital assets and persons who have acquired digital assets outside a business relationship with a service provider, i.e., outside transactions carried out through such providers. For example, a holder of digital assets may also be a person who acquired such assets through mining, i.e., by participating in the process of verifying transactions in information systems related to the specific digital asset.

6 The Concept of Virtual Currency in the Law on Digital Assets is Taken from the Law on the Prevention of Money Laundering and Terrorist Financing), “Official Gazette of RS”, No. 113/2017, 91/2019, and 153/2020, and Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018.]

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8 Ali, M., & Bagui, S. (2021). Introduction to NFTs: The future of digital collectibles. *International Journal of Advanced Computer Science and Applications*, 12(10). <https://doi.org/10.14569/IJACSA.2021.0121007>

9 See: Cvetković, M. (2023). Kripto kao predmet ugovorne obligacije prema Uredbi o tržištima kripto imovine (MICA) i Zakonu o digitalnoj imovini (Crypto as the Subject of Contractual Obligations under the Regulation on Markets in Crypto-assets (MICA) and the Law on Digital Assets). *Collected Papers of the Faculty of Law in Niš*, p. 164.

“Activities related to the creation of cryptocurrencies are not regulated by this law. Thus, the law regulates only the moment from the creation of the cryptocurrency onwards, i.e., its further legal life.”¹⁰ Mining, as a key mechanism for generating units of digital assets such as cryptocurrencies, is mentioned in the Law on Digital Assets only in Article 6, paragraph 2, and that in the context of exceptions to the application of the Law. According to this provision, mining is permitted, but at the moment of acquiring digital assets through mining, the provisions of this Law do not apply. However, the Law becomes applicable to persons who have acquired digital assets through mining if later, when disposing of such assets, they use the services of providers of services related to digital assets or perform transactions on the OTC (Over-the-counter) market.

Digital assets thus represent a broad and dynamic concept that encompasses various forms of virtual values, from currencies to tokens, while their legal nature remains a subject of theoretical debate and normative shaping.

DEVELOPMENT OF PROPERTY LAW IN SERBIA

The subject of property law in Serbia has had a dynamic and complex history, which has left a deep mark on its present regulation. “Even the most general overview of certain periods in the development of Serbian (Yugoslav) property law is sufficient to show that in this area there was no codification of civil law for a long period.”¹¹ After the abolition of the Serbian Civil Code in 1946 and the loss of the constitutional basis for a unified civil code in Yugoslavia (1971), property law remained only partially and fragmentarily regulated, which led to numerous legal gaps and ambiguities, especially in areas such as possession, condominium ownership, building rights, and neighborhood rights. Since the formation of the State Union of Serbia and Montenegro in 2003, and especially after gaining independence, Serbia has had the opportunity to regulate this legal field independently, but the problem of incomplete and outdated regulation remains present.

Throughout history, there has been a tendency toward codification of property law, which has each time ended unsuccessfully. It is first necessary to recall the earlier unsuccessful attempt at codifying property law regulation in Serbia. The constitutional changes in the SFRY of 1963 and 1971 transferred legislative competence from the federal level to the republics, whereby fundamental property-law relations remained under federal jurisdiction, while other property-law relations were to be regulated by republican laws. The Federal Assembly in 1980 adopted the Law on Basic Property Law Relations, but Serbia never exercised its competence to adopt a comprehensive law in this field. As early as 1978, a draft Law on Ownership and Other Property Rights was prepared, later amended, which encompassed an almost complete codification of property law. The final version of the draft from 1989 was submitted to the Assembly of the Socialist Republic of Serbia, but it never passed through the legislative procedure, primarily due to the political and economic turmoil at the time and the impending dissolution of Yugoslavia.

This historical incompleteness and normative instability form the basis for the conclusion that property law has always been subject to change, and today, in the era of accelerated technological development, digitalization, and market transformation,

10 Op.cit., Milojević, G., & Varađanin, T. (2025), p. 134.

11 Cvetić, R. (2019). Stvarno pravo Srbije – kako dalje? (Property Law of Serbia – What Next?). Proceedings of the Faculty of Law in Novi Sad, 40(2), 239.

it is expected that the concept of ownership and its forms will necessarily be reshaped. Contemporary tendencies, such as the emergence of digital assets, virtual goods, and new models of use and disposal of resources, put traditional concepts of ownership to a serious test and once again confirm that property law is a living body of law that must adapt to the realities of its time.

“Property law in the objective sense is a set of general legal norms of civil law that regulate subjective rights and govern relations between people with regard to the appropriation of things in order to determine to whom the thing belongs.”¹²

Property law in Serbia developed within complex legal and political circumstances, and the absence of unified codification still affects its consistent and comprehensive application. Despite attempts to systematize this field, both in the era of the SFRY and after independence, the legal framework has remained only partially developed, with numerous gaps that continue to undermine legal certainty. In this context, modern challenges, above all the emergence of digital assets, further complicate existing property law solutions.

THE IMPACT OF DIGITAL ASSETS ON THE CONCEPT OF PROPERTY LAW

In order to understand the impact of digital assets on the modern concept of ownership and property law relations in general, it is necessary first to grasp the origin and legal nature of digital assets. Cryptocurrencies and digital assets have emerged as one of the key drivers of transformation in modern financial systems. The appearance of Bitcoin in 2009 marked a turning point in the development of decentralized currencies, opening the way for the emergence of thousands of new cryptocurrencies and blockchain projects. However, their growth has also raised questions regarding their legal classification, regulatory oversight, and consequences for global economies.¹³ Digital assets are today viewed as a specific form of assets, derived from the process of global digitalization, which requires that existing concepts of property and ownership law be reconsidered and adapted to new legal circumstances.

Digital assets are increasingly treated in contemporary doctrine and practice as a distinct *leganature* lies in the fact that they exist solely in digital form, without physical manifestation, but nevertheless possess economic value and are subject to legal transactions. In many jurisdictions, digital assets are only partially regulated¹⁴, most often by regulating

12 Radulović, D. (2020). *Stvarna prava* (Property Rights). University Business Academy in Novi Sad, Faculty of Law for Commerce and Judiciary in Novi Sad, p. 4.

13 Fred, Tommy & Oluwaseun, Iseoluwa. (2025). *The Legal Status of Digital Assets and Cryptocurrencies: Adaptive Regulatory Models*, p. 1.

14 Although most first-world countries allow investment and trading in cryptocurrencies as a form of digital assets, in many countries distrust toward cryptocurrencies persists, and their circulation is explicitly prohibited. Except for the fact that most countries have regulated this field, in most cases there is no uniform approach to definition. For example, the United States has no unified approach regarding the legal nature of digital assets. The classification prevailing in their legislation shows that some tokens are considered securities (The Securities and Exchange Commission – SEC), while others are treated as commodities (Commodity Futures Trading Commission – CFTC). “The Securities and Exchange Commission (SEC) has become the key regulatory body in the US, introducing in 2019 a framework for the analysis of the ‘investment contract’ of digital assets in order to assist in determining which digital assets are considered securities.” See more in: Briefing (September 2023). European Parliamentary Research Service, Non-EU countries’ regulations on crypto-assets and their potential implications for the EU

cryptocurrencies and digital tokens, while broader questions of their legal nature remain unresolved. This uncertainty leads to insecurity concerning the protection of owners' rights, modes of acquisition and transfer, as well as the performance of obligations arising from digital transactions.¹⁵ category, separated from the traditional concept of property. Their specific

For something to be considered an "object" (*res*) in the traditional sense, it is necessary to meet two cumulatively prescribed conditions: (1) physical, that it is a material part of nature under human control; and (2) legal, that a property right exists over it.

The traditional definition of things as tangible objects prevents digital assets from being classified within that category, since digital goods such as electronic documents, digital tokens, or social media profiles lack physical form. At the same time, it is difficult to subsume them entirely under subjective rights, as many digital contents do not constitute rights in the classical legal sense. The Digital Assets Act attempts to provide a definition of digital assets, but its scope is limited primarily to virtual tokens and applies solely within the framework of that statute, without a universal character. This raises the question of whether it is time to redefine and expand the traditional concept of property so as to encompass not only things and rights, but also digital goods as a third category. Such a reform would enable systematic regulation of digital property, either through amendments to existing property law provisions or through the adoption of a special statute precisely governing the status and protection of digital assets.

Regulatory authorities are currently confronted with the dual challenge of simultaneously encouraging technological development and innovation while ensuring adequate protection of the public interest. Financial stability, anti-money laundering policies, and consumer protection are only some of the areas requiring timely regulation. Depending on whether a digital asset serves as a means of payment, an investment vehicle, or an instrument for accessing specific benefits or rights, different legal regimes may apply. However, the legislator does not provide a clear and unambiguous distinction between virtual currencies and digital tokens. Further complexity is introduced by the possibility of hybrid forms of digital assets¹⁵ which combine the characteristics of both categories. Additionally, where digital assets meet the criteria for financial instruments under the Capital Market Act¹⁶ the relevant provisions of that statute are also applicable. All these factors create legal uncertainty in practice, as there is no coherent and consistent legal regime that uniformly regulates different forms of digital assets.

On the basis of the foregoing, it can be concluded that the emergence and development of digital assets represent one of the most significant challenges for the traditional concept of ownership and proprietary relations in general. Certain authors argue that digital assets, as a specific form of property, constitute one of the greatest challenges for contemporary property law.¹⁷ Digital assets, as a new form of intangible property, call into question the classical legal definitions of things and rights, as well as the dichotomy of property into those two exclusive categories. Their legal nature and specificities require a change of approach, both in theoretical and in normative terms.

¹⁵ In such cases, the Act prescribes the application of rules governing virtual currencies

¹⁶ Capital Market Act ("Official Gazette of RS", no. 129/2021

¹⁷ See: Jovanić, T. (2021). Kriptovalute kao novi izazov zaštite potrošača (Cryptocurrencies as a New Challenge to Consumer Protection). Belgrade: Faculty of Law, Union University.

Fragmented and inconsistent legal regimes, such as the attempt of the Digital Assets Act to regulate only particular forms (e.g., virtual currencies and tokens), further contribute to legal uncertainty. The lack of a universal and comprehensive definition, as well as normative inconsistencies in the regulation of different forms of digital assets, impedes the protection of ownership rights and undermines legal certainty in transactions. A particularly pressing issue is the legal nature of digital assets, which varies according to their specific forms and functions whether they serve as a means of payment, investment, or access to a particular service. Yet, “a harmonious legal system, one without contradictions between legal norms, without legal gaps, and without uncertainties, represents an ideal which in practice has never existed anywhere.”¹⁸

The importance of understanding the nature of digital assets lies primarily in their legal implications, which always depend on these general conceptual questions. One recurring issue is the question of which legal action should be used when a third party exerts possession over one's digital asset against the owner's will.¹⁹ Typical disputes in the field of digital assets include:

- disputes not directly arising from trading digital assets on exchange platforms, but related to digital asset transactions, such as contractual disputes where cryptocurrencies are used as a means of payment (so-called “off-chain” disputes, i.e., disputes not generated on the blockchain itself but related to blockchain transactions);
- disputes involving the nullity of smart contracts or the performance of obligations arising from or related to them;
- claims for damages due to breach of contract, brought by investors against platforms for denial of access to trading, as well as claims by platforms against investors for failure to perform payment obligations;
- investor claims arising from misrepresentation of investment risks by platforms, the last two categories representing so-called “on-chain” disputes, i.e., those directly arising on the blockchain platform.²⁰

One of the central questions in this context is the applicability of existing legal norms to the diverse forms of digital assets.

COMPARATIVE LEGAL SOLUTIONS

The dilemma concerning the legal nature of digital assets is not unique to Serbia, but represents a global challenge for other legal systems as well. For example, in the United States there is no uniform approach to the regulation of digital assets. According to the

18 Vukadinović, G. (2014). Principles of the Legal System. Collected Papers of the Faculty of Law, Novi Sad, 48(4), p. 27.

19 Milojević, G., & Tul, D. (2023). Pojam i pravna priroda digitalne imovine (The Concept and Legal Nature of Digital Assets). In XX International Conference “Lawyers’ Days – Prof. Dr. Slavko Carić,” Two Decades of Development of Legal Thought. Faculty of Law for Commerce and Judiciary, University of Business Academy in Novi Sad, p. 156.

20 Lazić, M., & Dragičević, S. (2023). Crypto-assets and Arbitration in Serbia (Kripto-imovina i arbitraža u Srbij). Proceedings of the Kopaonik School of Natural Law, p. 67.

decisions of regulatory authorities, cryptocurrencies are classified either as securities or as commodities, depending on their function. The Securities and Exchange Commission (SEC) established in 2019 a legal framework for the classification of digital assets under the concept of an “investment contract,” yet legal uncertainties remain. For instance, Bitcoin is generally not considered a security, whereas the status of Ether is variable and subject to ongoing regulatory debate. On the other hand, the United States has introduced strict standards of investor protection on digital platforms. Regulatory bodies have, for example, imposed rigorous supervision over crypto-exchanges such as Binance and Kraken, which were required to pay multimillion-dollar fines due to irregularities, while the application Tornado Cash was sanctioned for enabling anonymous transactions that were misused for money laundering.²¹ These examples highlight the complexity of balancing transparency with the protection of users’ privacy, which remains one of the key challenges of contemporary digital asset regulation.

Switzerland, by contrast, is one of the countries with the most developed and precise regulatory framework in this field. The Swiss Financial Market Supervisory Authority (FINMA) classifies crypto-assets according to their purpose and function into three basic categories: payment tokens (cryptocurrencies), utility tokens, and asset tokens. Asset tokens are treated as securities, while utility tokens may fall under regulation if they possess investment characteristics. Switzerland addresses hybrid tokens in the following manner: “if certain tokens exhibit the characteristics of several categories, they are considered hybrid tokens, and their issuer may obtain authorization only once it has satisfied the conditions applicable to all categories into which the hybrid token falls. The least stringent requirements are imposed on issuers of payment tokens.”²² This approach of recognizing distinct forms of digital assets allows precise adaptation to market specificities and provides a useful example for other jurisdictions. In comparison with the Swiss model, the legal framework in the Republic of Serbia remains at the stage of normative formation, characterized by fragmentation and limited regulatory scope. While Switzerland, through the activities of its regulatory authority, establishes a clear and comprehensive classification of digital assets based on their function and legal nature, in Serbia the regulation remains partial and insufficiently aligned with technological realities.

A particularly notable case is El Salvador, the first country in the world to officially recognize Bitcoin as legal tender. The 2021 legislation allows Bitcoin to operate in parallel with the United States dollar as an official currency, thereby integrating digital assets directly into the national financial system.

For the harmonization of the legal regime of digital assets, the establishment of an adequate international regulatory framework is of paramount importance, taking into account the global nature of these assets and the transnational character of the transactions conducted through them. In its early stages, digital assets faced an absence of regulatory mechanisms, which was partly justified by their experimental status and limited market scope. Many states adopted the so-called “wait and see” approach, a strategy of observation and regulatory restraint aimed at avoiding premature or inadequate legislative solutions. While this approach may offer advantages such as avoiding legal errors and maintaining

21 See: Nikolić, L. (2025). Fundamental Problems of the Legal Regulation of Digital Assets – Examples from the US, EU and Serbia (Osnovni problemi pravnog regulisanja digitalne imovine - primeri u SAD, EU i Srbiji). Collected Papers of the Faculty of Law, University of Niš.

22 T. Galović, A. Šestanović, Regulatory Framework of Crypto-assets in the Republic of Croatia and Comparative Experiences of Selected States (Regulatorno uređenje kriptoomovine u Republici Hrvatskoj i komparativna iskustva odabranih država), 2024, p. 97.

flexibility, it also entails serious risks: legal uncertainty, insufficient protection of market participants, and potentially slowing innovation. Confronted with the challenges of classifying digital assets, regulators worldwide increasingly apply a functional approach, focusing on the economic purpose and use of a given asset rather than on its legal form alone. Although numerous international initiatives exist to guide regulatory policy, a global consensus on the legal nature and classification of digital assets has not yet been achieved. Consequently, states continue to develop divergent models, balancing the need to protect markets with the need to encourage technological innovation, thereby further contributing to legal diversity and normative inconsistency at the global level.

CONCLUSION

Digital assets pose a serious challenge to the existing legal framework, particularly in the field of property law. The traditional concept of property, which relies on a binary division between things and rights, fails to encompass the complexity and specificity of digital goods. Their intangible nature, functional diversity, and the emergence of hybrid forms that combine characteristics of different legal categories all demand a thorough reconsideration of the existing regulatory framework. Of particular importance is a clear determination of the legal nature of digital assets, as this directly affects the legal remedies available in cases of infringement of proprietary rights, the methods of regulation and taxation, as well as the possibilities of using digital assets as means of payment or investment. The current framework, relying on instruments such as the Digital Assets Act and the Capital Market Act, lacks coherence, resulting in legal uncertainty in practice. For these reasons, there is an increasing need to expand the traditional concept of property so as to include digital goods as a third, independent category, separate from things and rights. Such an approach would create conditions for the systematic and comprehensive regulation of digital assets, whether through amendments to existing property law provisions or through the adoption of a special statute that would clearly define the status, protection, and legal consequences associated with digital assets. Without such a reform, there is a significant risk that legal practice will lag behind technological development, thereby undermining legal certainty, hindering investment, and reducing confidence in digital markets.



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UTICAJ DIGITALNE IMOVINE NA TRADICIONALNI KONCEPT STVARNIH PRAVA

Apstrakt:

Pojavom digitalne imovine dolazi do potrebe za redefinisanjem tradicionalnog koncepta prava svojine. Budući da digitalna imovina egzistira isključivo u virtuelnom obliku, ona se ne uklapa u klasičnu definiciju stvari u stvarnopravnom smislu, čime se otvaraju brojna pitanja u vezi sa sticanjem, državinom i zaštitom svojinskih prava. Odsustvo jasnog zakonodavnog okvira i nedovoljno precizna terminologija generišu pravnu nesigurnost, dok dinamičan razvoj blockchain tehnologije i decentralizovanih finansijskih instrumenata dodatno naglašava potrebu za prilagođavanjem postojećih pravnih instituta novim oblicima digitalne imovine. Predmet ovog rada jeste analiza pravne prirode digitalne imovine i njenog odnosa prema savremenim svojinskopravnim kategorijama, sa ciljem da se ukaže na nužnost redefinisanja pojma svojine u digitalnom kontekstu radi očuvanja pravne sigurnosti i adekvatne zaštite učesnika na tržištu

Ključne reči: *digitalna imovina, pravo svojine,*

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JUSTICE IN THE DIGITAL SOCIETY: LEGAL FRAMEWORKS FOR ADDRESSING ETHICAL CHALLENGES IN CYBERSECURITY

Abstract:

Digital society is the result of technological progress, but in addition to the numerous advantages it offers, it also represents a major security challenge, primarily in cyberspace. In addition to being a challenge for the digital society itself, cybersecurity faces ethical challenges that accompany efforts to reconcile surveillance with the right to privacy, accountability for cyber incidents, and the protection of critical infrastructure. Addressing these challenges requires comprehensive and clear legal frameworks. This paper explores how legal frameworks can contribute to justice in the context of addressing these challenges, focusing on the ethical and social implications. The goal of the paper is to analyze existing international and national legal solutions to identify their shortcomings and, according to their characteristics, propose improvements that would enable better protection for individuals and societies in the digital environment. To achieve this goal, including the evaluation of the effectiveness of legal responses, a methodological framework was applied that combines a theoretical and practical approach, which is based on a qualitative analysis of the most important legal documents and existing references on ethics and cybersecurity policy, as well as practical analyses of real examples of cyber incidents. The expected outcome is recommendations for the development of legal frameworks based on equity – establishing a balance between security needs and ethical principles. Such a balance would improve citizens' trust in digital systems and, at the same time, strengthen the security of the digital society.

Keywords: *privacy, liability, law, security challenge, critical infrastructure*

1. INTRODUCTION

The digital space is no longer just a technological innovation – it has become an indispensable segment of modern society, where key processes of communication, business

and information management take place. However, its development does not always follow a proportional adaptation of legal and ethical norms, leading to growing challenges in the field of privacy, surveillance and legal liability for cyber incidents. This paper investigates precisely these legal and ethical dilemmas, analyzing how different regulatory approaches are reflected at the global, European and national levels.

The methodological procedure includes the analysis of legal sources, international norms and sectoral regulations, while considering concrete examples from practice that point to the limitations of existing legal solutions. The primary goal of the research is to determine the key challenges in the regulation of cybersecurity and the identification of legal mechanisms that can contribute to strengthening the protection of data and infrastructure.

Research results confirm that the legal system fails to keep pace with technological development, while political and social differences make it difficult to harmonize regulations internationally. The analysis shows that GDPR¹ and NIS2² are effective models of data protection and cybersecurity in the EU, but their application outside the Union depends on the institutional capacities of individual states. The research indicates that Serbia, despite striving towards European integration, not only has to adapt its laws, but also improve their practical application. The observed problems, such as mild punitive measures and slow administrative reactions, point to the need to strengthen legal mechanisms, transparent data management and investments in digital infrastructure, in order to ensure effective cybersecurity.

2. CYBERSECURITY AND ETHICAL CHALLENGES

Cyber security is a necessary response for users of the digital space to numerous dangers, embodied to the greatest extent through data theft, system hacking and manipulation of information flows. Establishing a system of preventive and reactive measures against cyber threats has grown into a functional imperative of digital society.³ The challenges in the construction and functioning of such a system are not only of a technical but also of a legal nature, considering that it is necessary to establish a balance between the protection of the individual and the need for surveillance, as well as to assume responsibility for cyber incidents and the protection of critical infrastructure. For a deeper investigation of legal frameworks in further work, it is necessary to first consider the challenges related to privacy, responsibility and infrastructure protection. In the following, we analyze the key ethical dilemmas that always arise when talking about cybersecurity, and through this short analysis we indicate the legal framework for considering these challenges. In the analysis, we rely on international and national regulations, as well as real practices, including ethical considerations, in an effort to highlight the need for just solutions that can reconcile security needs with the principles of justice and fairness.

