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International Scientific
Conference

"EU at the Crossroads – Ways to Preserve Democracy and Rule of Law"

EDITORS:
Dunja Duić
Tunjica Petrašević

EXECUTIVE EDITOR:
Ante Novokmet

BOOK OF PROCEEDINGS

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For the publishers
Tunjica Petrašević, PhD, Full Professor
Dunja Duić, PhD, Associate Professor

Editors
Tunjica Petrašević, PhD, Full Professor
Dunja Duić, PhD, Associate Professor

Executive Editor
Ante Novokmet, PhD, Associate Professor

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“EU at the Crossroads – Ways to Preserve Democracy and Rule of Law“

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FOREWORD

[International Scientific Conference on EU and Comparative Law Issues and Challenges: "EU at the Crossroads – Ways to Preserve Democracy and Rule of Law"]

June, 2024.

One of the characteristics of the European Commission over its long history is the common belief that democracy and the rule of law are a particularly important part of our life. In the words of Commission President von der Leyen, *it is a glue that binds our Union together.* Put simply, it is the foundation of our unity, essential for the protection of the values on which our Union is founded. In many respects, it is at the core of what we consider to be our common European identity and how we are perceived by others.

Democracy, as the crucial element, is a principle we are particularly fond of in Europe. Our European identity is irrevocably linked with the notions of openness, transparency and individual rights and liberties. The freedom to express our views is the essence of Europe, and our right to free and transparent elections is there to ensure voice of every citizen is heard. There is, however, a growing concern in the EU that the openness of our societies can be exploited and our democratic beliefs are increasingly questioned. This is why the Commission introduced the Defence of Democracy package ahead of the 2024 European elections that includes two recommendations. Recommendation on inclusive and resilient elections, with the objective of strengthening electoral processes in the EU and the recommendation on the participation of citizens and civil society organisations in public policy-making, aiming at fostering inclusive participation of citizens and civil society organisations in public policy-making. We are fortunate to have our very own Dubravka Šuica as the vice-president in the Commission in charge of this very portfolio. It is a continuously evolving task, evidenced by her work on the Conference on the Future of Europe, which I invite you all to examine more closely.

Rule of law is second crucial element of our European identity. Despite its universal acceptance, the situation in the Union did not always reflect these positive aspirations. This is why, after extensive consultations with stakeholders, the Commission released a Communication on 17 July 2019, setting out concrete actions to strengthen the Union's capacity to promote and uphold the rule of law, through promotion of a common rule of law culture, prevention of rule of law breaches and an effective response. This formed the major step in the formalisation of a comprehensive framework and an adequate mechanism at our disposal in order to defend and uphold the values which form the basis of the Union.

In particular, the Commission has established a Rule of Law Review Cycle and called on the EU institutions for a coordinated approach. This was the framework allowing a dialogue between the Member States in the Council, on the basis on the Commission's Report. The objective of the framework is to prevent emerging threats to the rule of law to escalate to the point where the Commission triggers the mechanisms of Article 7 of the Treaty on European Union (TEU). The focus of the dialogue is the exchange of views and best practices among Member States. It covers several thematic areas, next to the justice system, media pluralism, and other institutional issues related to checks and balances, it covers the anti-corruption framework. As evidenced from recent years, Article 7 is indeed a potent tool, but referred to by many and the "measure of last resort." The latest positive example is the closure of the Article 7(1) TEU procedure for Poland in 2024, withdrawing the reasoned proposal that had triggered this procedure in 2017.

The Rule of Law Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process. The Report is done by the Commission on the basis of the input from Member States; non-governmental organisations, professional associations and other stakeholders. Identifying challenges as soon as possible and with mutual support from the Commission, other Member States, and stakeholders including the Council of Europe and the Venice Commission, could help Member States find solutions to safeguard and protect the rule of law.

After its publication the Commission invites national parliaments and national authorities to discuss the Report, and encourages other stakeholders at the national and EU level to be involved. Academic scrutiny is an important part of that process as well.

The rule of law is important part of the general conditionality mechanism for the protection of the financial interests of the Union. It could be triggered in cases of breaches of the principles of the rule of law affecting sound management of Union budget. It is our fundamental belief that democracy and the rule of law remain crucial values which we uphold and will continue to uphold in the future. The geopolitical events over the past few years served as a serious reminder that our core beliefs and principles are not universally accepted and that we have to cherish our values more than ever. In Europe, it forms the core of our society and the foundation of our value systems. Crucially, it is a society which focuses on the citizen, therefore working on improving democracy and the rule of law means improving the lives of our citizens, which is undoubtedly a worthwhile goal.

Zrinka Ujević,
Head of Representation of
European Commission in the Republic of Croatia

Chapter 1

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Review article

ADDRESSING WRONGFUL CONVICTIONS IN CROATIA: A FOCUS ON GENETIC PRIVACY IN CRIMINAL PROCEEDINGS*

Damir Primorac, PhD, Full Professor
Attorney at Law and Full-time Professor at the Faculty of Law University of Mostar and Associate Professor at the University Department of Forensic Sciences at the University of Split, Domjanićeva 25, Zagreb, Croatia
damir.primorac@primorac-partners.com

Andrej Božinovski, LLM, Assistant
Faculty of Law in Zagreb, Croatia
Gundulićeva 10, Zagreb, Croatia
abozinovski1@pravo.hr

ABSTRACT

This paper addresses the intricate challenges of genetic privacy in criminal investigations, particularly within the Croatian context. Conducted by the Croatian Innocence Project, workshops emphasized key issues like DNA material handling, databasing, and the need for legal framework improvements and further research on this topic. The findings of several cases of the ECtHR underscored the risk of miscarriages of justice when genetic privacy is neglected. The paper explores genetic privacy through three elements: treatment of genetic materials, forensic errors, and DNA databasing. Analyzing European Court of Human Rights cases and trends in the U.K., U.S., and E.U., it provides insights to enhance Croatia's legal framework. The study aims to demonstrate the delicate balance between genetic privacy in handling genetic data and effective criminal prosecutions.

Keywords: *Croatian Innocence Project, DNA Databases, Genetic Data, Genetic Privacy*

* The research for this publication has been conducted within the framework of the Research Project titled "Innocent Project Croatia" (CROINOP), funded by the Croatian Science Foundation (IP-2019-2104-9893), and Career development project for young researchers - training of new PhDs (DOK-2021-2102-5858), also funded by the Croatian Science Foundation. See: https://croinop.pravo.unizg.hr/.

1. INTRODUCTION

Genetic privacy in criminal investigations and miscarriages of justice is a multifaceted and complex topic that raises significant theoretical considerations in the realm of law, ethics, and technology which deserves special consideration when dealing with wrongful convictions. The Croatian Innocence Project conducted workshops that focused on genetic privacy, forensic expertise, and their regulation within the context of Croatian criminal proceedings and the national DNA database. The aim was to illuminate key aspects of this issue, focusing particularly on the handling of DNA materials, DNA databasing, and the necessity for further enhancements to the national legal framework. Specifically, they emphasized the impact of genetic privacy on the management of forensic evidence and the inclusion of DNA profiles and materials in databases. The conclusions of these workshops have indicated that undermining and neglecting genetic privacy in the use of DNA forensic evidence in criminal investigations can lead to miscarriages of justice and result in wrongful convictions. As advancements in DNA analysis techniques have become essential tools in modern law enforcement, the balance between utilizing genetic information for solving crimes while protecting individuals' genetic privacy rights has become a subject of increasing academic scrutiny.

Additionally, the jurisprudence of the European Court of Human Rights (ECtHR or the Court) highlights the tension between removing DNA profiles from databases and the growing focus on databasing for future crimes, as seen in recent legal developments in the U.K. Genetic privacy intersects with forensic sciences and DNA databases, as advancements in technology enable the use of genetic information in criminal investigations. Striking the right balance involves navigating legal and regulatory considerations to ensure that genetic data is used responsibly, safeguarding individual rights, and preventing misuse. In the context of this research, genetic privacy is examined through three elements relevant to wrongful convictions: a) the treatment of genetic materials in criminal proceedings; b) forensic science errors and the handling of forensic evidence, and c) genetic privacy in DNA databasing, which includes the collection, dissemination, and storage of DNA profiles. Forensic DNA evidence is often perceived as incredibly trustworthy by courts and is frequently used as crucial evidence upon which judgments are based. This contrast underscores the complexity of the relationship between scientific principles and real-world challenges in the criminal justice system.