1 European Parliament and Council. (2016). *Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*. (2025, May 30) Retrieved from: <https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng>

2 European Parliament and Council. (2022). *Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union*. (2025, May 29) Retrieved from: <https://eur-lex.europa.eu/eli/dir/2022/2555/oj/eng>

3 Zirojević, M., & Ivanović, Z. (2022). *Cyber Law – Serbia*. Belgrade: Institute of Comparative Law.

2.1. Privacy and Surveillance in Digital Space

Digital society implies the inclusion of numerous digital technologies in the daily activities of citizens. Citizens themselves individually, and especially state institutions and organizations, as well as numerous business entities, undertake various security measures in order to counter numerous cyber threats in a timely manner. From the point of view of security, these measures are completely justified and necessary, but they are often not in balance with citizens' right to privacy. This especially applies to the increasingly common practice of mass surveillance, not only by state elements, which is why the question is often raised where the limits of ethical and legal justification of such activities are.

Privacy and Surveillance Legal Framework

Although data protection laws have developed significantly in recent times, ethical issues, including liability issues, are still present, which in some ways is not easy to avoid given the dynamic development of digital technologies. While in the US these laws are fragmented with large powers of government authorities to access private data,⁴ the General Data Protection Regulation (GDPR) in Europe sets standards that everyone must adhere to in order to preserve the protection of citizens' data.⁵ For example, Meta was fined 405 million euros in 2022 for breaching the GDPR, which points to strict European standards.⁶

Conflict: privacy or security?

Given the variety and sophistication of security challenges in the digital environment, which are practically impossible to avoid, surveillance methods that include monitoring of mass communications and biometric identification seem truly justified. However, these methods are not harmless, because they are applied by humans, which automatically includes the risk of abuse. The PRISM program, revealed in 2013, shows how mass surveillance by government agencies violates citizens' privacy, prompting ethical and legal criticism.⁷ Transparency and accountability are the main issues, the answers to which are expected to enable the creation of unambiguous legal rules that regulate surveillance without jeopardizing the basic rights and freedoms of citizens.

A Comparative Overview of Global Strategies

While in the EU privacy rights are more tightly controlled, in the US there is a national security approach, where government agencies have the power to collect data to stop cyber threats.⁸ China and Russia have extensive digital surveillance policies, whose legal systems greatly restrict personal rights. Thus, China's 2017 Cyber Security Law

4 For example: California Legislature. (2020). *California Consumer Privacy Act*, Cal. Civ. Code § 1798.100. (2025, May 29) Retrieved from: https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=3.&title=1.81.5&part=4.&chapter=&article=

5 European Parliament and Council. (2016). *Regulation (EU) 2016/679*, op. cit.

6 Data Protection Commission. (2022). *Data Protection Commission announces decision in Instagram Inquiry*. (2025, May 30) Retrieved from: <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-instagram-inquiry>

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requires data localization, limiting privacy in favor of state control.⁹ Ultimately, with well-defined systems of control, accountability, and openness in the enforcement of surveillance programs, the legislative response to these issues should ensure a balance between cybersecurity and privacy protection.

2.2. Liability for Cyber Incidents

Given that digital infrastructure is at the core of modern society, increasingly frequent cyber incidents require us to re-examine who and how bears responsibility – legal as well as ethical. Since cyber space is characterized by anonymity and cross-border, the process of determining responsibility is further complicated. Individuals, organizations and countries face numerous challenges in trying to find an effective mechanism to respond to such threats. Therefore, it is crucial to establish a balance between valid legal norms and ethical principles, in order to ensure adequate protection of victims and preserve justice in the digital environment.¹⁰

Legal Framework of Liability

Legal systems largely recognize cybercrime as a serious threat, defining forms of liability through various legal mechanisms. However, their application often remains limited by the complexity of cyberspace – especially when it comes to attacks involving multiple jurisdictions or actors with political protections. The Budapest Convention on Cybercrime (2001) encourages international cooperation and harmonization of legal solutions, but its effectiveness is questioned when incidents involve state entities.¹¹ At the national level, an example is the Law on Information Security of the Republic of Serbia (2016), which, among other things, stipulates the obligation to report on security incidents.¹² However, in practice, mechanisms for rapid response and cross-border cooperation remain underdeveloped, which significantly reduces its applicability in complex cases.¹³ A good indicator of these shortcomings is the case of the attack on Equifax (2017), in which more than 147 million user accounts were compromised. Although the company was fined \$575 million, the extent of justice for affected users remains disputed.¹⁴

9 Standing Committee of the National People's Congress. (2017). *Cybersecurity Law of the People's Republic of China*. (2025, May 30) Retrieved from: <https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/>

10 Marković, D. M., & Zirojević, M. (2024). Izazovi u regulisanju i identifikaciji *deepfake* sadržaja [Challenges in regulating and identifying deepfake content]. U M. Počuča (Ur.), *Odgovori pravne nauke na izazove savremenog društva – zbornik radova sa naučnog skupa*. (str. 679–692). Novi Sad: Univerzitet Privredna akademija. DOI: 10.5937/PDSC24679M.

11 Council of Europe. (2001). *Convention on Cybercrime (ETS No. 185)*. (2025, May 29) Retrieved from: <https://www.coe.int/en/web/cybercrime/the-budapest-convention>

12 Zakon o informacionoj bezbednosti [Law on Information Security], *Službeni glasnik RS*, br. 6/2016, 94/2017 i 77/2019, Art. 15.

13 European Commission. (2023). *Serbia 2023 Report (SWD(2023) 695 final)*. (2025, June 1) Retrieved from: https://enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf

14 Federal Trade Commission. (2024). Equifax Data Breach Settlement. (2025, June 2) Retrieved from: <https://www.ftc.gov/enforcement/refunds/equifax-data-breach-settlement>

Ethical Dimension

Responsibility in cyberspace cannot be viewed exclusively through a legal lens. The ethical perspective introduces additional requirements that are not only limited to punishing perpetrators, but also include proactive prevention of harm, as well as respect for the fundamental values of digital justice. In a world where cyber-attacks are becoming more sophisticated and the lines of liability increasingly blurred, ethics are becoming crucial to fill the gaps that the law still fails to cover.¹⁵

One striking example is the 2017 NotPetya attack, which led to billions of dollars in economic damage worldwide, including the financial, logistics and healthcare sectors. Although actors connected to state structures are responsible for the attack, legal responsibility has never been formally established, mostly due to complex geopolitical relations and the absence of universal mechanisms for sanctioning states in cyberspace.¹⁶

The Way to Just Solutions

Such cases show that ethical responsibility must go beyond the boundaries of the law. Organizations that manage large amounts of user data should adopt approaches based on the principle of “social responsibility”, even when formal rules do not require it. Also, states should establish rules of behavior in cyberspace that will be in line with international norms, with mutual respect for digital sovereignty.¹⁷ Otherwise, we risk that cybersecurity remains an unregulated field where the interests of power are placed above the interests of justice.¹⁸

2.3. Protection of Critical Infrastructure

Critical infrastructure – such as energy grids, financial systems, healthcare and transportation – is becoming increasingly reliant on digital technologies, making it particularly vulnerable to cyber threats. Cyber security in this domain goes beyond technical issues and penetrates into the area of protection of basic social functions, thus acquiring both legal and ethical dimensions.

In many countries, the protection of these systems is recognized as a strategic priority, but approaches vary. The European Union established the NIS Directive (2016), which obliges operators of key services to meet security standards and report incidents.¹⁹ In Serbia, a similar principle was introduced through the Law on Information Security, but its implementation still depends on the capacity of individual sectors and technical maturity.²⁰

On the other hand, numerous cyberattacks on infrastructure – such as the incident in the Ukrainian power system (2015) or the attack on the Colonial Pipeline in

15 Marković, D. M., & Zirojević, M., *op. cit.*

16 Greenberg, A. (2019). *Sandworm: A New Era of Cyberwar and the Hunt for the Kremlin's Most Dangerous Hackers*. New York: Doubleday, p. 204.

17 Council of Europe, *op. cit.*

18 Marković, D. M., & Zirojević, M., *op. cit.*

19 European Parliament and Council. (2016). *Directive (EU) 2016/1148 on measures for a high common level of security of network and information systems across the Union*. (2025, June 1) Retrieved from: <https://eur-lex.europa.eu/eli/dir/2016/1148/oj/eng>

20 Zakon o informacionoj bezbednosti, *op. cit.*

the USA (2021) – show that legal regulation often comes after the fact, as a reaction to the consequences.²¹ In such an environment, the ethical aspect plays a key role: organizations would have to act not only in accordance with the law, but also in the spirit of social responsibility, especially when it comes to the safety of citizens.

That is why it is necessary to develop models of cooperation between the state, the private sector and civil society, which will enable not only adequate protection of the infrastructure, but also transparency, trust and resilience of the system as a whole.

3. LEGAL FRAMEWORK AND REGULATIONS

The digital society faces challenges that go beyond the purely technical aspects of cybersecurity, requiring clear legal frameworks that can balance the protection of individuals with broader security interests. As shown in previous analyses, privacy, accountability and protection of critical infrastructure represent key dimensions of these challenges, but without legal support, ethical dilemmas remain unresolved.

An effective response to cyber threats requires a balance between security measures and citizens' rights, but legal systems often lag behind in adapting to these challenges, especially due to the complex nature of the digital space. This section discusses international and national regulations, with special reference to the position of Serbia in relation to European legal standards. Through the analysis of key norms, a comparative review of legislative solutions and the identification of legal gaps, we will point out the possibilities of improving legal protection in the digital environment.

Legal regulation in cyberspace is expected to balance security and respect for the basic rights of citizens. If the norms were not clear and applicable, ethical principles would be just a dead letter on paper. This analysis seeks to point out concrete legal steps that can contribute to shaping a safer digital society, in which justice is administered through laws adapted to cybersecurity challenges.

3.1. International legal standards

International legal regulation lays the foundation for cybersecurity, but often faces the challenge of adapting to accelerated technological progress. The European GDPR from 2018 brings strict data protection norms, obliging organizations to transparent and responsible handling of users' personal information. The €405 million fine against Meta in 2022 for privacy violations shows the power of the GDPR, but also the complexity of its global application.²²

On the other hand, the Budapest Convention²³ seeks to improve international cooperation in the fight against cybercrime, including the protection of critical

21 Easterly, J., & Fanning, T. (2023, May 7). *The attack on Colonial Pipeline: What we've learned & What we've done over the past two years*. Cybersecurity and Infrastructure Security Agency (CISA). (2025, June 2) Retrieved from: <https://www.cisa.gov/news-events/news/attack-colonial-pipeline-what-weve-learned-what-weve-done-over-past-two-years>

22 Data Protection Commission, *op. cit.*

23 Council of Europe, *op. cit.*

infrastructure, but it also has its shortcomings, which is not surprising considering that a lot has changed in the digital world for a quarter of a century of its existence. Even without those changes, it can be objected to this convention that it does not fully cover ethical dilemmas, such as mass surveillance, which still remains legally problematic. The NIS2 Directive (2022) is a modernized legal regulator of activities in cyberspace and, accordingly, requires EU member states to undertake the necessary activities in order to each improve cybersecurity in the most important sectors, the most important of which are health and energy industry.²⁴ However, it is precisely in that implementation that the problem arises, because the member states have their own challenges in adapting these norms to their legal system.

In practice, there are numerous examples that show that legal frameworks do not always succeed in establishing a balance between security and ethical norms. Snowden revealed to us that the PRISM program (2013) encroached on people's privacy, both in breadth and in depth - thus, not taking into account the right to privacy in the slightest.²⁵ If we compare the compliance of legal and ethical standards in other similar societies - the EU and the USA - we also see a discrepancy that makes it difficult to harmonize global standards, because while the GDPR protects citizens' data, the American Patriot Act (2001) enables broad surveillance, often without judicial approval.²⁶ In another part of the world, in China, which is a globally extremely important political factor in the international order, the challenge is the Cyber Security Law (2017), which mandates the localization of data and limits the digital rights of users.²⁷

These examples show how the inconsistency of safety with ethical norms manifests itself in practice, that is, in real situations. The creation of legal regulations is not simple, but requires a very good understanding of the characteristics of cyberspace in order to simultaneously protect citizens from abuses and ensure a balance between security and freedom. It is clear that in order to fulfill that goal - better regulation of cyberspace - it is necessary to improve international cooperation, and it could start with the reform of the Budapest Convention, which requires political will and clear ethical standards.

3.2. Legal Frameworks of Cybersecurity: Challenges and Improvement in Serbia and Globally

Serbia is a candidate for EU membership, and this imposes numerous obligations on it to comply with EU legislation, and the slowness of this process shows that there are numerous challenges for Serbia on that path. When drafting the Law on the Protection of Personal Data,²⁸ care was taken to be compliant with the GDPR - not in the sense of rewriting all GDPR provisions, but in terms of emphasizing the necessity of achieving transparency

24 European Parliament and Council. (2022), *op. cit.*

25 Greenwald, G. *op. cit.*

26 American Civil Liberties Union. (2001). *Surveillance under the USA/PATRIOT Act*. (2025, May 29) Retrieved from: <https://www.aclu.org/documents/surveillance-under-usapatriot-act>

27 Stanford DigiChina. (2017). *Translation: Cybersecurity Law of the People's Republic of China (Effective June 1, 2017)*. (2025, May 29) Retrieved from: <https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/>

28 Zakon o zaštiti podataka o ličnosti [Law on the Protection of Personal Data], *Sl. glasnik RS*, br. 87/2018.

and consent for data processing, including the “right to be forgotten”.²⁹ The effectiveness of the law is always demonstrated by its applicability in practice and, accordingly, by the influence on the behavior of those to whom the provisions are applied. Thus, in this case, it can be remarked that this Serbian law does not have a strong deterrent effect like the GDPR, not only because it does not match the GDPR completely, but also because of much lighter penalties than in the EU - while the GDPR allows fines of up to 20 million euros, the Serbian law foresees much lower amounts. When it comes to the Law on Information Security, there are also problems with its effectiveness, but these problems are of a different nature – the lack of resources and expertise for risk management, which hinders operators of critical infrastructures in fulfilling the obligations imposed by this law.³⁰ This is especially evident in sectors such as healthcare, where cyber attacks are becoming more frequent.

The problem that Serbia has not solved is the development of mechanisms for quick response, which the NIS2 Directive ordered as a strict obligation for EU member states, where both obligations are especially emphasized for the most sensitive strategic sectors, such as health and energy industry. The importance of readiness to provide an effective legal response to cyber threats was demonstrated in 2021 by the example of attacks on Irish hospitals.³¹ Serbia has not recorded such incidents, but that does not mean that they cannot happen in the future. On the contrary, insufficient readiness to respond is a vulnerability that itself attracts a potential attack. Jurisdiction is an additional challenge, as cyber threats cross borders and the Budapest Convention does not always ensure cooperation, as in the case of the 2017 NotPetya attack, where responsibility was not established.³² Attribution is also a problem, as anonymity makes it difficult to identify perpetrators, leaving victims without justice. In order for Serbia to be able to meet such high standards of the EU, it would have to improve its ability to coordinate, but also allocate significant financial resources for these needs.

There are also different challenges in other parts of the world, which arise from their specificities, which is why there are different legal approaches in relation to the EU. For example, the USA does not have a single, comprehensive law on the federal level like the GDPR in the EU, which is why legal fragmentation occurs in this area – individual American states pass their own laws, which often differ from the laws of other states, and even from federal regulations.³³ China, on the other hand, as we have already stated, uses the Cyber Security Law (2017) to strictly control data and citizens. But these are other parts of the world, other continents and different positions of those countries in the international order – far stronger than Serbia has. In order to improve, Serbia needs to increase penalties and allocate resources, and globally, stronger cooperation and ethical principles, such as transparency, are needed to prevent abuses such as mass surveillance or deepfakes.

29 The right to require internet search engine operators to remove links to certain content on all domains used by the search engine. See: Mladenov, M., & Stojšić Dabetić, J. (2021). *Ažuriranje „prava da se bude zaboravljen“ kao principa zaštite podataka u Evropskoj uniji* [An update on the right to be forgotten as a principle of personal data protection in European union]. *Kultura polisa*, 18(44), 99–109, DOI: 10.51738/Kpolisa2021.18.lr.2.04.

30 Zakon o informacionoj bezbednosti, *op. cit.*

31 Tidy, J. (2021, May 21). *Irish cyber-attack: Hackers bail out Irish health service for free*. BBC News. (2025, June 2) Retrieved from: <https://www.bbc.com/news/world-europe-57197688>

32 Schmitt, M., & Biller, J. (2017). *The NotPetya cyber operation as a case study of international law*. EJIL: Talk! (2025, June 2) Retrieved from: <https://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/>

33 DLA Piper. (2024). *Data protection laws in the United States*. (2025, June 2) Retrieved from: <https://www.dlapiperdataprotection.com/index.html?t=law&c=US>

Although the legal framework for the protection of personal data in Serbia exists, its implementation remains full of challenges. Criminal law data protection is insufficiently developed, and prosecution offices rarely process reports of violations, which leaves citizens without adequate protection.³⁴ In the health and education sectors, transparency of data management is problematic, particularly through systems such as the COVID-19 IS and JISP. A special risk is brought by mass video surveillance, the regulation of which is not adapted to the technological standards of privacy protection.³⁵ On the other hand, the new Law on Social Cards introduces broad data collection, but without clear guarantees of user protection. Unregulated international data transfers further complicate the situation, especially after the cancellation of the Privacy Shield mechanism for data transfers to the US.³⁶ This repeal occurred in July 2020 because the European Court of Justice found that the Privacy Shield does not provide sufficient protection against American surveillance of the data of European citizens.³⁷ In order to ensure a satisfactory level of data security, it was necessary to switch to alternative mechanisms, such as standard contractual clauses or special agreements between companies,³⁸ until 2023, when the European Commission adopted a new framework – the EU-US Data Privacy Framework.³⁹ Serbia is not a member of the EU and is not directly subject to the decisions of the European Commission, so it is not part of that legal framework, so according to the decision of the Government of Serbia, the free transfer of data to the USA is allowed, as a country with an “adequate level of protection”.⁴⁰ If it wants to be recognized as a country that adopts the highest standards in the field of cybersecurity, those required by the legal framework of the EU, Serbia must improve its regulations with European standards, not only in terms of protection but also in terms of penalties and resources. Justice in a digital society requires that citizens be protected from cyber threats, and from the point of view of citizens’ right to privacy and excessive surveillance, it is a kind of cyber threat, and this problem must also be brought into the appropriate legal and ethical framework. Alignment with the GDPR and NIS2 is an obligation that Serbia itself has accepted, and certainly it can help, but in order for the alignment to be not only formal, but also practical in terms of effective application of the law, public education is also necessary.

34 Marković, D. M., & Marković, D. (2025). Cybercrime and law – managing challenges and prospects in the digital age. *Pravo – teorija i praksa*, 42(2), 49–61. <https://doi.org/10.5937/ptp2502049M>

35 Domazet, S., Marković, D. M., & Skakavac, T. (2024). Privacy under threat – The intersection of IoT and mass surveillance. *Pravo – teorija i praksa*, 41(3), 109–124. DOI: 10.5937/ptp2403109D.

36 Partners Serbia. (2021). *Privacy and personal data protection in Serbia: An analysis of selected sectoral regulations and their implementation*. Partners for Democratic Change Serbia. (2025, June 2) Retrieved from: https://partners-serbia.org/public/documents/Privacy_and_Personal_Data_Protection_in_Serbia_An_Analysis_of_Selected_Sectoral_Regulations_and_Their_Implementation_PS.pdf

37 European Commission. (2023). *EU-US data transfers*. European Commission. (2025, June 2) Retrieved from: https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en

38 Schoenherr. (2023). *Rethinking EU-US personal data transfers and their effect on transfers from Serbia*. Schoenherr. (2025, June 2) Retrieved from: <https://www.schoenherr.eu/content/rethinking-eu-us-personal-data-transfers-and-their-effect-on-transfers-from-serbia/>

39 McGinnis, B. J., & Blaney, M. S. (2023). *European Commission adopts adequacy decision for EU-U.S. Data Privacy Framework*. National Law Review. (2025, June 2) Retrieved from: <https://natlawreview.com/article/european-commission-adopts-adequacy-decision-eu-us-data-privacy-framework>

40 Schoenherr, *op. cit.*

4. CONCLUSION

Cyberspace is a modern reality, which attracts the attention of outsiders not only as a technological phenomenon, but also as a legal and ethical challenge. The issue of privacy, surveillance and responsibility for cyber incidents is considered in many legal systems, and practice has already shown that the establishment of international standards is a prerequisite for obtaining quality answers to these questions. With regulations like GDPR and NIS2, the EU seems to have set very successful standards that help not only EU members but also countries that aspire to EU integration, such as Serbia, to try to answer not all the challenges brought by activities in cyberspace.

Globally, the diversity of legal approaches represents a difficulty on the way to establishing universal international standards, and the nebulousness of cyberspace borders can be effectively overcome only by harmonizing legal standards at the international level. This seems to be an impossible undertaking for now, because the creation of legal approaches is conditioned by social and political differences, which are mostly reflected through the prism of the main players on the international political scene – the EU insists on privacy, the USA supports broad surveillance with its Patriot Act, and China legalizes the control of digital space. In order to overcome such differences and establish uniform standards, reforms such as the modernization of the Budapest Convention are necessary.