Given the observation from workshops that genetic privacy is an under-researched topic in Croatia, this paper aims to contribute to the evolving field of genetic privacy in criminal proceedings. It seeks to provide insights and recommendations to enhance Croatia's legal framework concerning DNA genetic data and the protec-

tion of genetic privacy. In doing so, the first part of the paper will scrutinize genetic privacy in criminal proceedings, exploring the treatment of forensic evidence in various jurisdictions and the novelties of genetic privacy in DNA profiling. The second part will delve into the genetic privacy context within the European Court of Human Rights jurisprudence, examining key cases of *S and Marper v the United Kingdom, van der Velden v the Netherlands, Gaughran v. the United Kingdom, and Trajkovski and Chipovski v North Macedonia*, emphasizing the standards of safeguarding of genetic privacy rights in handling DNA materials. The third part will concentrate on emerging trends and innovative approaches in DNA data banking, studying legislative and jurisprudential aspects in the U.K., U.S., and E.U. in terms of storing and deleting DNA profiles from DNA databases, and notable differences. The fourth part will scrutinize the Croatian legal framework concerning the protection of genetic privacy rights, exploring national standards for DNA databanks and the treatment of DNA evidence within the Croatian jurisdiction. The concluding segment of the paper will summarize positive experiences and propose various options for the Croatian legislature to address the identified issues. The subsequent goal is to demonstrate the delicate balance between upholding privacy standards in dealing with DNA genetic evidence and facilitating effective criminal prosecutions. The research employs theoretical, case-study, and comparative research methods by examining the current legislations and practices, observances of the standards of the ECtHR cases, and the *Maryland v. King case* of the Supreme Court of the United States (hereinafter SCOTUS).

2. GENETIC PRIVACY IN CRIMINAL PROCEEDINGS

Genetic privacy involves safeguarding individuals' control and confidentiality over their genetic information, including DNA sequences and genetic data. In the context of criminal proceedings safeguarding genetic privacy is crucial in preventing unwarranted use, ensuring ethical considerations, and maintaining individuals' authority over who can access their sensitive genetic data. Genetic privacy is most important when it comes to forensic expertise. Genetic privacy in the context of this research refers to genetic data, which is envisaged and protected on international, European, and national levels. The Universal Declaration on the Human Genome and Human Rights[1] is the first intergovernmental instrument focused on safeguarding human rights in genetics which prohibits genetic discrimination,

[1] See Universal Declaration on the Human Genome and Human Rights, adopted on 11 November 1997, by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twenty-ninth session. Accessible at: [https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-human-genome-and-human-rights], Accessed 25 November 2023.

recognizes the right to know one's genetic characteristics, and emphasizes the confidentiality of private genetic information. Further, the International Declaration on Human Genetic Data[2] extends the principles outlined in the Universal Declaration, providing detailed rules for the collection, use, and storage of genetic data in criminal proceedings and in non-criminal law-related purposes. It legitimizes the notion that genetic data is more complex than biometric data, more special, and emphasizes strong protection of individual rights, such as informed consent and confidentiality while advocating international solidarity in genetic research. Similarly, the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention)[3] addresses genetic data rights with a focus on individual consent and the protection of human dignity. Contrastingly, the European Union's General Data Protection Regulation (GDPR)[4] takes a predominantly individualistic approach to privacy, categorizing genetic data as personal data subject to strict processing conditions. While the GDPR acknowledges genetic data as a special category, it lacks explicit recognition of the collective impacts of genetic data processing on groups beyond the consenting individual. However, there is room for interpretation within the GDPR to consider genetic data's potential harm to non-consenting members of a biological group. However, the prevailing indicator of all these documents is that genetic data is a different kind of data, which is very much dependent on individual rights and consent in processing that data, posing challenges in reconciling individual privacy with broader collective concerns in the context of genetic data.[5]

2.1. Genetic Privacy and Miscarriages of Justice

The implications of genetic privacy in miscarriages of justice can be observed through forensic science's involvement in wrongful convictions. Forensic sciences are multifaceted, encompassing both its potential to expose and contribute

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2 See International Declaration on Human Genetic Data. Adopted unanimously and by acclamation at UNESCO's 32nd General Conference on 16 October 2003. Accessible at: [https://www.unesco.org/en/ethics-science-technology/human-genetic-data], Accessed 25 November 2023.

3 See Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (The Oviedo Convention): Convention on Human Rights and Biomedicine ETS No 164. 1997. Accessible at: [https://www.coe.int/en/web/bioethics/oviedo-convention], Accessed 25 November 2023.

4 See Regulation (EU) 2016/679 of the European Parliament and of the Council. 2016, April 27. Official Journal of the European Union, L 119/1. Accessible at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679], Accessed 25 November 2023.

5 See Costello, Á., *Genetic Data and the Right to Privacy: Towards a Relational Theory of Privacy?* Human Rights Law Review, Vol. 22, No. 1, 2022, p. 31.

to such injustices. According to Derenčinović, Primorac and Becker[6], The way forward involves shifting the focus from simply determining forensic science's contribution to evaluating its effectiveness in supporting accurate investigative conclusions and preventing erroneous ones. This understanding challenges the simplistic narrative that forensic science is solely responsible for exposing and correcting wrongful convictions. Several studies and cases of injustice, out of which the most prominent case was the Amanda Knox case in Italy[7] of forensic science's contributions to wrongful convictions indicate that it is a complex endeavor, with many challenges, including incomplete exposure of wrongful convictions, faulty mechanisms of discovery, and differing definitions of what constitutes a wrongful conviction. Various approaches have been used to assess forensic science's role, primarily through the examination of data sets of wrongful convictions. These analyses revealed forensic science as a significant contributor to wrongful convictions, especially in cases involving faulty forensic expertise. The contribution of forensic science to wrongful convictions has an impact on a number of procedural institutes, such as the reopening of criminal proceedings, establishing a *novum*[8] for reopening the criminal procedure, and reaching the threshold of a new evidence criterion. The mechanisms that lead to the discovery of wrongful convictions are different, depending on the legal system, and the proceedings of reopening such cases, especially in Europe are different and more stringent than those in the U.S.[9] Moreover, discrepancies exist in determining how forensic science contributes to wrongful convictions. According to Scheck and Gianelli[10], Some wrongful convic-

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6 See Becker, S. W.; Derenčinović, D.; Primorac, D. *DNA as Evidence in the Courtroom.* Forensic DNA Applications: An Interdisciplinary Perspective, 2023, p. 433.

7 The Amanda Knox case, a notorious instance of wrongful conviction, revolves around the 2007 murder of Meredith Kercher in Italy. Accused alongside her boyfriend Raffaele Sollecito, Knox faced a flawed legal process marked by questionable forensic evidence, coercive interrogations, media sensationalism, and cultural and legal disparities. The reliance on contested DNA evidence and the use of dubious interrogation tactics raised doubts about the validity of the convictions. Intense media scrutiny further complicated the case, potentially influencing public opinion. The foreign legal setting added complexity, with cultural differences and tunnel vision in the investigation contributing to a perceived miscarriage of justice. The eventual acquittal of Knox and Sollecito in 2015 underscored the challenges in ensuring a fair trial and avoiding wrongful convictions in cases with international dimensions. The Amanda Knox case serves as a cautionary tale about the importance of meticulous legal procedures, unbiased investigations, and public awareness in upholding the principles of justice.

8 *Novum* in criminal proceedings refers to newly discovered evidence that was not available during the original trial. This evidence can be grounds for reopening a case, potentially leading to a new trial or altering the verdict if it significantly impacts the case's outcome.

9 See Bozhinovski, A. *Addressing Wrongful Convictions in Croatia through Revision of the Novum Criterion: Identifying Best Practices and Standards*; Mali, J (eds.), Human Rights in Contemporary Society – Challenges From an International Perspective, Vol. 1, 2023, pp. 57-77.

10 See Giannelli, P. C. *Wrongful convictions and forensic science: The need to regulate crime labs*. Netherlands Criminal Law Review., Vol. 86, 2007 p. 163.

tions have been caused by forensic experts who appeared to be either incompetent, corrupt, or both, leading to falsified test results or tests that were never conducted. Additionally, it is argued that some forensic errors may have been motivated by a desire for vengeance, with forensic experts seeing their role as assisting investigators whom they believed had correctly identified the suspect. On the other hand, Cole and Thomson suggest the economic factors of forensic errors, such as poorly trained, overworked, and overwhelmed staff in laboratories, are leading to faulty forensic examinations.[11] However, modern forensic science can be seen as a solution to the problem of wrongful convictions. In most post-conviction cases, especially those involving DNA exoneration, forensic science offers an accurate account of the crime that often contradicts the false accounts provided by conventional investigative tools such as eyewitness evidence, interrogations, and informants. Furthermore, Puff and Killias highlight that forensic science can lead to wrongful convictions by inaccurate or misleading (faulty) forensic evidence, exaggeration or overclaiming of evidence strength by forensic experts, biased interpretations, and courts' assessment and interpretation of forensic evidence.[12] The further argue that all categories can lead to an incorrect determination of the facts of a case and result in a wrongful conviction. Misunderstanding applied science can sometimes mislead investigators. Whether the Court renders a valid judgment or correctly evaluates expert evidence depends heavily on the role and testimony of forensic experts, making their role in criminal proceedings crucial. The sensitivity of genetic data, which may reveal personal health information or familial relationships, adds complexity and necessitates heightened privacy protections in criminal procedures. In both adversarial and inquisitorial legal systems, genetic privacy is considered within the context of legal proceedings where the burden of establishing facts lies with the parties involved. Courts in both systems recognize the potential for bias, particularly in expert testimony, and therefore subject such evidence to rigorous scrutiny to ensure its credibility and accuracy. Evaluating genetic privacy involves assessing the scientific methods used for genetic testing, the accuracy of the results, the margin of error, and the potential for DNA sample contamination. This ensures that the evidence presented is reliable and that individuals' genetic information is protected from misuse.[13]