Not only because it strives for European integration, Serbia must improve its approaches to data protection and cybersecurity, because there are numerous problems that need to be overcome – from mild punitive measures to slow adaptation to new requirements. Serbia must make an effort to harmonize its regulations in this area with European norms, and more than that – to improve the practical application of the legislation. In order to achieve this, it is necessary to strengthen resources and capacities for a faster response to cyber threats, increase transparency in data management, and all of this requires greater investments in the digital space. These investments do not only mean financial resources, although everything else depends on them – to build a sustainable cybersecurity system, it is necessary to invest in the education of citizens and the development of ethical responsibility of institutions. With the achievement of these goals, conditions will be created for the achievement of the main goal - effective cybersecurity built on a compromise between the needs to protect the technological infrastructure and the basic rights of individuals.



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PRAVDA U DIGITALNOM DRUŠTVU: PRAVNI OKVIRI ZA ADRESIRANJE ETIČKIH IZAZOVA U SAJBER BEZBEDNOSTI

Apstrakt:

Digitalno društvo je rezultat tehnološkog progressa, ali pored brojnih prednosti koje nudi predstavlja i veliki bezbednosni izazov, pre svega u kibernetičkom prostoru. Pored toga što i sama predstavlja izazov za digitalno društvo, sajber bezbednost se suočava sa etičkim izazovima koji prate napore za usklađivanje nadzora s pravom na privatnost, odgovornost za kibernetičke incidente i zaštitu kritične infrastrukture. Rešavanje ovih izazova zahteva sveobuhvatne i jasne pravne okvire. Ovaj rad istražuje na koji način pravni okviri mogu doprineti pravdi u kontekstu rešavanja ovih izazova, pri čemu težiste stavlja na etičke i društvene implikacije. Cilj rada je da se analizom postojećih međunarodnih i nacionalnih pravnih rešenja uoče njihovi nedostaci i, shodno njihovim obeležjima, predlože poboljšanja koja bi omogućila bolju zaštitu pojedinaca i društva u digitalnom okruženju. Za ostvarenje ovog cilja, uključujući i ocenu efikasnosti pravnih odgovora, primenjen je metodološki okvir koji kombinuje teorijski i praktični pristup, koji su zasnovani na kvalitativnoj analizi najvažnijih pravnih dokumenata i postojećih referenci o etici i politici sajber bezbednosti, kao i na praktičnim analizama stvarnih primera sajber incidenata. Očekivani ishod su preporuke za razvoj pravnih okvira na temeljima pravičnosti – uspostavljanju balansa između bezbednosnih potreba i etičkih principa. Ovakvim balansom bi se unapredilo poverenje građana u digitalne sisteme, a ujedno i ojačala bezbednost digitalnog društva.

Ključne reči: *privatnost, odgovornost, pravo, bezbednosni izazov, kritična infrastruktura*

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SOCIAL INEQUALITY AS REFLECTED THROUGH ECONOMIC INEQUALITY INDICATORS: A COMPARATIVE ANALYSIS OF ECONOMIC INEQUALITIES OF SERBIA WITH EU COUNTRIES

Abstract:

An ideal society is characterized by the equitable treatment of all individuals, wherein personal attributes such as gender, ethnicity, socioeconomic status, or other differences do not determine one's access to rights, opportunities, and resources. In this context, social justice represents a fundamental normative objective of any modern society, while social inequality serves as a measurable manifestation of disparities in individuals' actual access to resources, rights, and opportunities for advancement. Social inequality is assessed through a broad range of quantitative and qualitative indicators across various dimensions, including but not limited to economic status, education, healthcare access, political participation, and legal equity. This paper is specifically focused on the domain of economic inequality, examining core indicators such as income distribution disparities, poverty risk and social exclusion. Special emphasis is placed on the comparative analysis of the Gini coefficient as a principal measure of income inequality, with a focus on Serbia's positioning relative to countries in European Union. By analyzing key economic inequality metrics, we are able to construct an empirical representation of the current social landscape. These insights provide a foundational basis for evidence-based policymaking, legal reform, and the formulation of comprehensive strategies aimed at promoting social inclusion, reducing structural disparities, and advancing the overarching objective of a more equitable and just society.

Key words: *social justice, social inequality, economic inequality, Gini coefficient*

INTRODUCTION

Social inequality is a significantly broader concept than economic inequality, manifesting through the existence of classes and strata within a society. These social divisions are differentiated not only by the ownership and control of the means of production and other forms

of economic capital, but also by varying degrees of social power, prestige, and even conflicting interests, which may lead to structural social conflicts.¹ Social inequality often results in social exclusion. Social exclusion is defined as a process in which individuals are either born into or pushed to the margins of society and are thereby prevented from participating in social, cultural, economic, and political life.² Groups experiencing social exclusion are typically individuals who are prevented from full participation in society due to poverty or a lack of essential skills and lifelong learning opportunities, or as a result of discrimination. This exclusion distances them from employment, income, and educational opportunities, as well as from social networks, community frameworks, and collective activities. Such individuals often have limited access to power and decision-making bodies, leaving them feeling powerless and incapable of exercising control over decisions that affect their daily lives.³

Social exclusion also entails economic exclusion, and as Stiglitz emphasizes, inequality is costly, with its price reflected in weaker economies, lower growth, and greater instability.⁴ However, the consequences of social exclusion go far beyond economics, affecting both the well-being of individuals (in terms of physical and mental health and life expectancy) and societal well-being more broadly.⁵

INDICATORS OF ECONOMIC INEQUALITY

One of the most dominant contradictions, and simultaneously one of the greatest challenges of modern economies and societies, is the pronounced inequality in the distribution of material wealth and income.⁶ The waves of decreasing inequality in the 20th century “were the product of wartime chaos and the political and economic upheavals caused by wars, not the outcome of gradual, consensual, and peaceful development. In the 20th century, it was war that erased the past—not peaceful democracy and economic rationality.”⁷

1 For further details on this issue, see Babovic, M. (Ed.). (2011). *Socijalno ukljućivanje: Koncepti, stanje, politike*. Beograd: SeConS – Grupa za razvojnu inicijativu; Institut za sociološka istraživanja Filozofskog fakulteta u Beogradu; Dosije studio, ISBN 978-86-913917-2-0 and Vukovic, D., & Babovic, M. (2022). *U lavirintu siromaštva i socijalne iskljućenosti: Socijalna politika i država blagostanja u Srbiji*. Beograd: Dosije studio, ISBN 978-86-6047-396-9

2 Siersbaek, R., O'Donnell, C., Parker, S., Ford, J., Burke, S., & Ní Cheallaigh, C. (2023). Social exclusion and its impact on health over the life course: A realist review protocol. *HRB Open Research*, 6, 34. (Retrieved, Jun , 2025) from: <https://doi.org/10.12688/hrbopenres.13746.1>

3 Vukovic, D., & Babovic, M. (2022). *U lavirintu siromaštva i socijalne iskljućenosti: Socijalna politika i država blagostanja u Srbiji*. Beograd: Dosije studio, ISBN 978-86-6047-396-9, p. 39

4 For a detailed discussion, see Stiglitz, J. E. (2010). *Freefall: America, Free Markets, and the Sinking of the World Economy*. New York, NY: W.W. Norton & Company.

5 For further details on this issue, see Stiglitz, J. E., Sen, A., & Fitoussi, J.-P. (2009). *Report by the Commission on the Measurement of Economic Performance and Social Progress*. Paris: CMEPSP, Retrieved (May, 2025) from https://www.researchgate.net/publication/239807212_The_Measurement_of_Economic_Performance_and_Social_Progress_Revisited_The_Measurement_of_Economic_Performance_and_Social_Progress_Revisited_Commission_on_the_Measurement_of_Economic_Performance_and_So#fullTextFileContent and OECD report OECD (2011), *How's Life?: Measuring well-being*, OECD Publishing. Retrieved (Jun 2025) from <http://dx.doi.org/10.1787/9789264121164-en>

6 For a detailed discussion, see Lekovic, V. (2020). Institucionalna determinisanost ekonomskih i društvenih protivrečnosti u Republici Srbiji. In *Institucionalne promene kao determinanta privrednog razvoja Republike Srbije* (pp. 5–21). Kragujevac: Ekonomski fakultet, Univerzitet u Kragujevcu. ISBN 978-86-6091-110-2

7 Piketty, T. (2015). *Kapital u XXI veku*. Novi Sad: Akademska knjiga. ISBN 978-86-6263-075-9 p.296

The problem of inequality has not disappeared with economic development, technological progress, or global economic interconnectedness. On the contrary, inequality remains one of the most pressing issues of the 21st century. Numerous empirical studies have confirmed a mutual relationship between economic inequality and economic growth and development, indicating that the mode of income distribution is a key factor in achieving sustainable growth and development.⁸

Economic inequality is most commonly measured by the Gini coefficient.⁹ The Gini coefficient measures income distribution inequality within a society, where a value of 0 represents perfect equality and a value of 1 (alternatively expressed from 1 to 100) denotes perfect inequality. A coefficient of 0 would mean that income is distributed equally among all individuals, while a value of 1 (or 100) would imply that a single individual receives all income in the country, reflecting absolute inequality. It is important to understand that income encompasses more than just wages. As Milanovic explains, income data include wages, self-employment income, capital income (interest, dividends, rental income), income from production for own consumption (which is widespread in poorer and less monetized economies where households grow food for their own needs), social transfers (such as government pensions and employment benefits), and income deductions such as direct taxes.¹⁰ Income distribution data are obtained through national household surveys. Households are selected randomly, and data are collected on demographics, location, income sources and amounts, and consumption patterns. There is no universal standard for the sample size, and the number of households surveyed varies across countries. For example, Milanovic notes that the household survey in India covers 100,000 households (approximately half a million people), while in the United States it includes around 200,000 individuals.¹¹ In Serbia, for instance, the 2024 survey included a sample of 6,168 households, of which 5,527 were interviewed, encompassing a total of 14,128 individuals aged 16 and over.¹² As described earlier, income includes various sources and types of earnings, while consumption refers to the use of goods and services that directly satisfy the needs of the household—i.e., goods and services that had to be paid for within the reference period.

In addition to the Gini coefficient, economic inequality is frequently measured

8 For a detailed discussion, see Lekovic, V. (2020). Institucionalna determinisanost ekonomskih i društvenih protivrečnosti u Republici Srbiji. In *Institucionalne promene kao determinanta privrednog razvoja Republike Srbije* (pp. 5–21). Kragujevac: Ekonomski fakultet, Univerzitet u Kragujevcu. ISBN 978-86-6091-110-2

9 The Gini coefficient was developed by Corrado Gini, an Italian statistician and sociologist, in 1909, and was fully elaborated in his 1912 paper titled “*Variability and Mutability*” (*Variabilità e Mutabilità*). This coefficient made it possible to quantitatively measure inequality in the distribution of income and wealth. Gini’s concept was built upon the earlier idea of the Lorenz curve, devised in 1905 by American economist Max Lorenz. The Lorenz curve plots the cumulative percentage of the population (from the poorest to the richest) on the X-axis, and the cumulative percentage of income that this population holds on the Y-axis. Initially, the Gini coefficient was primarily used in academic circles and statistical institutions. However, after World War II, its use gradually expanded beyond academia. Since the 1990s, it has been widely adopted by major international organizations, including the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), the World Bank, and the United Nations Development Program (UNDP).

10 Milanovic, B. (2016). *Globalna nejednakost: Novi pristup za doba globalizacije*. Novi Sad: Akademska knjiga. ISBN 978-86-6263-136-7 p. 10

11 Ibid, p.11-13

12 Statistical office of the Republic of Serbia, (Republički zavod za statistiku) (2025), Survey on Income and Living Conditions 2024, (*Anketa o prihodima i uslovima života 2024*) (SILC). Retrieved (Jun 2025) from <https://publikacije.stat.gov.rs/G2025/Html/G20251164.html>

using the income quintile share ratio (S80/S20). This indicator represents the ratio of the total equivalized income received by the top 20% of the population to that received by the bottom 20% within a given country. Naturally, the higher this ratio, the greater the level of inequality in the society.

Economic inequality can also be examined through the lens of the at-risk-of-poverty rate and/or the rate of social exclusion. According to the *UN Statement on Poverty and Human Rights*,¹³ poverty is a condition in which individuals lack the financial resources necessary to meet basic needs such as food, housing, healthcare, education, and a minimum standard of living.

A distinction is commonly made between absolute poverty and relative poverty. Absolute poverty refers to individuals living on less than USD 2.15 per day.¹⁴ In contrast, relative poverty refers to individuals whose equivalized household income is less than 60% of the national median income. Equivalized income is calculated using the OECD equivalence scale and corresponds to the at-risk-of-poverty rate as defined in the EU-SILC methodology.¹⁵

The Gini coefficient, the S80/S20 quintile share ratio, the at-risk-of-poverty rate, and the at-risk-of-poverty or social exclusion rate (AROPE) are all quantitative indicators of income distribution and social inequality. These indicators are commonly used in EU statistics (EU-SILC) and are integral to the national strategies for poverty reduction.

RISK OF POVERTY AND SOCIAL EXCLUSION RATE, QUINTILE RATIO S80/S20 AND GINI COEFFICIENT IN SERBIA AND IN EU

The Survey on Income and Living Conditions (SILC) was conducted for the first time in Serbia in 2013. Therefore, Table 1 presents data from 2013 to the present. As shown in Table 1, the at-risk-of-poverty rate in Serbia exhibited an upward trend from 2013 to 2017. However, starting from 2018, when it stood at 24.3%, the rate has decreased each subsequent year, reaching 19.7% in 2024. Nevertheless, what is particularly alarming is the regional disparity in poverty risk rates. In 2024, the Belgrade region reported a risk-of-poverty rate of just 8.7%, while the rate was 21% in the Vojvodina region, 23% in the region of Sumadija and Western Serbia, and as high as 27.7% in the region of Southern and Eastern Serbia. These striking regional differences reflect significantly divergent living conditions across the country. It is evident that residents of Belgrade benefit from substantially more favorable economic conditions compared to those in other regions. There is clear evidence that most major investments and funding are concentrated in the capital, while residents of other parts of Serbia face a poverty risk up to three times higher. These data highlight a serious regional imbalance, which policymakers must urgently address by integrating these disparities into future strategies and action plans, and by developing concrete policy

13 UN Office of the High Commissioner for Human Rights. (2001). Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2000/5 Retrieved (Jun, 2025) from <https://digitalibrary.un.org/record/431505?v=pdf> and E_CN.4_2001_25-EN.pdf

14 World Bank. (2022). *Poverty and Shared Prosperity Report*. Retrieved (Jun 2025) from <https://www.worldbank.org/en/publication/poverty-and-shared-prosperity>

15 Examples from 2020: The relative poverty rate (defined as 60% of the national median equivalized income) was 21.7%. The at-risk-of-poverty threshold for a single-person household was RSD 22,000 per month, while for a four-member household it amounted to approximately RSD 46,200 per month.

measures to reduce the regional gap.

In monetary terms, the risk-of-poverty threshold for a single adult was RSD 13,680 in 2013. Over a 12-year period, this amount increased by a factor of 2.7 times, reaching RSD 35,606 in 2024. For a household consisting of two adults and one child under the age of 14, the monthly poverty threshold in 2024 was RSD 64,091, while for a household of four members (two adults and two children under 14), the monthly threshold was RSD 74,773. In 2024, the average monthly salary in Serbia ranged from RSD 95,836 in January to RSD 108,312 in December. The average consumer basket amounted to RSD 102,044 in January and RSD 105,765 in December, while the minimum consumer basket amounted to RSD 52,775 in January and RSD 54,565 in December 2024.¹⁶

As presented in Table 1. the percentage of the population at risk of poverty or social exclusion in Serbia ranged from 38.5% in 2016 to 24.3% in 2024. According to official data from the Statistical Office of the Republic of Serbia, this represents a reduction of 12.1 percentage points over a period of just nine years. However, these figures must be interpreted with caution, as previously discussed, due to the substantial regional disparities in both economic and social conditions experienced by individuals across different parts of the country. The living standards in Serbia vary significantly depending on the region in which individuals or households reside. Picture 1. presents data on the population at risk of poverty or social exclusion (AROPE) in European Union (EU) member states, where the average rate was 21%. Nevertheless, this indicator varies significantly across countries—for instance, Bulgaria recorded a rate of 30.3%, while Czechia had the lowest rate at 11.3%. These variations reflect the fact that, even within the EU, the quality of life in terms of economic and social conditions differs considerably depending on the country of residence.

¹⁶ The data were retrieved from the official website of the Ministry of Domestic and Foreign Trade of the Republic of Serbia, specifically from the report *“Purchasing Power of the Population – Consumer Basket, December 2024”* (Ministry of Trade, 2024) <https://must.gov.rs/extfile/sr/12081/Korpa%20decembar%202024.pdf>

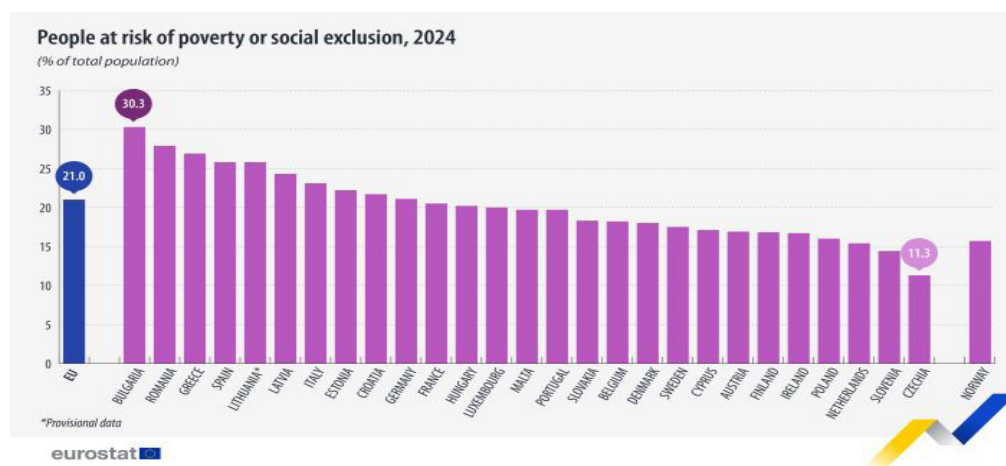
Table 1. Risk of poverty or social exclusion rate %, quintile ration S80/S20 and Gini coefficient in Serbia 2013-2024¹⁷

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
At-risk-of-poverty rate, total (%)	24.5	25.4	25.4	25.9	25.7	24.3	23.2	22.4	21.4	20.2	19.9	19.7
Belgrade region				...	...	...	...	12.2	10.3	8.7	8.7	8.7
Vojvodina region				...	...	...	...	22.5	20.9	19.8	21.1	21
Region of Šumadija and Western Serbia				...	...	...	...	26.5	25.3	24.2	23	23
Region of Southern and Eastern Serbia				...	...	...	...	28.9	30.1	29.2	27.9	27.7
Region of Kosovo and Metohija				...	...	...	...	...	...	...	...	...
At-risk-of-poverty limit (monthly average), RSD												
Single-person household in RSD	13,680	13,500	14,920	14,680	15,600	16,615	19,381	21,680	23,638	25,960	29,100	35,606
Household with two adults and one child under 14 years in RSD	24,624	24,300	26,856	26,424	28,080	29,907	34,886	39,024	42,549	46,729	52,380	64,091
Two adults with two children under 14 years in RSD	28,728	28,300	31,332	30,828	32,760	34,892	40,700	45,528	49,641	54,517	61,110	74,773
At-risk-of-poverty or social exclusion rate, %				38.5	36.7	34.3	31.7	31	28.9	29	27.2	24.3
At-risk-of-poverty rate before social transfers, %												
Social transfers not included in income	31.8			32.9	31.6	29.6	28.3	27.6	29.2	26.1	26.1	24.7
Pensions and social transfers not included in income	51.1			52.1	51.3	48.7	46.6	45.9	46.3	42	41.9	41.6
Relative at-risk-of-poverty gap	36.6	40.3	37.6	39.4	31.6	29.6	28.3	28.7	29.8	25.7	28.6	29.1
Quintile ratio S80/S20	8.6	9.8	9	11.0	9.4	8.6	6.5	6.4	6.1	5.7	5.6	5.6
Gini coefficient	38	38.6	38.2	39.8	37.8	35.6	33.3	33.8	33.3	32.6	31.7	31.9
Persistent at-risk-of-poverty rate, %				16.7	18.4	19.6	15.9	14.5	16.5	12.6	12.9	11.6

Source: Statistical Office of the Republic of Serbia. (2020). *Survey on Income and Living Conditions 2019* (Publication No. G20201283). <https://publikacije.stat.gov.rs/G2020/Pdf/G20201283.pdf>
 Statistical Office of the Republic of Serbia. (2025). *Survey on Income and Living Conditions 2024 – Published in 2025* (Publication No. G20251164). <https://publikacije.stat.gov.rs/G2025/HtmlL/G20251164.html>

¹⁷ Upon cross-referencing data for the year 2016 from the Survey on Income and Living Conditions (SILC) 2016 and the subsequently published SILC 2019 report, slight discrepancies were observed in the decimal values for several indicators related to 2016. In line with best practices for using the most recently verified statistical data, we have adopted the 2016 figures as reported in the 2019 publication as the authoritative source, and these values are reflected in the tables presented in this paper.