In adversarial jurisdictions, where the burden of establishing facts rests with the parties involved, expert witnesses are commissioned by those parties. This arrange-

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11 See Cole, S. A.; W. C. Thompson. *Wrongful Convictions.*, Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems, 2013, p. 111.

12 See *op. cit.,* note 3, p. 45.

13 See Becker, S.W.; Derenčinović, D.; Primorac, D.,, *op. cit.,* note 6, p. 12.

ment can sometimes raise concerns about potential bias, as the financial interests of these experts are tied to their hirers. Courts are aware of this issue and subject such evidence to rigorous scrutiny. In contrast, in inquisitorial jurisdictions, the duty of establishing facts falls upon the investigating judge and, later, the trial court, with experts commissioned by the authorities. In these cases, the investigative magistrate decides upon the admissibility of the evidence. While this approach may be perceived as a measure to ensure impartiality, it introduces questions about the relationship and trust between these experts and the mandating authority. In such systems, the validity of scientific evidence is often presumed, and fact-finders tend to accept expert conclusions as definitive, potentially without a rigorous discussion of their accuracy.[14] However, in both systems, forensic experts are commissioned to establish or assess certain scientific facts, and it is left to the legal actors, who have no knowledge of these facts to determine their admissibility and ramifications in the trial. According to Vuille and Champod**,** this creates a paradoxical situation that further relies on the trappings of science and the formal authority of experts on the real merits of the work carried out in the case.[15] They further argue that forensic expertise is often deemed in practice as idealistic, devoid of any possibility of error or flawed interpretation, and it establishes the objective truth of what happened. Vuille in this regard stipulates that there are two problems with this assertion, the scientific methods and the human capacities that are carrying out these examinations which, given their human nature, are prone to errors or bias.[16]

2.2. DNA Profiling and Genetic Privacy

Concerning genetic privacy in DNA profiling, Primorac and Schafield give an illustrative description of the entire process, giving thorough explanation of the DNA gene. The gene consists of two sets of 23 chromosomes each containing various genes inherited by each parent. Each chromosome contains both coding and non-coding regions. Coding regions contain the individual's profile (medical predispositions, physical characteristics, racial indicators, etc.) the non-coding regions, are generally considered to not contain any of this genetic or personal information. So, the human genome is 99.9 percent identical for all individuals with the 0,1 percent difference coming from the variance in the Short Tandem Repeats

[14] See *ibid.,* p. 15.

[15] See Vuille, J.; Champod, C., *Forensic Science and Wrongful Convictions.*, The Routledge International Handbook of Forensic Intelligence and Criminology, Routledge, 2017, pp. 125-135.

[16] See *ibid.,* p. 130.

between the genes.[17] These variants between the genes are known as alleles and can be specifically identified with a DNA test by examining the markers at certain locations or *loci* in a gene. When two profiles have pearls of the same size (i.e., the same number) at the same loci, the two profiles are said to "match" at these loci. That characterizes a DNA profile in fact summarizes a complex process that encompasses biological, physical, and chemical dimensions. To address privacy concerns, no names or specimens is uploaded, nor assigned to the profile. Instead of this, a Specimen Identification Number is assigned to the profile, and once in the database, the profile can be compared to DNA collected at the crime scene to search for a match, and the letters at the end are gender identifiers. Brants argues that determining two DNA profiles as "indistinguishable" depends on the measuring system used in the case. Therefore, reporting a match involves the observer's subjective judgment and always includes some uncertainty.[18] Conventional forensic DNA profiling analyses can be performed satisfactorily and reliably only if certain conditions are met, notably in terms of the amount and quality of the available DNA template. Several factors and circumstances can render analyses more complicated or can induce variations in the results.