Picture 1. People at risk of poverty or social exclusion



Source: Eurostat (ilc_pees01n) Living conditions in Europe - poverty and social exclusion - Statistics Explained - Eurostat

The income quintile share ratio (S80/S20) in Serbia initially showed an upward trend, increasing from 8.6 in 2013 to a peak of 11.0 in 2016. Since then, it has decreased each year, reaching 5.6 in 2024. In 2016, the top 20% of income earners in Serbia earned 11 times more than the bottom 20%. In comparison, the European Union average for 2024 was 4.66 times (Eurostat, 2024). Table 2. presents the S80/S20 quintile share ratios for the EU, with disaggregated data for each member state as well as for candidate countries, covering the period from 2015 to 2024. These data clearly show that no EU country recorded progress in reducing income inequality as substantial as Serbia's. For example, Romania had a ratio of 8.32 times in 2015, which decreased to 4.63 by 2024. The strong growth of income among the lower quintiles in Serbia can be partially attributed to direct government transfers. During the COVID-19 pandemic, the government implemented a series of financial assistance measures. In 2020, all adult citizens received EUR 100 as a one-time payment to mitigate the economic impact of the pandemic. In 2021, this was followed by an additional EUR 60 for all adults, paid in two installments, and RSD 3,000 to all vaccinated individuals as an incentive for immunization. Furthermore, in 2021, young people aged 16–29 received EUR 100, and in 2022, the same age group received two more payments of EUR 100. Pensioners received RSD 10,000 in 2022 and RSD 20,000 in 2023, while families with children under the age of 16 received RSD 5,000. Although these transfers were not substantial on an individual level, they nonetheless provided a meaningful increase in income for the poorest segments of the population. In addition, there were adjustments to minimum wages, increases in pensions, and expansions of social assistance programs. Meanwhile, the incomes of the top 20% earners in Serbia did not grow at a pace comparable to their counterparts in EU countries. The dramatic reduction in the S80/S20 income quintile share ratio in Serbia between 2013 and 2024 can be partially interpreted as the result of a combination of fiscal redistribution, growth in lower-income segments, limited income growth among top quintiles, and the formalization of informal labor. In contrast to EU member states, which have generally exhibited stable or only mildly declining trends, Serbia has achieved a noticeable shift in income distribution, reflected in a significantly reduced statistical inequality. Of course, it is unrealistic to claim that an additional EUR 200 per capita annually could halve inequality

as measured by this indicator. Nevertheless, future research should aim to explore, based on empirical evidence, whether this statistically reported reduction in inequality reflects a real structural transformation, or if it is merely a temporary statistical artifact influenced by state interventions. An open question remains: What will happen when the government discontinues direct cash transfers? How will the S80/S20 quintile income share ratio appear in 2025, especially in light of the ongoing situation involving teachers and university staff, many of whom have reportedly not received regular wages? Or they are not in the group of 20% richest or poorest, so it will not affect at all? This highlights the importance of sustained and systematic monitoring of income dynamics and the structural determinants of inequality.

Table 2. Quintile ratio S80/S20 in EU; total and by country 2015-2024

TIME	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
GEO (Labels)										
European Union - 27 countries (from 2020)	5.22	5.16	5.03	5.05	4.99	4.89	4.99	4.73	4.72	4.66
European Union - 28 countries (2013-2020)	5.22	5.16	5.08	5.12	5.07	:	:	:	:	:
Belgium	3.83	3.85	3.84	3.79	3.61	3.65	3.42	3.56	3.38	3.45
Bulgaria	7.11	7.69	8.23	7.66	8.10	8.01	7.45	7.30	6.61	6.96
Czechia	3.51	3.50	3.40	3.32	3.34	3.34	3.43	3.48	3.42	3.32
Denmark	4.08	4.06	4.08	4.11	4.09	4.00	3.93	4.03	4.15	4.16
Germany	4.80	4.62	4.49	5.07	4.89	4.87	4.98	4.38	4.44	4.49
Estonia	6.21	5.56	5.42	5.07	5.08	5.03	5.03	5.39	5.37	5.03
Ireland	4.50	4.45	4.63	4.23	4.02	3.92	3.75	3.81	3.86	3.68
Greece	6.51	6.55	6.11	5.51	5.11	5.23	5.79	5.20	5.28	5.27
Spain	6.87	6.60	6.59	6.03	5.94	5.77	6.19	5.63	5.50	5.39
France	4.29	4.32	4.31	4.23	4.27	4.42	4.41	4.60	4.63	4.66
Croatia	5.14	4.90	4.97	5.00	4.74	4.59	4.77	4.57	4.91	4.97
Italy	5.84	6.27	5.92	6.09	6.01	5.75	5.86	5.62	5.27	5.53
Cyprus	5.20	4.88	4.56	4.29	4.58	4.31	4.23	4.28	4.27	4.40
Latvia	6.51	6.20	6.30	6.78	6.54	6.27	6.63	6.33	6.20	6.28
Lithuania	7.46	7.06	7.28	7.09	6.44	6.14	6.14	6.39	6.32	6.54
Luxembourg	4.26	4.62	4.56	5.18	5.34	4.99	4.59	4.51	4.79	4.68
Hungary	4.30	4.26	4.27	4.35	4.23	4.16	4.15	3.99	4.47	4.26
Malta	4.15	4.22	4.21	4.28	4.18	4.69	5.03	4.75	5.30	4.87
Netherlands	3.82	3.93	3.99	4.05	3.94	4.15	3.88	3.94	3.87	3.72
Austria	4.05	4.09	4.29	4.04	4.17	4.11	4.00	4.25	4.28	4.34
Poland	4.92	4.76	4.56	4.25	4.37	4.07	4.03	3.91	4.06	3.85
Portugal	6.01	5.88	5.75	5.22	5.16	4.99	5.66	5.13	5.60	5.20
Romania	8.32	7.20	6.45	7.21	7.08	6.62	7.10	6.00	5.83	4.62
Slovenia	3.60	3.56	3.42	3.38	3.39	3.32	3.24	3.28	3.34	3.42
Slovakia	3.54	3.63	3.49	3.03	3.34	3.03	3.20	3.12	3.63	3.28
Finland	3.56	3.58	3.54	3.65	3.69	3.72	3.58	3.75	3.78	3.73
Sweden	4.06	4.25	4.27	4.13	4.33	4.12	4.04	4.34	4.73	4.34
Iceland	3.43	3.33	3.59	3.21	3.35	3.41	:	:	:	:
Norway	3.50	3.69	3.90	3.71	3.81	3.78	3.87	4.11	3.63	3.62
Switzerland	4.48	4.42	4.63	4.50	4.75	4.89	4.87	4.79	4.94	:
United Kingdom	5.23	5.12	5.40	5.63	:	:	:	:	:	:
Montenegro	7.48	7.38	7.57	7.37	6.72	5.96	5.81	5.58	:	:
North Macedonia	6.62	6.63	6.38	6.16	5.56	5.92	5.62	5.39	:	:
Albania	:	:	7.47	6.98	6.38	5.86	5.72	:	:	:
Serbia	10.70	11.02	9.38	8.58	6.48	6.29	6.01	5.70	5.55	:
Türkiye	8.62	8.65	8.68	8.66	8.35	9.20	8.64	9.39	8.72	9.06
Kosovo*	:	:	:	15.58	:	:	:	:	:	:

Source: Eurostat, 2025 online data code ilc_di11¹⁸

Table 3. Gini coefficient in EU; total EU and by country 2015-2024

GEO (Labels)	TIME 2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
European Union - 27 countries (from 2020)	30.8	30.6	30.3	30.4	30.2	30.0	30.2	29.6	29.6	29.3
Euro area – 20 countries (from 2023)	30.7	30.7	30.4	30.6	30.2	30.2	30.6	29.9	29.8	29.9
Belgium	26.2	26.3	26.1	25.7	25.1	25.4	24.1	24.9	24.2	24.7
Bulgaria	37.0	37.7	40.2	39.6	40.8	40.0	39.7	38.4	37.2	38.4
Czechia	25.0	25.1	24.5	24.0	24.0	24.2	24.8	24.8	24.4	23.7
Denmark	27.4	27.7	27.6	27.8	27.5	27.3	27.0	27.7	28.2	28.6
Germany	30.1	29.5	29.1	31.1	29.7	30.5	31.2	29.0	29.4	29.5
Estonia	34.8	32.7	31.6	30.6	30.5	30.5	30.6	31.9	31.8	30.8
Ireland	29.7	29.6	30.6	28.9	28.0	27.6	26.6	26.9	27.4	26.2
Greece	34.2	34.3	33.4	32.3	31.0	31.4	32.4	31.4	31.8	31.8
Spain	34.6	34.5	34.1	33.2	33.0	32.1	33.0	32.0	31.5	31.2
France	29.2	29.3	28.8	28.5	29.2	29.2	29.3	29.8	29.7	30.0
Croatia	30.4	29.8	29.9	29.7	29.2	28.3	29.2	28.5	29.7	29.8
Italy	32.4	33.1	32.7	33.4	32.8	32.5	32.9	32.7	31.5	32.2
Cyprus	33.6	32.1	30.8	29.1	31.1	29.3	29.4	29.4	29.6	30.1
Latvia	35.4	34.5	34.5	35.6	35.2	34.5	35.7	34.3	34.0	34.2
Lithuania	37.9	37.0	37.6	36.9	35.4	35.1	35.4	36.2	35.7	35.3
Luxembourg	28.5	29.6	29.2	31.3	32.3	31.2	29.6	29.1	30.6	30.1
Hungary	28.2	28.2	28.1	28.7	28.0	28.0	27.6	27.4	29.0	27.6
Malta	28.1	28.6	28.2	28.7	28.0	30.3	31.2	31.1	33.0	30.8
Netherlands	26.7	26.9	27.1	27.4	26.8	28.2	26.4	26.3	26.5	25.9
Austria	27.2	27.2	27.9	26.8	27.5	27.0	26.7	27.8	28.1	28.4
Poland	30.6	29.8	29.2	27.8	28.5	27.2	26.8	26.3	27.0	26.0
Portugal	34.0	33.9	33.5	32.1	31.9	31.2	33.0	32.0	33.7	31.9
Romania	37.4	34.7	33.1	35.1	34.8	33.8	34.3	32.0	31.0	28.0
Slovenia	24.5	24.4	23.7	23.4	23.9	23.5	23.0	23.1	23.4	23.8
Slovakia	23.7	24.3	23.2	20.9	22.8	20.9	21.8	21.2	21.6	21.7
Finland	25.2	25.4	25.3	25.9	26.2	26.5	25.7	26.6	26.6	26.1
Sweden	26.7	27.6	28.0	27.0	27.6	26.9	26.8	27.6	29.5	27.6
Iceland	24.7	24.1	25.2	23.2	23.7	24.0	:	:	:	:
Norway	23.9	25.0	26.1	24.8	25.4	25.3	25.9	27.5	24.7	24.4
Switzerland	29.6	29.4	30.1	29.7	30.6	31.2	31.4	31.1	31.5	:
United Kingdom	32.4	31.5	33.1	33.5	:	:	:	:	:	:
Montenegro	36.5	36.5	36.7	34.7	34.1	32.9	32.5	31.5	:	:
North Macedonia	33.7	33.6	32.4	31.9	30.7	31.4	30.3	29.8	:	:
Albania	:	:	36.8	35.4	34.3	33.2	33.0	:	:	:
Serbia	40.0	39.8	37.8	35.6	33.6	33.8	33.3	32.6	31.7	:
Türkiye	41.9	42.6	43.0	43.0	41.7	43.4	42.5	45.3	44.2	44.8
Kosovo*	:	:	:	46.6	:	:	:	:	:	:

Source: Eurostat, 2025, online data code: ilc_di12 [ilc_di12] Gini coefficient of equalized disposable income by age

According to data from the Statistical Office of the Republic of Serbia (SORS), the Gini coefficient in Serbia stood at 38 in 2013, and showed an upward trend until 2016, when it reached 39,8. Since then, the coefficient has exhibited a continuous downward trend, suggesting a gradual decline in income inequality over the past decade and a narrowing gap between the wealthiest and poorest segments of society.

In comparison, the EU-27 average Gini coefficient was 30.8 in 2015, and has slightly declined over the ten-year period to 29.3 in 2024. This represents a reduction of only 1.5 percentage points in the EU, whereas Serbia recorded a 7.9 percentage point decrease during the same period.

As illustrated in Table 3, no EU member state or EU candidate country has achieved a comparable reduction in income inequality over the past ten years. The same pattern can

be observed with regard to the S80/S20 quintile share ratio: Serbia has recorded the largest decrease in measured inequality, based on official statistical indicators.

It is important to emphasize that the extraordinary cash transfer programs implemented over the past five years in Serbia, while not insignificant, were not large enough to account for such a substantial change in the key statistical indicators. This raises a critical question: if we are to disregard the EU-SILC methodology, as applied by Eurostat, as a relevant source for monitoring economic inequality, what alternative indicators do we have to analyze and evaluate income distribution and inequality in Serbia?

Also, one of the key questions that arises in the context of Serbia's recent economic trajectory is also how to explain that observed reduction in unemployment was not accompanied by robust GDP growth. We must ask ourselves can we truly speak of substantial improvements in the labor market?¹⁹ This leads to a broader discussion on how economic growth should be measured, and which indicators and data sources are most reliable and relevant in the case of Serbia.

As Milanovic states, "the fact that the entire planet now operates under the same economic principles—organizing production for profit using free wage labor and capital, mostly privately owned, coordinated in a decentralized manner—has no historical precedent."²⁰ This global convergence of economic systems facilitates comparative research on economic topics, particularly inequality, by enabling the use of common methodological and statistical tools. However, it is essential not to overlook the specific domestic contexts that often remain invisible on the global stage. As Anicic observe, the dynamic shifts in the global business environment have significantly altered the rules of engagement on international markets²¹, but what happened within rules on domestic markets?

According to Lekovic (2020), the institutional environment plays a key role in shaping inequality through its effects on the bargaining power of economic actors.²² The nature of institutions—whether inclusive or extractive—determines their systemic role in the reproduction of inequality. As Lekovic argues, the roots of inequality can often be found in government policies and institutional frameworks that create market conditions. This leads to the phenomenon of rent-seeking, whereby state institutions, through various programs, subsidies, questionable procurement procedures, or selective regulations, may transfer valuable public resources to individuals or interest groups connected to political

19 For further details on this issue, see; Petrović, P., Brčerević, D., Gligorić, M. (2019), Why is Serbia an economic growth underachiever? (Zašto privredni rast Srbije zaostaje); **Ekonomika preduzeća** (Volume 67, issues 1–2, str. 17–33, DOI: 10.5937/EKOPRE1808017P, Retrieved (Jun, 2025) from <https://scindeks-clanci.ceon.rs/data/pdf/0353-443X/2019/0353-443X1902017P.pdf> and Bejatovic G.,(2020). Ekonomski rast Srbije pomatran kroz kretanje BDP-a i novi trendovi u analizi ekonomskog rasta u 21.veku, Zbornik radova 17. tradicionalnog međunarodnog naučnog skupa „Pravnički dani prof. dr Slavko Carić“ – tema skupa: Uloga države i prava i 21.veku održanog 25. septembra 2020.godine na Pravnom fakultetu za privredu i pravosuđe Univerziteta Privredna akademija u Novom Sadu, str. 433-442-395 str. UDK : 330.34(47.11); ISBN 978-86-6019-104-7

20 Milanovic, B. (2021). *Kapitalizam sam: Buducnost sistema koji vlada svetom*. Novi Sad: Akademska knjiga. ISBN 978-86-6263-365-1 p.12

21 Anicic, D., Anicic, J., Bejatovic, G., Petrovic, V. (2019) The Effects of Globalization and Neoliberal Concept on Economy Development of Countries in Transition, JPMNT, Volume 7, Issue 1, p. 7-11, doi:10.5937/jouproman7-19856

22 Lekovic, V. (2020). Institucionalna determinisanost ekonomskih i društvenih protivrečnosti u Republici Srbiji. In *Institucionalne promene kao determinanta privrednog razvoja Republike Srbije* (pp. 5–21). Kragujevac: Ekonomski fakultet, Univerzitet u Kragujevcu. ISBN 978-86-6091-110-2

elites. Gordon Tullock and Anne Krueger defined rent-seeking as a process in which actors invest resources (such as time, money, or influence) to gain economic benefits through political or institutional mechanisms—without creating new goods or services.²³

CONCLUSION

To assess Serbia's economic performance, it is necessary to adopt a multidimensional approach that goes beyond GDP growth alone. Key indicators include: real GDP per capita (adjusted for inflation and purchasing power), employment and unemployment rates, disaggregated by region, age, and gender, labor force participation rate, productivity per worker or per hour worked, export and investment dynamics, sectoral structure of GDP (share of services, industry, agriculture), public debt and fiscal balance, foreign direct investment (FDI) inflows, poverty and inequality indicators (Gini, S80/S20, AROPE) and others.

There are numerous structural and institutional factors that generate, sustain, and exacerbate economic inequality. In the context of Serbia, examples of rent-seeking include party-based employment in public institutions, non-competitive public tenders, selective subsidies, tailor-made legislation, and media control. Eliminating rent-seeking practices is essential for ensuring sustainable and genuine economic growth in Serbia.

This paper has presented some of the key indicators used to measure economic inequality in Serbia and EU countries and offered a comparative perspective. However, future research is needed to more thoroughly explore and explain the causes behind the statistically observed decline in inequality. Much of what we observe in everyday life appears to contradict these statistical trends, raising the question of whether this reduction reflects actual structural change or a temporary statistical artifact. In such a context, Serbia's economic strategy must be both adaptive and evidence-based, recognizing structural vulnerabilities and leveraging institutional reforms to promote inclusive and sustainable growth.

23 Tullock was first conceptualized rent-seeking as the act of seeking economic gain through the political process, rather than through productive activity—essentially attempting to obtain benefits via political influence, but Anne Krueger was the first to defined rent-seeking as competition over state-induced economic privileges—ranging from legal rents to corrupt practices like bribery and smuggling in Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, *American Economic Review* 64, no. 3 (1974): 291–303, Retrieved (May, 2025) <https://assets.aeaweb.org/asset-server/files/9452.pdf>



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**DRUŠTVENA NEJEDNAKOST PRIKAZANA
KROZ POKAZATELJE EKONOMSKE NEJEDNAKOSTI I
UPOREDNA ANALIZA EKONOMSKIH POKAZATELJA
NEJEDNAKOSTI U SRBIJI SA ZEMLJAMA EU**

Abstract:

Idealno društvo karakteriše pravičan tretman svih pojedinaca, u kojem lične karakteristike poput pola, etničke pripadnosti, socioekonomskog statusa ili drugih razlika ne određuju pristup pravima, resursima i mogućnostima. U tom kontekstu, društvena pravda predstavlja temeljni normativni cilj savremenih društava, dok društvena nejednakost funkcioniše kao empirijski pokazatelj razlika u stvarnom pristupu resursima, ostvarivanju prava i kreiranju šansi za napredovanje. Društvena nejednakost se meri primenom kvantitativnih i kvalitativnih indikatora iz različitih oblasti društvenog života, uključujući ekonomiju, obrazovanje, zdravstvenu zaštitu, političko učešće i pravnu jednakost. Ovaj rad se fokusira na oblast ekonomske nejednakosti, pri čemu se razmatraju ključni pokazatelji kao što su nejednakost u raspodeli dohotka, rizik od siromaštva i socijalna isključenost. Posebna pažnja posvećena je uporednoj analizi Džini koeficijenta, kao jednog od najvažnijih pokazatelja nejednakosti u raspodeli dohotka, sa akcentom na pozicioniranje Srbije u odnosu na zemlje Evropske unije. Analizom relevantnih pokazatelja ekonomske nejednakosti dobijamo empirijski utemeljenu sliku savremenih društvenih struktura, što pruža osnov za koncepciju i unapređenje javnih politika, reformu zakonodavnog okvira i razvoj stratezijskih mera usmerenih ka smanjenju strukturnih razlika, jačanju socijalne uključenosti i ostvarenju cilja pravednijeg i inkluzivnijeg društva.

Ključne reči: *društvena pravda, društvena nejednakost, ekonomska nejednakost, Džini koeficijent*

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LEGAL AND ECONOMIC REGULATION OF ESTABLISHING AN ENTREPRENEUR IN THE MODERN ECONOMY

Abstract:

The subject of this paper is the analysis of entrepreneurship in modern business conditions, with an emphasis on the legal and economic regulation of establishing an entrepreneurial business. Global trade and the exchange of goods have become virtually borderless. The expansion of information technologies—enabling remote work, virtual meetings, online shopping, electronic payments, and social media—has created a wide range of new professions and opened opportunities for many individuals to explore entrepreneurship. Due to a turbulent environment marked by constant change, privatization, deregulation, informatization, and globalization, large corporations have also been compelled to incorporate entrepreneurial thinking into all organizational segments. Centralization has given way to decentralization, and reactive approaches have been replaced by proactive ones. It is no longer sufficient to merely satisfy customer needs in the best possible way—those needs must also be created. Customers increasingly seek partnership-based relationships with sellers. The aim of this paper is to provide all interested parties with an overview of the scientific literature addressing this topic.

Keywords: *entrepreneurship, entrepreneur, legal and economic regulation, modern economy*

ENTREPRENEURIAL ECOSYSTEM

Entrepreneurial ecosystems have emerged as a popular concept for explaining the existence of high-growth entrepreneurship in specific regions, focusing on the combination of environmental factors that influence individuals' willingness and ability to engage in entrepreneurial activities. Startup ecosystems are composed of cultural characteristics, social networks, investment capital, universities, and active economic policies that together create an environment supportive of innovation-based business. Key factors influencing ecosystems include: education and research, human capital, finance and funding, government interventions, business support, and connectivity.¹

¹ Ziakis, C., M. Vlachopoulou, and K. Petridis. "Start-up ecosystem (StUpEco): A conceptual framework and empirical research." *Journal of Open Innovation: Technology, Market, and Complexity* 8, no. 1 (2022): 35.

A review of the literature on entrepreneurial ecosystems reveals a wide variety of models, depending on the level of analysis. The elements of an entrepreneurial ecosystem are highly complex, largely because entrepreneurship plays different roles at different stages of development. One of the most well-known and widely accepted models is the Global Entrepreneurship Ecosystem developed by Zoltan Acs. This model, created in collaboration with his colleagues, enabled the development of the Global Entrepreneurship Index, designed to measure the quality of the entrepreneurial process in a given country.

A crucial aspect of entrepreneurial ecosystems is their dependence on geographic location, which provides the context for their growth and development.² The entrepreneurial ecosystem refers to the collective and systemic action of all actors (entrepreneurs, individuals, organizations, and institutions at the national level) aimed at encouraging and developing entrepreneurship.³

In developed countries, universities play a central role in the innovation process by producing knowledge through multidisciplinary processes, applying it commercially, and supporting the development of new businesses through the concept of “entrepreneurial universities.” In addition to universities evolving into entrepreneurial institutions, businesses themselves are increasingly engaging in traditional academic activities, such as establishing R&D departments and offering staff training and professional development.

Education, along with beginner training, is a key factor contributing to business profitability. Selecting the right human resources and ensuring their loyalty is of exceptional importance. Prior work experience helps potential entrepreneurs better recognize and seize market opportunities, giving them an advantage over beginners. Support and collaboration contribute to the success of new products. Innovation involving external partners is a priority for the success of newly established enterprises.⁴

Support institutions within the entrepreneurial ecosystem include incubators and hubs, science and technology parks, and business accelerators. Incubators and hubs represent networks of entrepreneurs connected with business partners, potential customers, investors, financiers, consultants, professionals, and other entities that assist them in the early stages of development. Science and technology parks focus on small and medium-sized enterprises and emphasize the promotion and exchange of knowledge, innovation, and ideas. These parks offer services from various educational and research institutions. Business accelerators support the development of already established startups by providing education, mentorship, and incentives for further growth and investment opportunities.⁵

The most common form of support from incubators is providing office space with appropriate infrastructure at below-market prices. Statistical reports confirm that incubators increase business success rates from 20% to 87%, thanks to affordable rent, shared services, professional business support, training, and access to favorable capital.⁶

2 Raut, J., S. M. Veljković, B. Melović, Đ. Čelić, and D. Nikolić. “Preduzetnički ekosistem kao novi koncept preduzetništva.” In *XXVIII Skup TRENDOVI RAZVOJA: Univerzitetsko obrazovanje za privredu*, Kopaonik, 2022.

3 FON. “FON.” Accessed April 5, 2025. <https://ctm.fon.bg.ac.rs>.

4 Ziakis, Vlachopoulou, and Petridis, “Start-up ecosystem,” 35.

5 FON, “ctm.”

6 Avlijaš, R., and Avlijaš, G. *Preduzetništvo*. 5th ed. Belgrade: Singidunum University, 2021.

Clusters are a form of networking that involves a group of economic activities by business entities and institutions, geographically concentrated at the local or regional level, which have established formal or informal relationships and industrial sector affinity to exchange information, knowledge, and goods for the creation of joint products. Cluster activities are based on cooperation, concentration, and connectivity. Main advantages include better access to employees and suppliers, specialized information, institutions and public goods, improved motivation, easier implementation of measures, and synergy effects.⁷

The entrepreneurial ecosystem in the Republic of Serbia, despite having many participants, remains underdeveloped due to a lack of organization and support. Serbia is characterized as a post-socialist transitional economy with cultural traits that do not favor the development of entrepreneurial awareness. Although it may seem contradictory to promote entrepreneurship in transitional economies—marked by high corruption, limited business financing, distrust in the financial sector, rigid bureaucracy, and other constraints—on the path to a market economy, the importance of entrepreneurship for national economic development and prosperity must be acknowledged.⁸

Some institutions supporting entrepreneurship in Serbia include:

- The Research and Development Center of the Faculty of Organizational Sciences in Belgrade
- The Science and Technology Park Belgrade (a partnership between the Government of Serbia, the City of Belgrade, and the University of Belgrade)
- StartIT (focused on the IT sector)
- ICT HUB (focused on technological entrepreneurship)
- Impact Hub (a global network of local hubs)
- Nova Iskra (the first creative hub in the Balkans)
- BITF (founded by four technical faculties of the University of Belgrade)
- SeVen (a startup and entrepreneurship development association in Serbia and Southeast Europe)
- StartLabs (a U.S.-based fund investing in startups from Southeast Europe)⁹

THE MODERN ENTREPRENEUR

The entrepreneur is viewed as a catalyst for change in modern business.¹⁰ Despite discouraging statistics—similar worldwide and relatively unchanged over the years—

7 Pokrajac, S., and D. Tomić. *Preduzetništvo*. Novi Sad: Alga-graf NS, 2008.

8 Gardašević, J., S. Brkanlić, and J. Kostić. "Entrepreneurship, national culture and the Republic of Serbia." *Ekonomija – teorija i praksa* 13, no. 1, 2020.

9 FON, "ctm."

10 Avlijaš and Avlijaš, *Preduzetništvo*, 48.

indicating that 20% of small businesses fail within the first year, 30% within two years, and as many as 50% within five years, there remains a noticeable enthusiasm for launching new ventures. In recent years, the number of startups and newly established companies has even increased.

Although success rates are still low (9 out of 10 startups fail, mostly due to lack of market demand), other data are encouraging:

- 90% of new billionaires on the Forbes list (from the U.S.) achieved their wealth through their own businesses
- 15 million Americans work full-time in their own businesses
- 62% of adults believe entrepreneurship is a good career choice
- There are currently 582 million entrepreneurs worldwide

Employment is a vital part of life on many levels—from basic survival to family and social development, including acquiring new skills, meeting new people, and advancing socially. What governments cannot always provide, resourceful, inventive, and capable entrepreneurs can—regardless of the size of their business. At the core of every venture is always just one person. Everything else is built upon that foundation.¹¹

Certain personality traits distinguish successful entrepreneurs: risk-taking, independence, internal locus of control, readiness for action and excitement, self-initiative, self-confidence, adaptability, persistence, tolerance for ambiguity, conflict resolution skills, and a broad perspective.

An entrepreneur is a person with a wide range of knowledge, decisiveness, curiosity, and belief in their idea—not only for material gain or profit but also for social recognition and self-fulfillment. It is important to emphasize that an entrepreneur respects not only legal regulations but also generally accepted moral and ethical principles.¹²

Many entrepreneurs and aspiring entrepreneurs often wonder whether they have what it takes to succeed. The exceptional entrepreneur Ewing Marion Kauffman—affectionately known as “Mr. K” by his employees—believed his success stemmed from a philosophy of treating others the way one wishes to be treated.

Sarasvathy described entrepreneurial thinking through five principles:

- **The Bird-in-Hand Principle:** Entrepreneurial action is driven by available means, emphasizing the creation of something new from existing resources.
- **The Affordable Loss Principle:** Entrepreneurs define in advance what they are willing to lose, rather than calculating expected returns.
- **The Crazy-Quilt Principle:** Entrepreneurs form partnerships with any stakeholders willing to commit to the project, without conducting detailed competitive analyses.

11 EU Barometer. “EU Barometer.” 2021. Accessed April 5, 2025. https://www.ey.com/sr_rs/insights/entrepreneurship/ey-preduzetnicki-barometar-2021

12 Pokrajac and Tomić, *Preduzetništvo*, 55.

- **The Lemonade Principle:** Entrepreneurs turn unexpected events into opportunities rather than avoiding or resisting them.
- **The Pilot-in-the-Plane Principle:** Entrepreneurs work with people and leverage the right technological and socio-economic moments.

These principles characterize successful entrepreneurs operating in dynamic and uncertain environments.¹³

An entrepreneur must recognize and foster creativity among collaborators to drive innovation. However, creativity is difficult to measure, as one cannot compare a creative scientist with a creative artist.¹⁴

LEGAL AND ECONOMIC REGULATION OF ESTABLISHING AN ENTREPRENEUR

The Law on the Procedure of Registration with the Business Registers Agency regulates the process of registration, recording, and publication of data and documents that, in accordance with specific laws, are subject to registration, recording, and publication in the registers and records maintained by the Business Registers Agency, as well as other matters relevant to registration.

The process of establishing business entities (entrepreneurs) is conducted through a one-stop registration system, which allows registered entities to simultaneously obtain:

- a registration number assigned by the Statistical Office of the Republic of Serbia,
- a tax identification number (TIN) assigned by the Tax Administration,
- registration for lump-sum taxation or salary payment or VAT,
- confirmation of registration (Form M-A) issued by the Central Registry of Compulsory Social Insurance,
- a health insurance number issued by the Republic Health Insurance Fund.¹⁵

Required documentation for registering an entrepreneur:¹⁶

1. Unified registration application for establishing legal entities and other subjects and entry into the unified register of taxpayers
2. Proof of identity of the entrepreneur (for domestic individuals – copy of ID card; for foreigners – copy of passport or foreign ID card)
3. Proof of payment of the registration fee (fee amount specified by the Agency)

13 Hisrich, R. D., M. P. Peters, and D. A. Shepherd. *Poduzetništvo*. 7th ed. Translated by J. Debeljak and I. Spajić. Zagreb: Mate, 2011.

14 Ožegović, L., and Z. Sajfert. *Preduzetništvo*. Novi Sad: Faculty of Economics and Engineering Management, 2009.

15 Business Registers Agency. "Business Registers Agency." Accessed April 5, 2025. <https://www.apr.gov.rs>.

16 Ibid.

4. License, consent, or other act of the competent authority, if required by special law as a condition for registration

For certain activities, licenses from competent authorities or ministries are required prior to registration (e.g., medical practices or taxi services). Other licenses necessary for operation (e.g., tobacco sales license) are obtained after registration (s-knjigovodstvo.com).¹⁷

Before submitting the registration application, it is necessary to verify address data in the Address Register of the Republic Geodetic Authority or the National Spatial Data Infrastructure—specifically, whether the street name exists in the settlement where the business will be located. The registrar must use address data from the official register. If the street name does not match the official records, the application will be rejected.

It is also important to note that one individual may have only one active entrepreneurial business. If already registered, a new business cannot be opened until the existing one is deleted from the register—even if temporarily suspended and not paying taxes or contributions, it is still considered active. An entrepreneur may change their activity, be employed elsewhere, and be a founder of other companies, but may only have one registered entrepreneurial business.

Business name selection, although seemingly simple, can cause issues. Mandatory elements include: the entrepreneur's full name, the designation "PR" or "entrepreneur," and the location (based on the agency's seat). For example, an entrepreneur may register as "Petar Petrović PR Belgrade" and avoid complications.¹⁸

Opening a bank account is one of the final steps and involves signing a business account agreement with the chosen bank. Required documents include:

- Certificate of registration
- OP form (authorized signatories)
- TIN
- Company stamp
- Copy of ID card

After obtaining a bank account, the entrepreneur submits a tax application.¹⁹

Laws and their practical application are often subject to change. Since entrepreneurs in their first year are primarily focused on acquiring clients and ensuring survival, these legal details are often overlooked. However, registration has significant legal effects and should not be taken lightly. It grants the entrepreneur the right to conduct business.

The Business Registers Agency website provides detailed explanations and video tutorials for every step before and after registration.

17 "S-knjigovodstvo," accessed September 5, 2025, <https://s-knjigovodstvo.com>.

18 "Business Registers Agency."

19 "Vodič za osnivanje preduzetničkog preduzeća," accessed April 5, 2025, <https://uniija.com/sr/kako-osnovati-preduzetnicko-preduzece/>.

On the Paragraf Lex legal database ²⁰, key laws regulating market and non-market business in Serbia can be found, depending on the type of activity, business structure, and territory. These include:

- Law on Business Companies
- Law on Obligations
- Law on Payment Transactions
- Law on Foreign Trade
- Customs Law
- Law on Foreign Exchange Operations

Additional legal and financial guidelines for export-oriented business can be found on the websites of:

- Chamber of Commerce of Serbia – pks.rs²¹
- Chamber of Commerce of Vojvodina – pkv.rs²²
- Regional Chamber of Commerce Novi Sad – pkv.rs²³

Other institutions offering support to entrepreneurs include:

- Development Agency of Serbia – ras.gov.rs²⁴
- Export Credit and Insurance Agency – aofi.rs²⁵

CONCLUSION

Business giants and large corporations with traditional management models are gradually becoming a thing of the past, while small and medium-sized enterprises are gaining increasing market share in the global economy. Although the influence of large companies remains significant, it is diminishing, and they are being forced to adopt entrepreneurial organizational cultures and form alliances and partnerships with smaller firms.

Knowledge as a resource is becoming the greatest wealth, and only those who continuously learn and improve can succeed. Teamwork and innovative thinking must be

20 Paragraf Lex. "Paragraf Lex." Accessed April 5, 2025. <https://www.paragraf.rs>.

21 Chamber of Commerce of Serbia. "Chamber of Commerce of Serbia." Accessed April 5, 2025. <https://pks.rs>.

22 Chamber of Commerce of Vojvodina. "Chamber of Commerce of Vojvodina." Accessed April 5, 2025. <https://pkv.rs>.

23 Regional Chamber of Commerce Novi Sad. "Regional Chamber of Commerce Novi Sad." Accessed April 5, 2025. <https://pkv.rs>.

24 Development Agency of Serbia. "Development Agency of Serbia." Accessed April 5, 2025. <https://ras.gov.rs>.

25 Export Credit and Insurance Agency. "Export Credit and Insurance Agency." Accessed April 5, 2025. <https://www.aofi.rs>.

nurtured. Innovation brings change to all aspects of human life, and it is impossible to survive in a turbulent modern environment without creating change.

The Republic of Serbia, still undergoing a transition process, does not yet have a fully developed system for the advancement of entrepreneurship. Compared to developed countries, Serbia's entrepreneurial ecosystem remains underdeveloped due to a lack of institutional support and organization. However, recent state incentives—especially those aimed at supporting women's entrepreneurship—are a positive sign.

Given that entrepreneurship is an abstract concept and cannot be precisely defined by a mathematical model, there is no exact formula for entrepreneurial success. Education is one of the most important prerequisites, but it does not guarantee success. Persistence, determination, teamwork, attentiveness to others, creativity, innovation, willingness to take risks, action, and continuous improvement are all traits of successful entrepreneurs.

Anyone wishing to engage in entrepreneurship must be prepared to operate in uncertainty, particularly in the financial domain. Although many ventures fail on the first attempt, the positive effects of those that succeed justify the risks. More and more people are seeking new opportunities and turning to entrepreneurship due to dissatisfaction with their current employment.

It is unrealistic to expect everyone to become an entrepreneur, as not all individuals have the inclination or ambition to run their own business. Moreover, human civilization functions in such a way that behind every entrepreneur stands a team. What everyone can adopt, however, is an entrepreneurial mindset—teamwork, accountability, initiative, dedication, active listening, openness to criticism, and constructive feedback. In this way, we can all be “small entrepreneurs” and contribute something valuable to our present and to future generations.



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ПРАВНА И ЕКОНОМСКА РЕГУЛАТИВА ОСНИВАЊА ПРЕДУЗЕТНИКА У САВРЕМЕНОЈ ЕКОНОМИЈИ

Анстракт:

Предмет овог рада је анализа предузетништва у савременим пословним условима, са акцентом на правну и економску регулативу оснивања предузетничког бизниса. Глобална трговина и размена робе постале су практично без граница.

Експанзија информационих технологија – омогућавајући рад на даљину, виртуелне састанке, куповину преко интернета, електронска плаћања и друштвене медије – створила је широк спектар нових професија и отворила могућности многим појединцима да истражују област предузетништва. Због турбулентног окружења обележеног сталним променама, приватизацијом, дерегулацијом, информатизацијом и глобализацијом, и велике корпорације су биле приморане да укључе предузетничко размишљање у све организационе сегменте. Централизација је уступила место децентрализацији, а реактивни приступи су замењени проактивним. Више није довољно само задовољити потребе купаца на најбољи могући начин – те потребе морају бити и створене. Купци све више траже партнерске односе са продавцима. Циљ овог рада је да свим заинтересованим странама пружи преглед научне литературе која се бави овом темом.

Кључне речи: *предузетништво, предузетник, правна и економска регулатива, савремена економија*

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GLOBAL CHALLENGES IN THE PROCESS FROM INNOVATION TO PHARMACEUTICAL PRODUCT: INTELLECTUAL PROPERTY BALANCING MARKET INTERESTS AND PUBLIC HEALTH

Abstract:

The legal framework of intellectual property in the pharmaceutical sector encompasses multiple forms of protection that enable right holders to maintain exclusivity and market dominance. Patent protection and the Supplementary Protection Certificate (SPC) are the most prominent mechanisms for extending commercial control over innovative medicines. In addition to these tools, other forms of protection play a relevant role, including trademarks, industrial design, and copyright related to documentation and software solutions.

This paper offers a descriptive analysis of these instruments and their function within the pharmaceutical market, with the aim of examining the legal rationale, effect, and interrelationship of various forms of protection. Special emphasis is placed on the parallel between patent protection and the SPC, which frequently operates as a mechanism for postponing the market entry of competing products.

The central research question posed is whether the current system of legal protection contributes to the realization of the right to health by encouraging innovation, or whether it primarily serves the interests of pharmaceutical companies by restricting access to essential therapies. Through legal analysis of the function, scope, and implications of intellectual property protection in the pharmaceutical context, the paper seeks to enhance understanding of the interplay between private rights and public interest in the field of health law.

Key words: *intellectual property, patent, supplementary protection certificate, pharmaceutical industry, public health*

1. INTRODUCTION: THE INTEGRAL ROLE OF INTELLECTUAL PROPERTY IN THE PHARMACEUTICAL INDUSTRY

Intellectual property represents a key element in the pharmaceutical industry, as it enables the protection of innovations, fosters research and development (R&D), and ensures a balance between market interests and public health. In this context, it is particularly important to emphasize that the role of intellectual property is not limited solely to patent protection but encompasses a wide range of rights—patents, supplementary protection

certificates (SPCs), trademarks, industrial designs, copyrights, and trade secrets—which collectively function to safeguard competitive advantage and encourage innovation.

Pharmaceutical companies face extremely high costs and lengthy timelines in the development of new medicines, which involve complex clinical trials and strict regulatory procedures. Under such conditions, the legal instruments of intellectual property provide protection for research results and guarantee economic incentives for further investment. At the same time, they ensure patient safety through the regulation of pharmaceutical product quality and strengthen trust in the healthcare system. Nevertheless, numerous controversies arise regarding the effects of these rights: while some argue that they contribute to scientific progress and enable the introduction of new therapies, others warn that excessive and prolonged protection may limit access to medicines and thereby endanger the realization of the right to health.

Large multinational companies dominate the global market with pharmaceutical raw materials and finished products—medicines. They have secured strong patent protection in this sector and ensure compliance with legal regulations and the enforcement of intellectual property rights.¹ The purpose of this paper is to examine, through legal analysis, the function and scope of various forms of intellectual property in the pharmaceutical industry, with particular attention to the relationship between patents and supplementary protection certificates. The central research question is: do existing intellectual property mechanisms genuinely foster innovation and serve the public interest in healthcare, or do they primarily cater to the economic interests of pharmaceutical companies?

2. OVERVIEW OF INTELLECTUAL PROPERTY RIGHTS

2.1 Copyright and Related Rights

Copyright and related rights constitute an important segment of the intellectual property system and play a specific role in the pharmaceutical industry. Although the pharmaceutical sector is primarily associated with patents and other forms of industrial property, copyright emerges as a key mechanism for the protection of educational, scientific research, and marketing materials, given that a copyrighted work is regarded as an original intellectual creation² and is therefore in undeniable correlation with the field of pharmacy.

In the pharmaceutical context, copyright protection covers a wide range of works—from scientific monographs, manuals, and promotional brochures to multimedia educational courses and digital applications intended for physicians, pharmacists, and patients (e.g., **Medscape**, **Epocrates**). These works often contain complex scientific and professional information whose accuracy and quality have a direct impact on medical practice and patient safety. Copyright grants the holders control over the use and distribution of such materials, thereby protecting the intellectual contribution of the authors and providing incentives for the continuous creation of high-quality and innovative resources. From a legal perspective, protection is based on the Law on Copyright and Related

1 Radosavljević, L., & Jovanović, S. (2000). Intellectual Property in the Field of Pharmaceutical Products. *Procesna Tehnika*, 2000(1-2), 45–50

2 Law on Copyright and Related Rights, “Official Gazette of the Republic of Serbia”, Nos. 104/2009, 99/2011, 119/2012, 29/2016 – Constitutional Court decision, and 66/2019.

Rights of the Republic of Serbia, while the international framework consists of the Berne Convention,³ the WIPO Copyright Treaty⁴, and the TRIPS Agreement (WTO). In this way, harmonization and international protection of copyrighted works used and distributed in the digital environment are ensured

2.2 Industrial property rights

Industrial property rights represent the fundamental pillar of innovation protection in the pharmaceutical industry. They encompass patents, trademarks, industrial designs, as well as other specific institutes.

Patents are the most significant form of innovation protection in pharmacy. They relate to new chemical substances, pharmaceutical formulations, dosage forms, methods of administration, as well as manufacturing processes. The patent system provides the patent holder with the exclusive right to exploit the invention for a period of 20 years, thereby ensuring the recovery of substantial investments in research and development. However, the specificity of the pharmaceutical sector lies in the lengthy nature of clinical trials and regulatory procedures, which is why the legal system of the European Union introduced the Supplementary Protection Certificate (SPC) as a special instrument for the extension of protection. In the Republic of Serbia, this matter is regulated by the Patent Law⁵, which is harmonized with EU law and TRIPS standards. If patents are not adequately protected, various forms of infringement may occur, including counterfeiting, unauthorized copying, and placing products on the market. For this reason, pharmaceutical companies seek to extend the protection of their innovations. While such measures may be justified from the perspective of companies and inventors, legislators must simultaneously take into account the interests of society and public health⁶.