When dealing with DNA evidence in criminal proceedings, it is crucial to consider its vulnerabilities at various stages and the impact of forensic evidence on the process. Both adversarial and inquisitorial systems have unique characteristics and safeguards to address potential forensic errors. Despite their differences, both systems enforce stringent rules for the admissibility and treatment of forensic DNA materials. When deciding the admissibility of genetic evidence in a trial, the primary consideration is whether the DNA material was collected according to ECtHR standards and if there was any blanket or indiscriminate retention of DNA profiles. Any irregularities in storing DNA profiles unrelated to the case would violate Article 8 of the European Convention on Human Rights. Brants defines relevance as anything that has a direct or indirect impact on the likelihood of a key fact in the proceeding, further arguing that the presentation of forensic DNA evidence in court involves assessing whether introducing this evidence would compromise the fairness of the proceedings or result in unfair prejudice.[19] Concerning the admissibility of genetic information and whether genetic privacy protocols were respected, a notable concern arises: the defense's argument that genetics played a role in impeding impulse control might be exploited by the pros-

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17 See Primorac, D.; Schanfield, M., (eds.), *Forensic DNA Applications: An Interdisciplinary Perspective*. CRC Press, 2023, p. 1-17.

18 See Brants, C. *Criminal Procedure to Wrongful Convictions.* Wrongful Convictions, 2010, p. 157.

19 See Brants, C. *Tunnel Vision, Belief Perseverance and Bias Confirmation: Only Human?*, Wrongful Convictions and Miscarriages of Justice, Routledge, 2013, pp. 161-192.

ecution to argue for a lengthier sentence, citing the need to safeguard society from potential reoffending. Vuille, Biedermann, and Taroni deliberate on the general rules that forensic experts must adhere to when providing expert opinions to the court regarding forensic DNA expertise. These rules relate to *assistance, relevant expertise, impartiality,* and *evidentiary reliability*.[20] *Assistance* is understood as that the expert evidence must be of substantial help to the fact finder in ascertaining any fact that is of consequence to the determination of the proceedings. *Relevant expertise* obligates the expert to provide an opinion rooted in a fact derived from the cumulative knowledge that defines the expert's expertise or is predominantly and significantly reliant on such knowledge. This means that the expert should possess specialized knowledge or skills acquired through experience, training, or study. A good example of this is the United States, Rule 702 of the Federal Rules of Evidence envisages that an expert witness must be deemed qualified by knowledge, skill, experience, training, or education, and their testimony must assist the fact-finding in understanding the evidence or determining a factual issue.[21] Further, *impartiality* obligates the expert to be able to give impartial evidence on the matters within his or her field of expertise, and *evidentiary reliability* requires that the forensic expertise be of an acceptable standard. This means that to determine whether the opinion is accepted, the court must apply the general "reliability" test. This test is best described in the case of R v Atkins where the English Court of Appeal highlighted the importance of cautiously approaching new areas of expertise. While acknowledging the potential for issues when experts exaggerate their claims, the court asserted that the remedy isn't to restrict experts from providing informed opinions. Instead, the suggested approach involves: (i) Having the evidence scrutinized and critiqued by an expert with equal experience and skill, (ii) Subjecting the evidence to thorough testing through cross-examination, and (iii) Ensuring a meticulous explanation by the judge to the jury regarding the distinction between objective, measurable data and subjective, yet informed, judgments.[22] Further, in the U.S. jurisprudence, the Frye v. United States case is important for establishing the first framework of rules for admitting scientific evidence in the safeguarding of genetic privacy. Frye case deemed that established evidence would be considered evidence that had 'gained general acceptance' in its field. However, this approach

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20 See *supra* note 7.

21 See Federal Rule of Evidence 702. (n.d.). In *United States Code, Title 28, Appendix*., accessible at: [https://uscode.house.gov/view.xhtml?req=granuleid:USC-1999-title28a-node246-article7-rule702&num=0&edition=1999], Accessed 25 November 2023.

22 See Judgment *R v Atkins*, [2009] EWCA Crim 1876, Case No: 200801604 D4 200801607 D4, *Dean Atkins and Michael Atkins, Appellants, v The Queen, Respondent*. Retrieved from: [https://vlex.co.uk/vid/r-v-atkins-793896693], Accessed 25 November 2023.

faced criticism for causing a delay before evidence met the acceptance standard.[23] As seen the implication these types of evidence have in practice, Gianelli notes that the remedies for forensic laboratories and forensic experts, working on the collected genetic materials are very much obvious: the accreditation of laboratories, the certification of experts, standardization, quality assurance programs, proficiency tests and external audits of the laboratories.[24]

3. THE ECtHR STANDARDS AND GENETIC PRIVACY

Genetic privacy in DNA profiles in Europe is shaped by the jurisprudence of the ECtHR which plays a major role in regulating the collection, ramification, and storage of genetic materials in criminal proceedings. The Court establishes that forensic evidence is not standard piece of evidence. As a genetic material, DNA is considered a more sensitive, specific type of personal data, and therefore it is subject to more stringent legal protection than biometric data. Derencinovic, Roksandic, and Prtenjaca further stipulate that in criminal proceedings, including the trial phase, certain provisions govern the collection, ramification, and storage of DNA materials, and they are subject to detailed and precise provisions of the various laws on criminal procedure, influenced by the jurisprudence of the ECtHR.[25] The ECtHR standards, as opposed to the U.S. standards, are established on determining cases of removal of DNA materials from national databases as well as are all adjudged through the lens of the right to privacy (Article 8) of the Convention.