Trademarks enable the differentiation of products and services in the market and play a multifaceted role in the pharmaceutical sector. They protect not only the name of the medicine (e.g., Aspirin), but also the visual elements of packaging, colors, shapes, or sound marks. In this way, they build trust among patients and healthcare professionals while also preventing confusion in the marketplace. A particular significance of trademarks in pharmacy lies in the fact that they often remain in force even after the expiry of patent protection, thereby extending the market value of the brand, considering that the duration of a trademark is ten years with the possibility of indefinite renewal.⁷

Industrial design provides legal protection for the external appearance of an industrial product. In the pharmaceutical sector, this includes the design of medical devices and aids (such as inhalers, applicators, and injectors), as well as packaging. The aesthetics of

3 Law on the Ratification of the Berne Convention for the Protection of Literary and Artistic Works, "Official Gazette of the SFRY", No. 14/75 and "Official Gazette of the SFRY – International Treaties", No. 4/86 – regulation.

4 Law on the Confirmation of the WIPO Copyright Treaty, "Official Gazette of the FRY – International Treaties", No. 13/2002.

5 Law on Patents, "Official Gazette of the Republic of Serbia", Nos. 83/2015, 113/2017 – authentic text.

6 Killick, J., Schultz, A., & Dawes, A. (2008). The Stockholm Network Experts' Series on Pharmaceutical Intellectual Property Rights: The special regime of intellectual property for the pharmaceutical industry (pp. 3–5). Stockholm: Stockholm Network.

7 Lasić, I. (2010). Pharmaceutical Patents: General Characteristics and Current Issues in an International Law Context. *Pravni Zapisi*, V(1), 176–196.

a product has a direct impact on its functionality and accessibility for patients, and through design protection, manufacturers also secure differentiation in the market.⁸

Although less frequently applied in the pharmaceutical industry, the legal framework also provides for the protection of geographical indications and plant varieties. These may be relevant in the case of natural substances originating from specific regions, as well as in the development of medicinal plants used as raw materials. In this way, the pharmaceutical sector remains connected with both agricultural and biotechnological fields.

2.3 Trade Secrets (Know-How)

Trade secrets, or know-how, represent an indispensable form of protection in the pharmaceutical industry. Unlike patents, which require the disclosure of an invention, trade secrets allow the retention of key information under a confidential regime by the holder, who may be either a natural or a legal person⁹. In practice, this relates to specific formulations, manufacturing processes, laboratory protocols, or research data that are not publicly available.

The protection of trade secrets is based on the Law on the Protection of Trade Secrets of the Republic of Serbia, and at the international level on the standards of the TRIPS Agreement. The particular importance of trade secrets in the pharmaceutical field lies in the fact that they are often combined with patent protection—while certain segments of an innovation are patented, others remain protected as trade secrets, thereby providing an additional layer of competitive advantage. Unauthorized disclosure or use of trade secrets may have serious consequences, both economic and legal, including potential criminal liability.

3. PATENT PROTECTION IN THE PHARMACEUTICAL INDUSTRY

Patent protection represents a key legal instrument in the pharmaceutical industry, granting holders of innovations exclusive rights to the use and commercialization of their inventions. The purpose of a patent is to provide recognition and legal protection for innovative solutions, thereby encouraging investment in research and development. The essential characteristics of a patent include novelty, inventiveness, and industrial applicability. An invention is patentable only if it is clearly distinguishable from previously known solutions, contains inventive elements, and can be applied in industrial production.

3.1 Specificities of Pharmaceutical Patents

In the context of the pharmaceutical industry, patents are generally divided into three main categories¹⁰: Product patents – protect the pharmaceutical product itself, i.e.,

8 Law on Legal Protection of Industrial Design, “Official Gazette of the Republic of Serbia”, Nos. 104/2009, 45/2015, and 44/2018 – other law.

9 Law on the Protection of Trade Secrets, “Official Gazette of the Republic of Serbia”, No. 53/2021

10 Correa, C. M. (ed.), 2008, A Guide to Pharmaceutical Patents, Vol. I, p. 4; Correa, C. M., 2004,

the active substance or the medicine; Process patents – protect the technical methods and processes used in the production of the medicine; Second medical use patents (new indications) – protect the specific application of an already known substance for the treatment of new diseases or conditions.

These patents provide companies with legal exclusivity regarding formulations, manufacturing processes, and therapeutic indications, thereby ensuring market advantage and fostering further innovation.

3.2 Duration of Patent Protection

In accordance with the applicable legislation, a basic patent lasts for 20 years¹¹ from the date of filing. During the patent term, the holder has the exclusive right to manufacture, use, and sell the protected medicine, which enables the recovery of R&D investments and serves as an incentive for continued innovation.

3.3 Strategies for Extending Protection

Pharmaceutical companies often employ legally permissible strategies to extend the market exclusivity of their innovative products, taking into account the legal and regulatory frameworks governing intellectual property in the pharmaceutical sector. These strategies are of crucial importance for safeguarding investments in research and development, as well as for maintaining competitive advantage in the medicines market. The most common strategies include secondary patents, new dosage forms, or the use of Supplementary Protection Certificates (SPCs).¹²

Secondary patents refer to additional patents that may be granted for new forms of already patented medicines, including different crystalline forms, salts, esters, or new pharmacological indications. Although these patents do not concern the basic invention itself, they allow pharmaceutical companies to obtain legal protection for incremental innovations that enhance the efficacy, stability, or safety of a medicine. It is important to note that such patents must meet the standards of novelty, inventiveness, and industrial applicability in order to be valid under national and international patent law.¹³

Changes in pharmaceutical dosage form,¹⁴ such as transforming tablets into capsules, applying transdermal patches, or developing inhalers, represent a strategy that can not only improve the bioavailability and pharmacokinetic properties of a medicine but also secure legal protection through new patents. These innovations are often combined with secondary patents to maximize the extension of a product's market exclusivity.

Ownership of knowledge – the role of patents in pharmaceutical R&D, Bulletin of the WHO, 82:784–790, p. 785

11 Law on Patents, "Official Gazette of the Republic of Serbia", Nos. 83/2015, 113/2017 – authentic text.

12 Council Regulation (EEC) No. 1768/92 of 18 June 1992 on the Creation of a Supplementary Protection Certificate for Medicinal Products, Official Journal L 182, 02/07/1992, p. 1–5.

13 Trips

14 Killick, J., Schultz, A., Dawes, A., 2008, The Stockholm Network Experts' Series on Pharmaceutical Intellectual Property Rights: The special regime of intellectual property for the pharmaceutical industry, Stockholm Network, pp. 3–5.

The Supplementary Protection Certificate (SPC) is a legal instrument provided under European law¹⁵ that allows for the extension of a medicine's exclusive protection after the expiration of the basic patent. SPCs are granted to compensate for time delays arising during the regulatory approval process of a medicine and can extend protection for up to five years. An example of this mechanism is the medicine Nexium by AstraZeneca, where an SPC enabled additional market exclusivity following the expiration of the basic patent. The Supplementary Protection Certificate (SPC) represents a specific legal instrument within intellectual property law, developed primarily for the pharmaceutical industry, which allows for the extension of a medicine's exclusivity after the expiration of the basic patent, compensating for the period lost during clinical trials and regulatory approval (Killick, Schultz, Dawes, 2008, p. 5). The legal basis for SPCs in the European Union is Council Regulation (EC) No. 1768/92 of 18 June 1992, which introduced the possibility of issuing SPCs for medicinal products and pharmaceutical drugs.

An SPC has the same effect as a patent but does not extend the original patent term itself; rather, it constitutes a *sui generis* instrument with a limited extension effect, the maximum duration of which cannot exceed five years, starting from the expiry of the basic patent (Council Regulation 1768/92, Article 13). The function of the SPC is to enable pharmaceutical companies to recover the time lost between the filing of a patent application and the approval of the medicine, thereby encouraging further research and development of new drugs by ensuring a period of exclusive marketing that compensates for R&D investments (Killick, Schultz, Dawes, 2008, pp. 9–10; Tritton et al., 2002, p. 177). Within the EU regulatory framework, the SPC is implemented through Regulation (EC) No. 726/2004 and Directive 2004/27/EC, which govern the procedures for authorization and supervision of medicinal products and establish the European Medicines Agency. Considering that pharmaceutical products can be brought to market only after lengthy clinical trials, the basic patent often does not provide a full period of exclusive protection, which the SPC successfully compensates.

At the same time, SPCs carry significant market and legal implications, as they allow companies to extend market exclusivity and protect investments, but their misuse can serve as a tool to block competition from generic medicines, which is subject to regulatory oversight and case law. In this context, SPCs represent a balance between incentives for innovation and public interest, as they provide pharmaceutical companies with fair compensation for time lost during regulatory procedures, while their abuse may trigger intervention by regulatory authorities and courts. These strategies are frequently the subject of litigation and regulatory scrutiny, particularly regarding access to medicines and public health. While pharmaceutical companies seek to maximize market exclusivity, regulators and legal systems must balance the interests of innovators with the societal need for the availability of generic drugs.

3.4 Regulatory Data Protection

In addition to patent protection, pharmaceutical companies can also rely on regulatory data protection (Data Exclusivity)¹⁶. This mechanism grants companies exclusive rights to use

15 Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, Official Journal L 136, 30/04/2004, p. 34–57.

16 Lasić, I. (2010). *Pharmaceutical Patents: General Characteristics and Current Issues in an International*

clinical data on the safety and efficacy of a medicine for a specified period. Pursuant to Article 39 of the TRIPS¹⁷ Agreement, member states are obliged to protect such data from unfair commercial use, except where necessary to safeguard public interest. The European model „8+2+1” defines eight years of data exclusivity, an additional two years of market protection, and the possibility of an extra one year if specific criteria are met.

3.5 Social and Market Effects

Patent protection has a direct impact on public health and the market. On one hand, it allows companies to recover their investments and encourages the development of new medicines. On the other hand, it may lead to high medicine prices and limited access, particularly in developing countries. Litigation concerning secondary patents and SPC strategies, such as in the case of AstraZeneca, demonstrates that legal protection can be challenged, and successful lawsuits by generic manufacturers can facilitate broader access and lower prices.

4. LEGAL FRAMEWORK AND CRITICAL ANALYSIS OF THE SUPPLEMENTARY PROTECTION CERTIFICATE (SPC) THROUGH CASE LAW

Although the SPC was originally conceived as an instrument to ensure fair compensation for investments in research and development and to encourage innovation, its application can be misused to delay the entry of competing generic medicines into the market, as demonstrated in practice by the AstraZeneca Group case. In the specific case, AstraZeneca was subject to proceedings before the EU General Court¹⁸ due to attempts to mislead several European patent offices regarding its medicines for the treatment of ulcers, including **Losec**¹⁹. The company sought to revoke marketing authorizations for **Losec** capsules in Denmark, Norway, and Sweden, withdraw the original product from the market, and simultaneously introduce a modified version (**Losec MUP**), thereby attempting to illegitimately extend market exclusivity using the SPC. The EU General Court emphasized in its decision that, while patent protection is essential for fostering pharmaceutical innovation, the SPC must not be used as a means to monopolistically block competition or maintain higher market prices for a product. AstraZeneca Group was fined USD 60 million for the unlawful use of the SPC to delay the market entry of generic medicines.

The analysis of this case highlights several critical legal and economic aspects of SPC application. First, the SPC is clearly defined as a limited protection extension instrument, with a maximum duration of five years²⁰, intended to compensate for regulatory time lost from the filing of a patent application to the authorization to place a medicine on the market. Second, misuse of the SPC to strategically block competition and maintain a market

Law Context. Pravni Zapisi, V(1), 176–196.

17 Trips

18 AstraZeneca v. Commission, Case T-321/05, Judgement of the General Court, 1 July 2010, European Court of Justice of the European Union, par. 1–2.

19 AstraZeneca v. Commission, Case T-321/05, Judgement of the General Court, 1 July 2010, European Court of Justice of the European Union, par. 1–2.

20 Council Regulation (EC) No. 1768/92 of 18 June 1992 on the Creation of a Supplementary Protection Certificate for Medicinal Products, Article 13.

monopoly is subject to sanctions, as confirmed by EU case law. Third, the AstraZeneca precedent serves as a critical guide for balancing the interests of pharmaceutical innovators with the public interest regarding access to medicines at reasonable prices.

From an academic perspective, the case demonstrates that legal instruments such as the SPC do not operate in isolation but interact with market dynamics and regulatory frameworks. They must be carefully interpreted and applied in accordance with the fundamental principles of competition law and public health. Jurisprudence clearly indicates that the SPC cannot be transformed into a mechanism to delay competition; rather, its primary function remains to provide fair compensation for regulatory processes, thereby ensuring incentives for innovation without compromising public interest.

5. CONCLUDING CONSIDERATIONS

Pharmaceutical patents, due to their specific nature, represent a key incentive for scientists and researchers, as they provide protection for the results of their work and investments in drug research and development, particularly in countries with well-developed financial and technological infrastructures. However, in developing countries, where a significant portion of the population is impoverished and healthcare facilities are insufficiently developed, patent protection has limited effectiveness in stimulating research and development of new products.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets minimum standards of intellectual property protection for members of the World Trade Organization (WTO), while least-developed countries were granted the possibility to delay the implementation of these standards for a period of ten years. Nevertheless, this does not resolve the issues faced by countries lacking the capacity to manufacture medicines, nor for underdeveloped states that are not WTO members, as in such circumstances patent protection does not contribute to improving access to essential medicines.

The Commission on Intellectual Property Rights, Innovation, and Health Protection²¹ emphasizes that in underdeveloped regions of the world, where the population has very limited purchasing power, patents are neither an effective factor in stimulating R&D nor in enabling access to new products in the market. Until a balance is achieved between the interests of pharmaceutical companies and the needs of developing countries for access to essential medicines, the challenges discussed in this study will persist.

As highlighted by Bill Gates at the World Health Assembly in 2005²², political and market systems operate efficiently in developed countries, enabling the financing of research and the provision of healthcare to citizens who can afford it. However, in much of the world, these conditions are largely absent. This underscores the need for a better global approach that ensures access to medicines for the poorest populations without undermining the innovative potential of the pharmaceutical sector.

Achieving a compromise between pharmaceutical companies and human rights activists is a necessary yet challenging task, as solutions are rarely fully satisfactory to both

21 Commission on Intellectual Property Rights, Innovation, and Health (CIPRH). (2006). Public Health, Innovation and Intellectual Property Rights. Geneva: World Health Organization. Available at: <https://www.who.int/publications/i/item/9241563416>

22 Gates, B. (2005, May). Remarks at the World Health Assembly. Geneva, Switzerland

parties. A final agreement harmonizing intellectual property rights with access to essential medicines would enable, on the one hand, the population to fully exercise their human rights, while, on the other hand, inventors and scientists enjoy the fruits of their labor and companies continue to earn profits. The mere removal of patent protection would not guarantee access to medicines, since funding for innovation would still be required; however, it would create space for the implementation of appropriate regulatory measures and selective distribution of medicines, while simultaneously reducing prices and increasing availability.

Market economics indicate that producing medicines at lower prices increases demand and, consequently, the profits of pharmaceutical companies. This dynamic, combined with global population growth, leads to a continuous increase in the production and sale of medicines, which allows for reinvestment in the development of new patents and innovations. Lowering the prices of essential medicines in underdeveloped countries not only contributes to the full realization of human rights but also enhances the reputation of companies and stimulates further innovation in the pharmaceutical sector.



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GLOBALNI IZAZOVI NA PUTU OD IDEJE DO LEKA: INTELEKTUALNA SVOJINA IZMEĐU TRŽIŠNIH INTERESA I JAVNOG ZDRAVLJA

Apstrakt:

Pravni okvir intelektualne svojine u oblasti farmaceutske industrije obuhvata više oblika zaštite koji omogućavaju nosiocima prava da očuvaju ekskluzivitet i tržišnu prednost. Patentna zaštita i sertifikat dodatne zaštite (SPC) predstavljaju najznačajnije mehanizme za produženje komercijalne kontrole nad inovativnim lekovima. Osim ovih instrumenata, značajnu ulogu imaju i drugi oblici pravne zaštite: žigovi, industrijski dizajn, kao i autorsko pravo u vezi sa pratećom dokumentacijom i softverskim rešenjima.

Rad se bavi deskriptivnom analizom navedenih instrumenata i njihovom funkcijom u kontekstu farmaceutskog tržišta, sa ciljem razmatranja pravne svrhe, efekta i međusobnog odnosa različitih oblika zaštite. Poseban akcenat stavlja se na paralelu između osnovne patentne zaštite i SPC-a, koji često funkcioniše kao sredstvo za odlaganje tržišnog ulaska konkurentskih proizvoda.

Ključno istraživačko pitanje koje rad pokreće jeste: da li postojeći mehanizmi pravne zaštite doprinose ostvarivanju prava na zdravlje kroz podsticanje inovacija, ili,

pak, pretežno pogoduju interesima farmaceutske kompanije ograničavanjem dostupnosti terapije? Kroz pravnu analizu funkcije, domašaja i posledica zaštite intelektualne svojine u farmaciji, rad nastoji da doprinese razumevanju odnosa između prava i javnog interesa u oblasti zdravstva.

Ključne reči: intelektualna svojina, patent, sertifikat dodatne zaštite, farmaceutska industrija, javno zdravlje

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PERSONAL DATA AND ARTIFICIAL INTELLIGENCE: LEGAL AND ETHICAL ASPECTS IN THE ERA OF RAPID IT DEVELOPMENT

Abstract:

The modern era brings rapid development of information technologies, and artificial intelligence (AI) is becoming increasingly present in various areas of life and work. This technology relies on accelerated data transfer and large databases (datasets) for training and improving its models. These databases often contain citizens' personal data, including highly sensitive information, which raises numerous questions regarding privacy and data protection in the process of creating AI-based software solutions. This paper analyzes the key challenges of personal data protection in the development of AI, with particular attention to the risks of identifications, data leakage, and ethical dilemmas. We will also present the relationship between the AI Act and the GDPR as the main legal frameworks in the EU, which current represent the highest level of regulation in these fields worldwide. Preserving privacy, including anonymization, represents a crucial issue in the era of accelerated AI development. Through the analysis of case studies and best practices, aiming to achieve a balance between technological progress and the protection of individuals' fundamental rights. The results indicate the need for continuous development and implementation of innovative approaches that enable the advancement of AI while preserving user privacy.

Keywords: *Personal data, Artificial intelligence, Training sets, Information technologies.*

INTRODUCTION

The modern era is characterized by the unstoppable advancement of information technologies, with artificial intelligence (AI) at the very heart of this transformation. Its omnipresence across various spheres of life, work, and professional practice, from process automation to personalized services, attests to its revolutionary potential. It is as if all the knowledge of humankind has suddenly become fluid.

The foundation of AI model functioning and improvement lies in vast amounts of data, the so-called “datasets” used for training AI systems, as well as in the technologies that enable the creation and transfer of such extensive data volumes. However, these databases often contain personal data, and frequently even sensitive categories of citizens’ data. Questions of privacy and data protection have thus become a central point of debate in the process of designing and implementing AI-based software solutions.

The aim of this paper is to provide a detailed analysis of the key challenges that emerge in the field of personal data protection during the development of AI-driven systems. Particular focus will be placed on identifying specific risks and the technical measures that can be used to mitigate or at least minimize them. The paper also addresses the complex ethical dilemmas that accompany the collection, processing, and use of personal data in the AI context. In this regard, it is essential to consider the relationship between two critical regulatory frameworks of the European Union, the General Data Protection Regulation (GDPR)¹ and the recently adopted Artificial Intelligence Act (AI Act)². These instruments represent the highest forms of regulation currently available worldwide and provide the foundation for understanding the legal framework within which AI development must take place.

Safeguarding privacy emerges as an imperative in the age of AI development. By analyzing relevant case studies and industry best practices, this paper seeks to provide concrete recommendations for the responsible management of personal data in the training process of AI systems. The ultimate goal is to achieve a delicate balance between fostering technological progress and safeguarding the fundamental rights of citizens. The findings of this research will highlight the necessity of developing and applying innovative approaches that allow AI to realize its full potential while simultaneously guaranteeing user privacy.

In preparing this paper, methods commonly employed in the social sciences will be applied, particularly the analysis of legal acts and case law. The scientific contribution of this research derives from the scarcity of sources on these modern topics and the pace of technological development, which leaves little room for the legal profession to pause and reflect.

2. PERSONAL DATA AND ARTIFICIAL INTELLIGENCE

In contemporary digital society, privacy has become one of the most important issues, both at the individual and the societal level. Personal data constitute the foundation of each individual’s identity, representing a highly vulnerable resource. Protecting this resource gains significance because it involves safeguarding one of the fundamental human rights, the right to privacy.³ In the modern era, this becomes a critical concern due to

1 GDPR – General Data Protection Regulation – Regulation (EU) 2016/679 of European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

2 The Artificial Intelligence Act – Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.

3 The significance of these rights is further emphasized by the fact that one of the most important acts of the European Union—the Charter of Fundamental Rights of the EU—explicitly enshrines these two rights: respect for private and family life and the right to the protection of personal data. See Articles 7 and 8.

the emergence of technological tools that carry significant risks for personal data, and consequently, for individual privacy.

The basic principle of artificial intelligence (AI) functioning lies in its capacity to learn from data. The AI Act defines AI systems as follows: *“An artificial intelligence system is a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment; which, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or digital environments.”*⁴ This definition highlights that such systems possess a certain degree of autonomy and adaptability, features that, until recently, were exclusively associated with human intelligence. However, the term “intelligence” in this compound suggests that the technology is “smart” and mimics certain elements of human cognition. Nevertheless, we must remain aware that artificial intelligence also has significant limitations when compared to human intelligence.⁵

AI-based systems, particularly those employing machine learning methods, develop their capabilities through the analysis of massive datasets that frequently contain information about individuals’ behaviors, habits, preferences, and other personal data. These systems detect behavioral patterns and adjust their responses accordingly, resulting in adaptability and personalization of interactions with users. Consequently, technology appears more personal and persuasive in its relationship with the individual. By knowing users’ habits, AI-based systems may also be exploited for manipulative purposes or other unethical uses.