The case of *Van Der Velden v the Netherlands*[26] illustrates the Court's position about the legality and necessity in a democratic society when it comes to collecting genetic materials. The applicant committed five bank robberies and stole four cars on various dates. During the criminal investigation, he underwent psychological and psychiatric examinations. The reports suggested that he was suffering from inadequate development or a pathological disorder, most likely a schizoid personality disorder. Further, the applicant alleged that his confinement in a custodial clinic was extended contrary to domestic law. Given the fact that the applicant had previously been convicted of multiple bank theft offenses, under Dutch law, it was obligatory to provide genetic material for a DNA profile in a national police

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23 See Judgment *Frye v United States*, 293 F. 1013 (D.C. Cir. 1923), accessible at: [https://casetext.com/case/frye-v-united-states-7.], Accessed 25 November 2023.

24 See, Becker, S.W.; Derenčinović, D.; Primorac, D, *loc. cit.,* note 6.

25 See Derenčinovic, D.; Vidlička, S. R.; Dragičević Prtenjača, M. *Innocence Projects and Subsequent DNA Testing in Croatia: A Possible Reality or an Unattainable Desire.* Zbornik PFZ, Vol. 67, 2017, p. 373.

26 See Judgment *Van Der Velden v. The Netherlands*, Application no. 21203/10, Strasbourg, Accessible at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-112547%22]}], Accessed 25 November 2023.

database. The applicant contested this obligation, arguing that his genetic data was irrelevant to his crimes and could not serve a practical purpose in preventing, detecting, prosecuting, and trying criminal offenses under Article 8(2) of the European Convention of Human Rights. He claimed that the collection violated his rights to privacy and data protection under Article 8 of the ECHR. In its assessment, the Court acknowledged that the retention of genetic material and the data derived from it was intrusive under Article 8, but it recognized that this measure was in accordance with national law. The Court also acknowledged the legitimacy of compiling and retaining a DNA profile for the purposes of preventing crime and protecting the rights and freedoms of others. Further, the Court did not find any breach of the appellant's rights sufficient to support an appeal to the ECtHR. However, in reaching this decision, the Court explicitly stressed that the measures in question were deemed necessary for a democratic society, emphasizing the significant contribution DNA records make to law enforcement. However more recent practice of the court, when it comes to the application of the ECtHR standards in the ramifications of genetic materials in criminal proceedings, national jurisdictions need to adhere to the principles of legality, proportionality, and necessity in a democratic society, or the famous *Marper* test, derived from the case of *S. and Marper v The United Kingdom*.[27] The legality standard concerns the legality of the collected DNA genetic profiles for various categories of persons targeted by the criminal investigation. The jurisprudence of the ECtHR leaves a greater margin of appreciation to restrict the right of privacy of the convicted persons in comparison to those who have just been arrested or acquitted. This standard envisages a clear, accessible, and foreseeable legal framework as an imperative in governing the collection of genetic materials.

Furthermore, the ECtHR reiterates the significance of informed consent of individuals understanding the circumstances under which their DNA may be collected and the legal foundation for the collection of their DNA. The proportionality standard requires that the period of DNA retention should depend on the gravity of the crime. Derencinovic, Primorac and Becker, elaborate that the proportionality of any intrusion on an individual's privacy, such as the collection of DNA samples must be justified by a compelling rationale, and the measures taken should be strictly essential for the stated purpose.[28] The Court urges the authorities to

[27] See Judgment *S. and Marper v. United Kingdom* (2008), Application no. 30562/04 and no. 30566/04, 4 December 2008, paras 3-25. This judgment is a landmark European Court of Human Rights case. It challenged the indefinite retention of DNA and fingerprint data of individuals not convicted of a crime. The court ruled that the UK's policy violated the right to respect for private life under Article 8 of the European Convention on Human Rights, emphasizing the need for a balance between law enforcement interests and individual privacy rights.