2.1. The Role and Importance of Data

Data represent the fundamental resource for the development of AI systems. These data are organized into datasets, which may be defined as collections of information used for the training, testing, and validation of AI models. Datasets can contain diverse types of information, including images, sounds, text, and structured user data (as mentioned in the previous section). The volume of information that a system may hold about a single user can be extremely extensive, encompassing names, addresses, email addresses, and often sensitive data such as geolocation, search history, communications, and even medical records. Consequently, AI systems may at times be trained on vast collections of data about individuals without their knowledge.

A company developing AI systems may employ multiple databases. As noted in the literature: “The data used throughout the entire developmental process of an AI-based system can broadly be categorized as follows:

1. Training data – Data used to train the AI model;
2. Test data – Data used to test the model and compare it with other models;
3. Validation data – Data used to validate the final AI model.”⁶

⁴ AI Act, article 3. paragraph 1, point 1.

⁵ Tul D. (2024.). Etički principi veštačke inteligencije. Odgovori pravne nauke na izazove savremenog društva, pg. 761.

⁶ Refer to Article: What data is used to train an AI, where does it come from, and who owns it? Link: <https://www.potterclarkson.com/insights/what-data-is-used-to-train-an-ai-where-does-it-come-from-and-who-owns-it/> (accessed: 13.07.2025.)

It is important to underscore that the role and importance of personal data in contemporary digital society cannot be examined in isolation from the broader regulatory framework established at the European and international levels. Privacy and data protection rights are recognized as fundamental human rights, as demonstrated by numerous international instruments and recommendations. Particularly notable is Recommendation 1984 (2011) of the Parliamentary Assembly of the Council of Europe, which addresses the media and the use of the Internet, prescribing the protection of privacy and personal data online in digital media. This recommendation calls for an action plan to enhance common legal standards for the protection of privacy and personal data across networks and services throughout Europe and beyond, under the framework of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Importantly, the Convention has been acceded to by certain non-European states as well. Such an approach emphasizes the necessity of global and coordinated efforts in the protection of privacy, particularly in the context of ongoing digitalization and AI development, where personal data are frequently at the center of both innovation and risk.⁷

For this reason, responsible data management and compliance with regulatory frameworks provide the foundation for building trust between users and the developers of AI-based technological solutions. This leads naturally to a discussion of the risks inherent in such technologies, as well as of the responsibilities companies bear in managing those risks when developing AI-driven systems.

2.2. Risks and Privacy Challenges

By understanding the significance of personal data in the development of AI-based systems and the nature of the technology itself, it becomes possible to accurately assess the associated risks to individuals' personal data.

An additional aspect of this technology must be explained. It is particularly important to emphasize that once an AI system is trained, the data that entered into the training process have already influenced the development of the model, and control over that data is effectively lost. Data may be removed from the database on which the model was trained, but the model itself has already been shaped and enhanced by that information. The only way to eliminate those data would be to abandon the current version of the model entirely, reverting one or more steps back to a version prior to the training process. Naturally, this could result in significant costs for the company developing the technology, creating a potential disproportionality between the value of the personal data involved and the financial loss incurred. This is precisely why companies must exercise great caution when handling personal data and implement all available technical safeguards.

The risks identified include the following:

- Reidentification – The re-linking of anonymized data with specific individuals.
- Data leakage – Occurring either due to inadequately protected databases or through AI-based models themselves.
- Lack of transparency – Most contemporary models operate as “black boxes,”

⁷ See Doc. Dr Reljić D. (2024.). Uvod u pravo zaštite ličnih podataka. Univerzitet PIM Banja Luka, pg. 71-72.

making it difficult to determine how data were utilized and whether misuse or unauthorized access has occurred. Such opacity complicates the enforcement of data subjects' rights (e.g., the right of access, the right to information, and the right to erasure).

- Ethical and social risks – These require careful analysis as they can be highly diverse. An illustrative example includes AI-based systems assisting corporate hiring processes, such as Amazon's recruitment tool, which exhibited gender bias against female candidates (a case discussed later in the paper).
- Legal challenges – Issues related to oversight bodies, obtaining CE marking for market entry, and potential financial penalties.

3. REGULATION AND DATA PROTECTION

Databases are subject to various regulatory frameworks. First and foremost, they are protected by copyright and related rights. At the same time, databases may contain information that qualifies as trade secrets as well as personal data. Given the presence of personal data, a database must also comply with data protection regulations.

Accordingly, for a company to use a database legally, it must address three levels of protection:

- The right to use the database;
- Intellectual property rights regarding individual elements within the database (such as copyrighted works, text, images, music, etc.);
- The right to privacy, i.e., the protection of personal data contained in the database.

It is the last of these dimensions that constitutes the primary focus of this paper.

In addition to legal frameworks, ethical principles are of fundamental importance for the responsible management of databases containing personal data. An ethical approach requires that companies, beyond simply complying with the law, also acknowledge their broader social responsibility in the ways they gather, process, and utilize data. Key ethical principles include respect for the autonomy and dignity of individuals, transparency in data processing, minimization of data collection, and accountability for any potential misuse or breaches of information. Ensuring fairness and preventing discrimination in algorithmic processing are particularly important, to avoid situations in which AI-based systems deepen existing social inequalities. The introduction of ethical concepts such as *privacy by design* further contributes to the proper implementation of these principles.

As one legal perspective explains: *"Data protection law establishes the basic principles for information processing in order to prevent the misuse of personal data. These principles face profound challenges in their application within the context of generative artificial intelligence. Therefore, it is necessary to consider the lawfulness of data processing, risk assessment, and information security from a legal standpoint in order to strengthen the regulatory framework."*⁸ From this follows the evolution of regulation that has brought us

8 Jiayi, W. (2025). Research on Challenges and Legal Measures for Personal Data Protection in

to the highest level of development to date, namely, the European legal frameworks of the General Data Protection Regulation (GDPR) and the Artificial Intelligence Act (AI Act).

3.1. GDPR and AI Act

One of the most significant legal instruments in the field of personal data protection, not only in the EU but also worldwide, is the General Data Protection Regulation (commonly referred to as the GDPR). Although this comprehensive framework represents the result of years of work by leading experts in data protection law, at the time of its adoption in 2016 it could not foresee the pace of AI development nor its growing relevance to everyday life, particularly in relation to the right to data protection. An average lawyer, or indeed any individual newly encountering AI, might well raise the question of what connection, if any, exists between these two pieces of legislation, which at first glance appear unrelated: the GDPR, which governs the protection of personal data, and the AI Act, which regulates providers who place AI systems on the EU market or put them into use within the EU, regardless of where they are established, as well as AI users located in the EU and those in third countries when their systems' outputs are used in the EU.

The relationship between the GDPR and the AI Act is highly interwoven, given that data constitute the essential component of AI technology while the AI Act itself makes extensive references to AI functionalities directly related to personal data. For example, prohibited uses of AI include systems designed to manipulate human behavior, social scoring (rating and ranking citizens), and real-time biometric identification in public spaces.⁹ The importance of data protection within the AI Act is underscored by the fact that it mentions "protection" 55 times. Since AI algorithms are trained on vast datasets that often include personal data, all processing of personal data during every stage of AI development must comply with the GDPR. The fundamental objective of the GDPR is the protection of individuals' fundamental rights and freedoms in a digitalized society where privacy and personal data are more vulnerable than ever. Risks to personal data now no longer stem solely from system hacking and data theft, but also from data use within AI training and processing. The GDPR grants individuals meaningful control over their personal data: data subjects must be informed who is using their data, for what purposes, how, and for how long. The pressing question is: do these guarantees apply equally in the context of AI?

Recital 15 of the GDPR states: *"In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used."*¹⁰ This statement makes it clear that AI must also adhere to the principles of personal data processing. Processing is lawful if any of the legal grounds specified by the GDPR is satisfied.¹¹ This means that even when personal data are processed through AI systems, the data subject must, for instance, provide consent for the publication of a photograph on an employer's website or for the use of cookies. Another legal ground would be data processing necessary for the performance of a contract, such as online purchases, or to fulfill legal obligations (e.g., toward tax authorities or banks). The GDPR further recognizes processing when vital interests are at stake (e.g., providing care to an

Generative AI. Pg. 101

9 For the list of prohibited AI functionalities, see Article 5(1) of the AI Act.

10 See Recital 15 of the GDPR Preamble.

11 See article 6. of GDPR.

accident victim), based on legitimate interests (such as targeted digital marketing), or for reasons of public interest. Without one of these legal bases, there can be no lawful personal data processing, regardless of whether the controller or processor is a natural person or an AI system.

A significant component of GDPR compliance is the work of independent supervisory authorities for data protection. The most prominent case occurred in March 2023, when the Italian supervisory authority *Garante* temporarily banned ChatGPT within Italy, citing:

1. Breaches of users' ChatGPT data, including financial records and conversations;
2. OpenAI's lack of transparency with users regarding its personal data processing;
3. OpenAI's failure to demonstrate any legitimate interest (legal ground) for the mass collection and processing of personal data for the training of algorithms;
4. The processing of inaccurate personal data;
5. The absence of any mechanism for verifying users' ages, even though OpenAI's own terms of service restricted usage to individuals aged 13 or older.¹²

Shortly thereafter, legislative measures regulating AI systems, their risks, and their use were introduced, culminating in the AI Act. The Act specifies three levels of risk in relation to AI systems: high, limited, and minimal. High-risk AI systems are subject to stringent requirements prior to market placement. Limited-risk systems are subject to transparency obligations, such as the requirement to inform individuals that they are interacting with an AI system or that they are viewing content generated by AI. Minimal, or no-risk systems, by contrast, do not fall under any specific obligations of the Act.

The GDPR similarly addresses data protection risks, prescribing obligations for controllers to safeguard individuals' rights and freedoms. As stipulated: *"Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks."*¹³

The GDPR also introduced a new right for citizens: the right to object to automated decision-making.¹⁴ This right encompasses the ability of an individual to oppose a decision made solely by an AI-based system, as well as their right to request human intervention and even to contest the final decision when procedural rights are not respected. This provision is particularly important given the widespread lack of trust in AI systems and the difficulty for users in understanding how such decisions are reached. As noted, *"Automated individual decision-making refers to any decision adopted entirely without human involvement. Examples include determinations of tax rates or refunds based on user submissions, automated credit approvals, issuing fines for parking violations by automated*

¹² Article: Italian Granate bans Chat GPT from processing personal data of Italian data subjects. Link: <https://www.dataprotectionreport.com/2023/04/italian-garante-bans-chat-gpt-from-processing-personal-data-of-italian-data-subjects/> (accessed: 21.07.2025.)

¹³ See article 35. paragraph 1 of GDPR.

¹⁴ See article 22. of GDPR.

*surveillance systems, or even student assessments conducted by AI-based grading software.*¹⁵ In addition, Professor Krivokapić has elaborated on the related concept of profiling: *“Profiling is a narrower concept and represents any form of automated data processing used to evaluate certain personal characteristics.”*¹⁶

The AI Act does not supersede or replace the GDPR, nor does it regulate matters already covered by the GDPR. In fact, the GDPR anticipated AI-related concerns in its recognition of rights such as the objection to automated decision-making, even before the AI Act was introduced. Given their numerous points of intersection, the European Data Protection Board (EDPB) has initiated the drafting of Guidelines on the interaction between the GDPR and the AI Act.

3.2. Safeguards and Practical Approaches

Companies developing AI systems must rely on datasets, or databases, to train their AI models. The relationship to such databases may vary: a company may own the database itself, may use databases obtained from third parties, or may even rely on publicly available datasets (such as from the Internet or open data repositories). Ownership of a database, however, does not automatically imply ownership of the individual data contained within it. The database owner is responsible for upholding ethical standards, identifying and mitigating risks, and implementing protective measures to ensure data security.

In all cases, companies developing AI models must align their operations with data protection regulations. The process of compliance is outlined in detail in practical guides such as *“Personal Data Protection.”*¹⁷ The ultimate aim of compliance is to ensure that corporate activities are consistent with regulatory frameworks, thereby providing an adequate level of personal data protection within business processes. AI software developed by companies that disregard users’ privacy may encounter market resistance due to reputational risks.

One of the most important legal obligations within the GDPR is the preparation of a Data Protection Impact Assessment (DPIA). As emphasized by the European Data Protection Board (EDPB): *“The DPIA is an important element of accountability, where processing in the context of AI models is likely to be characterized as high risk to the rights and freedoms of individuals.”*¹⁸

The challenges of compliance include process complexity, data and documentation management, and the evolving regulatory landscape.¹⁹ Through compliance processes, companies must determine which protective measures are mandatory and which are advisable to both respect regulations and minimize privacy risks. As practice shows, there exists a diverse spectrum of both commendable and poor corporate approaches.

15 Krivokapić Đ. Adamović J. (2023). Zaštita podataka o ličnosti u poslovanju, pg. 81.

16 Krivokapić Đ. Adamović J. (2023). Zaštita podataka o ličnosti u poslovanju, pg. 82.

17 Tul D. (2023). Zaštita podataka o ličnosti. KEC grupa, pg. 51-81.

18 Publication of the European Data Protection Board (EDPB): Opinion of the Board (Art. 64) - Opinion 28/2024 on certain data protection aspects related to the processing of personal data in the context of AI models (17.12.2024.). Link: https://www.edpb.europa.eu/system/files/2024-12/edpb_opinion_202428_ai-models_en.pdf (accessed: 13.07.2025.).

19 For a more detailed discussion of these risks, see the scholarly article: Paul, J. (2024). Privacy and data security concerns in AI, pg. 8.

Training data can originate from diverse sources. One example is the Spotify AI DJ, which analyzes users' listening history, an element of personal data, in order to generate personalized playlists. Spotify's Privacy Policy affirms this purpose of processing: *"To evaluate and develop new features, technologies, and improvements of the Spotify service. This includes the development and training of algorithmic and machine learning models that help us keep our service safe and improve user experience."*²⁰ By accepting this document, users explicitly consent to the use of their data for AI training purposes, demonstrating adherence to the principle of transparency.

Another example is provided by Tesla vehicles, which collect terabytes of user data annually from their multiple cameras, sensors, GPS, radars, and other systems. These data are extensively used to train AI-based systems.²¹ However, users are often unaware of the full scope of the collected data, and companies have occasionally exceeded reasonable purposes for processing by over-collecting.

A further case involves WeTransfer, a file-sharing service where files may contain personal correspondence or works subject to copyright. WeTransfer revised its Terms of Service to state that user content *might* be used to "improve machine learning models," which provoked backlash, especially from the creative industries. Following public pressure, the company stated it had never used content to train AI (even internally) and had no intention to do so. The Terms of Service were subsequently revised to remove all references to AI and machine learning.²²

One of the most important technical methods for safeguarding personal data is encryption. *"Privacy protection in machine learning research can broadly be divided into two directions: federated learning and homomorphic encryption, as well as perturbation methods such as differential privacy. Encryption not only encodes plain text into ciphertext that only authorized individuals may decrypt but also ensures confidentiality of data during storage and transfer. At the same time, computations can be carried out directly on encrypted text using secure protocols... The main challenge of this method is designing an appropriate perturbation mechanism that balances privacy with the usability of the algorithm."*²³

Several practical cases confirm the importance of data protection and compliance with data privacy laws by companies developing AI systems. They also illustrate the risks highlighted in this paper.

Practical Case I: Amazon - One of the most widely known examples demonstrates how improper use of personal data within AI systems can lead to discrimination. Amazon automated part of its hiring process by inputting job applicants' data for training. Since data on genders were not excluded from résumés, the system incorporated those as relevant variables. By analyzing the data, the AI system identified that men historically occupied more engineering positions and began disproportionately recommending male candidates.

20 Spotify Privacy Policy. Link: https://www.spotify.com/us/legal/privacy-policy/#_qvke6o2w2k1 (accessed: 16.07.2025.). Section 4.

21 See in Article: Big Data and Analytics in Tesla Inc. Link: <https://www.linkedin.com/pulse/big-data-analytics-tesla-inc-bipin-karki/> (accessed: 17.07.2025.).

22 See Article: WeTransfer says user content will not be used to train AI after backlash (published: 16.07.2025.). Link: <https://www.theguardian.com/technology/2025/jul/16/wetransfer-user-content-ai-artificial-intelligence> (accessed 17.07.2025.)

23 Yang, L. (2024). AI-driven Anonymization: Protecting Personal Data Privacy While Leveraging Machine Learning, pg. 2.

This outcome shows how reliance on statistical patterns led the system to assign importance to gender, a discriminatory result arising from flawed data use.²⁴

Practical Case II: Clearview AI - Clearview AI is a facial recognition system trained on vast collections of photographs scraped from the Internet, without individuals' consent or acknowledgment of any privacy policy. By compiling online images into its database, the system can identify individuals even years later despite significant changes in facial features (e.g., facial hair, hairstyle, or aging). Such practices are in direct violation of GDPR and the AI Act. Unsurprisingly, the company has faced multiple proceedings and sanctions across several jurisdictions worldwide.²⁵

4. CONCLUSION

The development of AI systems brings transformative changes across all spheres of life, offering opportunities for societal progress and new innovations. AI systems evolve through a process known as "training," which is fundamental to the advancement of this technology. Consequently, datasets and the data contained within them form the bedrock of AI-based system development. Precisely for this reason, questions of privacy, ethics, and regulation inevitably arise during the development of such technologies.

Through an analysis of the relationship between the General Data Protection Regulation (GDPR) and the Artificial Intelligence Act (AI Act), it has been highlighted that the EU is at the forefront of establishing a comprehensive legal framework that seeks to balance the encouragement of innovation with the protection of citizens' fundamental rights. Nevertheless, technology advances rapidly, while law, being slower than life itself, adopts a stance in these areas that requires defining basic principles and protecting them in the broadest possible terms. Here, legal science transforms its traditional approach, demanding that legal professionals understand technology and embrace creativity. One of the core principles of AI development must be the principle of privacy protection. Different AI systems and the companies developing them will address privacy concerns in various ways. Each of these companies must align its business processes with the GDPR. Without such compliance, they risk incurring millions in fines as well as administrative measures, including the deletion of databases. Although the AI Act is nearly a decade younger than the GDPR, its provisions empower independent supervisory authorities to impose draconian measures, even when AI has processed personal data.

The ultimate goal is to achieve a delicate balance: to enable the full potential of artificial intelligence for the benefit of society, while simultaneously guaranteeing the preservation of privacy and the security of personal data. Beyond the regulatory framework, this also necessitates efforts in raising awareness, education, and the adoption of ethical principles by companies developing AI-based systems. The objective is for AI to serve humanity in a responsible and sustainable manner, respecting the privacy of users and all citizens.

24 For more information see Article: Insight – Amazon scraps secret AI recruiting tool that showed bias against women. Link: <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G/> (accessed: 15.07.2025.)

25 See Article: Clearview AI faces more legal uncertainty in UK and US. Link: <https://www.biometricupdate.com/202506/clearview-ai-faces-more-legal-uncertainty-in-uk-and-us> (accessed: 15.07.2025.)



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LIČNI PODACI I VEŠTAČKA INTELIGENCIJA: PRAVNI I ETIČKI ASPEKTI U ERI UBRZANOG RAZVOJA IT-A

Abstrakt:

Moderno doba donosi ubrzani razvoj informacionih tehnologija, a veštačka inteligencija (VI) postaje sve prisutnija u različitim oblastima života i rada. Ova tehnologija se oslanja na ubrzan prenos podataka i velike baze podataka za obuku i unapređenje svojih modela (data setovi). Baze podataka često sadrže lične podatke građana, pa često i veoma osetljive podatke, što otvara brojna pitanja u vezi sa privatnošću i zaštitom podataka u procesu stvaranja softverskih rešenja baziranih na VI. Ovaj rad analizira ključne izazove zaštite ličnih podataka u procesu razvoja VI, sa posebnim osvrtom na rizike od identifikacije, curenja informacija i etičke dileme. Prikazaćemo i odnos AI Act-a i GDPR-a kao osnovnih zakonskih osnova u EU, koji predstavljaju najviši oblik regulative ovih oblasti na svetu trenutno. Očuvanje privatnosti, uključujući anonimizaciju, predstavljaju bitna pitanja u doba ubrzanog razvoja VI. Kroz analizu studija slučaja i najboljih praksi, rad daje preporuke za odgovorno upravljanje ličnim podacima u obuci VI, sa ciljem postizanja ravnoteže između tehnološkog napretka i zaštite osnovnih prava pojedinaca. Rezultati ukazuju na potrebu za kontinuiranim razvojem i primenom inovativnih pristupa koji omogućavaju razvoj VI uz očuvanje privatnosti korisnika.

Ključne reči: *Lični podaci, Veštačka inteligencija, Trening setovi, Informacione tehnologije.*

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2. GDPR - General Data Protection Regulation – Regulation (EU) 2016/679 of European

- Parliament and of the Council of 27 April 201 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
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ARTIFICIAL INTELLIGENCE IN UNCITRAL MODEL LAW ON AUTOMATED CONTRACTING

Abstract:

With the development of information technologies, trade has moved from traditional fields to a virtual environment. Today, artificial intelligence-based software and systems whose function is the automation of contractual relations are widespread. The preparation of the contract model, the negotiation phase, the submission of the offer and its acceptance, the conclusion of the contract, changes to the concluded contract, its execution and termination can take place today without the participation of people or with their minimal participation. Contracts are created and executed between humans and AI systems, but also between two or more AI systems automatically and/or autonomously. Not only humans but also machines enter into contractual relations with or without human control and intervention. In the era of artificial intelligence, UNCITRAL, through the solutions given in the UN Convention on the Use of Electronic Communications in International Contracts and the Model Law on Automatic Contracting, is trying to respond to the challenges that this technology brings to private-law contractual relations and contract law. UNCITRAL's working group IV on electronic commerce created technologically neutral legal rules that recognize the legal force of contracts concluded in this way. The subject of this paper is the analysis of UNCITRAL's Model Law on Automated Contracting, using the normative and comparative law method, with the aim of presenting a brief history of its creation, showing its structure, the principles on which it rests and the norms it contains. The norms were then discussed in the light of the Law on Artificial Intelligence of the European Union and the conditions it sets for the use of artificial intelligence, all for the sake of a more complete and comprehensive understanding of the regulatory framework that is emerging and exists in the sphere of contracting automatization, as well as pointing out the gaps that are more difficult to fill in the application of artificial intelligence in this area.

Keywords: *Automated Contracting, Artificial Intelligence, UNCITRAL, Model Law,*

INTRODUCTION

The United Nations Commission for International Trade Law - UNCITRAL contributed to the development of international trade relations through the creation of legal rules that regulate those relations. Through its normative activity by creating texts of conventions, model laws, recommendations, rules and instructions, UNCITRAL significantly influenced the unification of private legal rules of international trade law.

With the development of information technologies, trade has moved from traditional fields to a virtual environment. UNCITRAL's working group IV for electronic commerce, as a response to this trend in the 1980s, started work on the creation of legal rules that could regulate commerce in the electronic space as well as commerce that takes place through information technologies. This is how the Recommendation to governments and international organizations on the legal validity of computer records was created. After these recommendations in the field of electronic commerce, the Model Law on Electronic Commerce, the Model Law on Electronic Signature, the Model Law on Electronic Transfer of Records, the Model Law on the Use and Cross-Border Recognition of Identity Management Services and Trust Services, the Model Law on Automated Contracting and the UN Convention on the Use of Electronic Communications in International Contracts were created.

In the era of artificial intelligence, UNCITRAL, through the solutions given in the UN Convention on the Use of Electronic Communications in International Contracts and the Model Law on Automated Contracting, is trying to respond to the challenges that this technology brings to private-law contractual relations. Today, artificial intelligence-based software and systems whose function is the automation of contractual relations are widespread. The preparation of the contract model, the negotiation phase, the submission of the offer and its acceptance, the conclusion of the contract, changes to the concluded contract, its execution and termination can take place today without the participation of people or with their minimal participation. Contracts are created and executed between humans and AI systems, but also between two or more AI systems automatically and autonomously. The subject of this paper is the analysis of UNCITRAL's Model Law on Automated Contracting, using the normative and comparative law method, with the aim of presenting a brief history of its creation, showing its structure, the principles on which it rests and the norms it contains. The norms were then considered in the light of the "Artificial Intelligence Law" of the European Union (P9_TA(2024)0138) and the conditions it sets for the use of artificial intelligence, all for the sake of a more complete and comprehensive understanding of the regulatory framework that arises and exists in the sphere of contracting automation, as well as pointing out the gaps that are more difficult to fill in the application of artificial intelligence in this area.

EMERGENCE OF MODEL LAW ON AUTOMATED CONTRACTING

The work of UNCITRAL on regulating the use of information technologies in international trade and for international trade is quite long. It started in the second half of the eighties of the last century, but intensified after 2000, when the expansion of the Internet, computers and other technologies began, which simplified, accelerated and reduced the costs of international trade relations. Automation has long been viewed as a tool to improve trade through its potential to reduce transaction costs, increase efficiency and create economic benefits in various trade activities¹. The accelerated development of artificial intelligence and systems based on it has made it possible for traditional institutes such as the declaration of the will of subjects in law, conclusion of contracts, fulfillment - implementation of contracts from the sphere of subjects of international private-legal - trade relations to be transferred to the "jurisdiction" of artificial intelligence or as it is often called virtual agents in the works².

1 Uncitral model law on automated contracting with guide to enactment, str. 5, e-ISBN 978-92-1-154264-6, 2024

2 In the following text, the term artificial intelligence will be used to include both the concept of artificial intelligence and the concept of an artificial intelligence system as given in the Law on Artificial Intelligence

UNCITRAL's work on the analysis of the impact of artificial intelligence on international trade and on international trade agreements began in 2018 when, at the fifty-first session, the need to deepen discussions on the use of modern technologies in international trade was highlighted, as well as that working group IV had already compiled a list of legal topics related to the use of modern technologies³. Wendehorst considers contracts to be the legal blood stream of the digital economy, pointing in particular to the fact of their increasing automation in terms of negotiation, conclusion and execution through advanced artificial intelligence⁴. It should be borne in mind that UNCITRAL stated in several documents that the introduction of new technologies, including artificial intelligence for automated contracting, can create obstacles in the digital economy⁵. However, R.E. Puhek believes that while natural intelligence serves life, artificial intelligence helps the former serve life better, in which sense it can be said that artificial intelligence will help the development of trade relations and create economic improvement for humanity⁶.

In 2020, UNCITRAL created a legal taxonomy related to the application of artificial intelligence in the digital economy, entitled Legal issues for the digital economy - artificial intelligence.

In 2022, Working Group IV (Electronic Commerce) at the fifty-fifth session of UNCITRAL, held in New York from June 27 to July 15, was given a mandate to, in the first phase, prepare a proposal for provisions that will refer to automated contracting, while later, in the second phase, it would work on changes to those provisions in order to harmonize them with the needs of international trade.

In 2023, proposals were made for the provisions of the future model law, which partially regulated the field of automated contracting. The work continued with the aim of supplementing the text of the model law with provisions that will regulate liability, as well as provisions that would regulate the issue of who belongs to the results of the operation of artificial intelligence during the automated conclusion of contracts.

At the 57th session of the UNCITRAL Commission, held from June 24 to July 12 in New York, the Model Law on Automated Contracting (abbreviated: MLAC) was adopted, which fulfilled one of the initially set tasks of Working Group IV, while further work continues on the regulation of the issue related to contracts on the transfer of data.

of the European Union (P9_TA(2024)0138).

3 Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 253 (b).

4 Wendehorst, C. (2024). Discussion Draft: Principles for AI in Contracting (Version 2.1). **Journal of European Consumer and Market Law**, 13(1), 43-60. <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/13.1/EuCML2024007>

5 Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17 (A/79/17), para. 239v Note submitted by Czechia on legal aspects of smart contracts and artificial intelligence A/CN.9/960 from 30.05.2018. page 2. See also: Uncitral model law on automated contracting with guide to enactment, str. X, e-ISBN 978-92-1-154264-6, 2024

6 Puhek, R.E. (2025). Artificial intelligence & Common Sense. *Open Journal of Political Science*, 15, 94-103., <http://doi.org/10.4236/ojps.2025.151007>

STRUCTURE AND PRINCIPLES OF MODEL LAW

The model law on automated contracting does not have a binding effect, but represents a model - a recommendation or guideline to states and other international actors on how they can regulate mutual relations when using artificial intelligence and other automation systems for the purpose of negotiation, conclusion of contracts and their execution. It consists of ten articles that regulate: 1) Definitions, 2) Field of application, 3) Interpretation, 4) Technological neutrality, 5) Legal recognition of automated contracting, 6) Legal recognition of contracting in computer code and the use of dynamic information in automated contracting, 7) Attribution of actions performed by an automated system, 8) Unexpected actions performed by an automated system, 9) Requirements related to information and 10) Non-avoidance. From the content, the conclusion follows that it does not regulate the subject area comprehensively but partially, leaving room for the application of existing legal rules to those issues that are not expressly regulated by it. Traditional legal rules, principles and principles of contract law are directly applied to all relationships that are not specifically regulated by the model law.

The model law rests on the principle of party autonomy, the principle of technological neutrality and the principle of non-discrimination. The principle of autonomy of the parties is reflected in the freedom of the contracting parties to choose the way in which they will negotiate, draw up the contract, conclude the contract, i.e. change or execute it, as well as whether they will use an automated system for this or not. The parties to the contract are also free to choose the type of automated system they will use and thus can choose deterministic or non-deterministic systems, systems based on artificial intelligence or preprogrammed software. The principles of technological neutrality and non-discrimination are closely related and can be viewed together in the context of the model law. The model law does not discriminate against automated systems regardless of whether they are based on artificial intelligence or not, i.e. it does not differentiate on what technology they are based on. It also does not discriminate between traditional contracts and contracts concluded through automated systems. Contracts or actions that occur during the life cycle of the contract will not be treated less favorably simply because they arose or are a consequence of the operation of the automated system⁷. On the other hand, technological neutrality is reflected in the fact that the model law does not refer to any specific technology, but gives an equal chance to any technology used for the automated conclusion of contracts. According to Article 4, no provision of the model law requires the use of an automated system or a specific method in an automated system for the creation or execution of a contract⁸. Koops states that technological neutrality when drafting legal rules must include the principle of non-discrimination of one technology in relation to another, that the regulation must not hinder the development of technologies and that it must be sustainable, that is, it can be applied over a long period of time regardless of the constant evolution of technology⁹. The model law thus applies to automated systems that are based on artificial intelligence, predictive or not, with a greater or lesser degree of autonomy, but also to any other systems and technologies for contracting automation. Thus, the same can be applied to software systems that use mathematical models to make decisions about undertaking a transaction, which systems are pre-programmed and that follow given instructions and facts that occur

7 Uncitral model law on automated contracting with guide to enactment, str. 9, e-ISBN 978-92-1-154264-6, 2024

8 Uncitral model law on automated contracting Article 4

9 Koops, B.J., (2006) Should ICT Regulation Be Technology-Neutral? Information Technology & Law Series, 9, pp. 77-108. DOI: https://doi.org/10.1007/978-90-6704-665-7_4

during the exchange of messages and undertake defined activities¹⁰. When certain issues are not regulated by the model law, these principles must be applied¹¹.

CONTENTS OF THE MODEL LAW

The field of application of the law model is determined for situations in which automated systems are used for the creation or execution of contracts through data messages, regardless of whether it is the stage of creation of the contract, during the duration of the contract or during its execution. The model law can be applied to the formation of an offer and the acceptance of offers, as well as to changes in the contract and its termination. In practice, the law can be applied only in certain phases or in all phases of the life cycle of the contract if automated systems are applied in them. Artificial intelligence can be used in the phase of creating the text of the contract proposal, in order to provide the contracting parties with a proposal for regulating the relationship or to send an offer for the conclusion of a contract of a certain content.

However, the model law does not regulate issues that are important for the creation of automated systems, their commissioning or their operation and use. Other regulations would apply to the above-mentioned issues. Thus, the Law on Artificial Intelligence of the European Union would be applied to the automated system based on artificial intelligence in the territory of the EU. An automated system based on artificial intelligence should not use subliminal techniques but would have to meet the requirements regarding 1) risk management system, 2) data and data management, 3) technical documentation, 4) record keeping, 5) transparency and provision of information to persons in charge of releasing the system, 6) human supervision and 7) accuracy, robustness and cyber security.

An automated system for the purposes of the model law is defined as a computer system that is capable of performing an action without the necessary review or intervention of a natural person. Automated systems are considered to be systems that are programmed to work in a predetermined way or in an undetermined way, which means:

- that with systems that work in a predetermined way for the same information input, the same output result is obtained;

while

- with systems that work in an unspecified way for the same information input, there is no certainty that they will give the same output - result, which is characteristic of artificial intelligence¹².

This definition of an automated system corresponds to the trend of technological neutrality of legal rules, which, on the one hand, simplifies the application of legal rules,

10 Mitić M. & Pavlović Z., (2023), Portfolio investicije i informacione tehnologije [Portfolio investments and Information technology], Zbornik radova XX međunarodnog naučnog skupa „Pravnički dani – Prof. dr Slavko Carić, Pravni fakultet za privredu i pravosuđe u Novom Sadu, p.634

11 Uncitral model law on automated contracting Article 3 paragraph 3

12 Mitić M. (2024), Veštačka inteligencija i decentralizovani delovodnik: Nadogradnja međunarodnih trgovinskih odnosa [Artificial intelligence and Distributed ledger: Upgrading of international trade law], Zbornik radova XXI međunarodnog naučnog skupa „Pravnički dani – Prof. dr Slavko Carić, Pravni fakultet za privredu i pravosuđe u Novom Sadu, p.726

while on the other hand, it enables application to a greater number of technological solutions and even those that do not exist at the moment. Artificial intelligence systems defined by the EU Artificial Intelligence Law may fall under the definition of automated systems from the model law, but automated systems do not necessarily have to be artificial intelligence systems, bearing in mind that automated systems are not always based on artificial intelligence. The definition of automated systems is broader and more comprehensive than the definition of artificial intelligence systems. They have in common that both of them include artificial intelligence of different degrees of autonomy, deterministic and non-deterministic, which functions through specific hardware, in the first case through computer hardware, while in the second case, machine hardware. From the point of view of the law model, artificial intelligence systems that work with a greater or lesser degree of autonomy can be validly applied.

Contracts are created, modified or terminated by automated data messaging. Automated systems exchange data messages that represent information created, sent, received or stored by means of electronic, magneto-optical or similar means. A very similar definition of a data message is contained in the Convention on the Use of Electronic Communications in International Agreements (hereinafter: the New York Convention), which defines a “data message” as information created, sent, received or stored by means of electronic, magneto-optical or similar means, including but not limited to electronic data exchange, electronic mail, telegram, telex or telecopier¹³.

Contracts created through automated systems or contracts executed through automated systems will not be denied validity. The model law recognizes the validity of such contracts or execution of contracts regardless of the fact that a natural person did not perform a check or participated in any other way in the creation of changes or execution of the contract, but was carried out by artificial intelligence. The essence of this provision according to Wendehorst is that it suggests that contracting through advanced artificial intelligence systems is possible¹⁴. Also, validity is recognized by contracts contained in computer code, but also by actions related to the creation of such contracts, which is a consequence of information originating from a source whose information changes constantly or periodically. The validity of these agreements will not be challenged merely because their provisions are contained in computer code or because the information about the provisions and the provisions themselves are found in a source who's information constantly changing. For Barnheiser, the codability of the contract is reflected in the possibility that the input parameters during the formation of the contract or the output results of that process in the form of contract execution can be presented in regulated instructions that are subject to automation through computer code¹⁵. The draft guide for making provisions on automated contracting, the UNCITRAL secretariat points out that the legal doctrine raised the issue of the right to recognize and give meaning to contracts in the form of a code, bearing in mind that their provisions are not expressed in natural language or accessible to natural persons¹⁶. Regardless of the aforementioned model law, it equates

13 United nation convention on the use of electronic communications in international contracts 2005

14 Wendehorst, C. (2024). Discussion Draft: Principles for AI in Contracting (Version 2.1). *Journal of European Consumer and Market Law*, 13(1),43-60. <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/13.1/EuCML2024007>, page18

15 Barnhizer, D. (2016). Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives. *Yearbook of Antitrust and Regulatory Studies*, 9(14), 15-42. <https://doi.org/10.7172/1689-9024.YARS.2016.9.14.1>

16 UNCITRAL, (2024), Draft guide to enactment of the provisions on automated contracting, Note by the Secretariat, A/CN.9/1179, p. 10

contracts concluded with the use of artificial intelligence without human intervention to contracts in the creation of which humans directly participated. However, the model law does not impose on contractors that they must use only automated systems for contracting. On the contrary, in this regard, the model law is neutral and non-discriminatory, leaving it up to the contractors to choose the contracting technique - whether it will be in electronic form using electronic tools and automated systems, or whether it will be in traditional paper form.

Parties to a contract using automated contracting systems may agree on procedures by which actions taken by the automated contracting system will be attributed to one of the contracting parties. Contractors can, before engaging in automated contracting, draw up a framework contract on automated contracting that will regulate issues related to the automated contracting process, leaving automated systems to conclude individual contracts. It should be noted that automated systems can play a significant role in the conclusion of those framework contracts. If such an agreement-contract does not exist or is inapplicable, the action taken by the automated system is attributed to the contractual party that used the automated system for that purpose. The occurrence of an unexpected error - a failure in the operation of the automated system cannot be a reason for disputing that it was undertaken at the expense of the party that used the system. However, in a situation where the party to whom the action of the automated system is attributed could not reasonably have expected such an action while the other party knew or could have known that the party to whom the action was attributed did not expect such an action, then the other party cannot expect benefits from such an action, i.e. such an action does not produce an effect for it. The fact that the contract was created and/or executed through an automated system does not exempt any party from the consequences of that contract, nor can the parties be released from the consequences of non-compliance with positive regulations by referring to the fact that they used automated contracting systems.

In practice, artificial intelligence in the automation process is mostly applied in the phase of contract creation in order to draft a contract model proposal for a specific business operation, then in the negotiation phase to analyze the offered contract and in the phase of contract execution following the parameters and dynamics of the implementation of the contracted business operation. For automated contracting, a sensitive field is the declaration of will as a formative element of the contract, which can be expressed only by subjects in law, namely natural persons directly and legal persons indirectly through their management bodies. Giving declarations of will by artificial intelligence systems is still not widely accepted in practice, but analyzing the content of the model law, we can conclude that it does not dispute the possibility that artificial intelligence can give declarations of will that will lead to the creation, change, execution or termination of contracts and such declarations of will and such contracts will be recognized as having legal force and validity and will not be challenged on that basis.

CONCLUSION

The process of automation of contract law, which began with the creation of paper contract models, today in the era of modern technologies is receiving new automation tools in the form of more or less autonomous systems of artificial intelligence, which the new UNCITRAL law model recognizes and regulates normatively. Without diminishing the value of traditional ways of contracting and executing contracts, the legal model not

only recognizes them but also promotes new technologies and new techniques in contract law. The model law provides solutions related to automation in contract law from the point of view of modern technologies, among which is not only artificial intelligence, but also machine learning, deep learning, smart contracts and other technological solutions. It creates the possibility of filling a gap in the existing positive regulations in the field of contract law that exist in situations where artificial intelligence appears in the life cycle of the contract. Artificial intelligence is recognized as having the ability to validly create, conclude, amend and execute contracts, regardless of whether a natural person has performed any verification. Contracts created and executed by artificial intelligence will be considered valid and the consequences arising from such contracts will go to the parties that used artificial intelligence. The model law clearly determines to whom the results of the “work” of artificial intelligence belong, even in situations where unexpected results or malfunctions of artificial intelligence occur. The principles of technological neutrality and non-discrimination on which the law model rests give it a wide field of application to various emerging forms of artificial intelligence (machine learning, deep learning, etc.) as well as forms that will appear in the future. However, we should not ignore the fact that the existing legal rules can still respond to the challenges posed by modern technologies in the field of contract law, which the model law recognized, leaving it up to the contractors to arrange their relations in a way that suits their interests. It remains to be seen in the future how much and in what way the UN member states will implement the model law in their legislation, as well as to what extent its provisions will be found in the contracts of economic entities.



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VEŠTAČKA INTELEGENCIJA U UNCITRAL-OVOM MODELU ZAKONA O AUTOMATIZOVANOM UGOVARANJU

Apstrakt:

Sa razvojem informacionih tehnologija trgovina je sa tradicionalnih polja prešla u virtuelno okruženje. Danas su rasprostranjeni softveri i sistemi bazirani na veštačkoj inteligenciji čija je funkcija automatizacija ugovornih odnosa. Priprema modela ugovora, faza pregovaranja, upućivanja ponude i njen prhvata, zaključenje ugovora, izmene zaključenog ugovora, njegovo izvršenje i prestanak danas se mogu odvijati bez učešća ljudi ili uz njihovo minimalno učešće. Ugovori nastaju i izvršavaju se između ljudi i AI sistema ali i između dva ili više AI sistema automatski i/ili autonomno. Ne samo ljudi nego i mašine stupaju u ugovorne odnose sa ili bez kontrole i intervencije ljudi. U eri veštačke inteligencije UNCITRAL kroz rešenja data u Konvenciji UN o upotrebi elektronskih komunikacija u

međunarodnim ugovorima i Modelu zakona o automatizovanom ugovaranju pokušava da odgovori izazovima koje ova tehnologija nosi za privatno-pravne ugovorne odnose i ugovorno pravo. UNCITRAL-ova radna grupa IV za elektronsku trgovinu je kreirala tehnološki neutralna pravna pravila koja ovako zaključenim ugovorima priznaje pravnu snagu. Predmet ovog rada je analiza UNCITRAL-ovog Modela zakona o automatizovanom ugovaranju, primenom normativnog i uporedno-pravnog metoda, sa ciljem da se predstavi kratak istorijat njegovog nastanka, prikaže njegova struktura, principi na kojima počiva i norme koje sadrži. Norme su potom razmatrane u svetlu Zakona o veštačkoj inteligenciji Evropske Unije i uslova koje on postavlja prilikom upotrebe veštačke inteligencije a sve radi potpunijeg i svestranijeg razumevanja regulatornog okvira koji nastaje i koji postoji u sferi automatizacije ugovaranja kao i ukazivanja na praznine koje se teže popuniti u primeni veštačke inteligencije u ovoj oblasti.

Ključne reči: *Automatizovano ugovaranje, Veštačka inteligencija, UNCITRAL, Model zakona,*

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CIP - Каталогизација у публикацији
Библиотеке Матице српске, Нови Сад

34:316.3"20"(082)

INTERNATIONAL Scientific Conference "Legal days - Prof. Slavko Carić" (22 ; 2025 ; Novi Sad)

XXII International Scientific Conference "Legal days - Prof. Slavko Carić", "Law and Justice", October 10th and 11th 2025 in Novi Sad : [proceedings] / [The Editor-in-Chief Milan Počuča]. - Novi Sad : The University of Business Academy, The Faculty of Law for Commerce and Judiciary, 2025 (Novi Sad : Feljton). - 614 str. : tabele, graf. prikazi ; 24 cm

Radovi na engl. jeziku. - Tiraž 100. - Str. 15: Introductory remarks / Milan Počuča. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad. - Rezime na srp. jeziku uz svaki rad.

ISBN 978-86-86121-84-4

а) Правна наука -- Савремено друштво -- 21. в. -- Зборници

COBISS.SR-ID 176461065



Faculty of Law for Commerce and Judiciary in Novi Sad
University Business Academy in Novi Sad

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