[28] See, Derenčinović *et al., op. cit.*, note 6. p. 376.

carefully weighing of the benefits of DNA sample collection against the potential infringement on an individual's right to respect for private life. Furthermore, Derencinovic explains that this principle demands a clear and compelling justification for the collection and ramifications of DNA samples. It necessitates that the means chosen for this purpose should not go beyond what is strictly required and should avoid unnecessary or excessive intrusion into an individual's private sphere.[29] The third principle is necessary in a democratic society which is applied to determine whether the intrusion of the right to a private life is needed at all. Usually, the ECtHR jurisprudence stipulates that any interference with human rights must meet a pressing social need or be proportionate to the legitimate aim pursued. In the case of forensic DNA sample collection, the ECtHR considers whether such intrusion is necessary to achieve a specific legitimate aim, such as crime prevention, public safety, or any other aim within the context of a democratic society.

In the ECtHR jurisprudence, a notable difference between the *Van der Velden* case and the *Marper* case hinges on whether the person whose privacy rights were violated was found guilty or not. Both cases agreed that collecting and analyzing genetic material initially goes against the right to privacy. The *Aycaguer v France* case further supported this idea, stating that storing genetic data interferes with privacy, regardless of how the data is later used. So, the key point is that dealing with genetic information raises privacy concerns, no matter if the person is guilty or innocent.[30] The perspectives of the vagueness of the national law can be noted from the case of *Trajkovski and Chipovski v North Macedonia*[31], where the requirement for the authorities to envisage in their respective legislation, an adequate mechanism to enable the deletion of their genetic material from the DNA database is evident.[32] In this case, the applicants alleged that the domestic regulatory framework based on which the authorities had collected, processed, and stored their DNA material was incompatible with the requirements under Article 8 of the European Convention on Human Rights and the *Marper* test of the European

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29 See, *ibid.* pp. 373–404.

30 See Judgment *Aycaguer v France* (2017), Application no. 8806/12, 22 June 2017, paras. 15-25.

31 See Judgment *Trajkovski and Chipovski v North Macedonia* (2020), Applications nos. 53205/13 and 63320/13, paras 1-13 Accessible at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200816%22]}], Accessed 25 November 2023.

32 The ECtHR ruled against North Macedonia, finding their indefinite retention of DNA profiles from convicted individuals, exemplified by the case of Trajkovski and Chipovski, to violate the right to privacy. The court deemed the broad and indiscriminate nature of the retention system disproportionate to its crime prevention goal, lacking the necessary safeguards established with the Marper test. The judgment has broader implications, emphasizing the need for a balanced approach in jurisdictions with similar DNA retention policies, stressing that perpetual retention exceeds what is essential for crime prevention, constituting a violation of the European Convention on Human Rights.

Court of Human Rights. the domestic legislation in North Macedonia did not set a specific time limit for the retention of DNA data as the genetic material of the applicants as convicted persons, stating that DNA profiles were to be recorded in the relevant registers and "retained for a certain time, but not indefinitely (засекогаш)". Such data, under the amendments of the Law on Police of North Macedonia[33] "may be retained until it has fulfilled the purpose for which it has been taken". This provision, such as it is very vague and open to misinterpretation. It implies that taking of DNA samples from the applicants provides that DNA data is stored in the relevant register permanently. In the absence of anything to suggest that such retention may be linked to any fixed point in time, the Court considers that the respondent State permits an indefinite retention period of DNA profiles. Furthermore, it has not been argued that the nature or gravity of the offense for which a person was convicted, or received a penalty, or any other defined criteria, such as previous arrests, and any other special circumstances, have any bearing on the collection, storage, and retention of DNA records.[34] Moreover, whereas the police are vested with the power to delete personal data from the registers, the law is silent on the conditions under which it can be done and the procedure to be followed. Whereas the law provides, in general terms, for the possibility of judicial review coupled with a prior administrative review, there is no provision allowing for a specific review of the necessity of data retention. Similarly, there is no provision under which a person concerned can apply to have the data concerning him or her deleted if conserving the data no longer appears necessary in view of the nature of the offense, the age of the person concerned, the length of time that has elapsed and the person's current personality, which goes against the requirements stated in the case of *Gaughran v the United Kingdom*. The Court found that the blanket and indiscriminate nature of the powers of retention of the DNA profiles fails to strike a fair balance between the competing public and private interests. The Court ruled that there was a violation of the Convention's Article 8 of the Convention.

In the context of genetic privacy, another significant case that reiterates the importance of balance between the need for law enforcement to retain genetic data for the purpose of prevention of crime and the individuals' right to privacy is *Gaughran v. the United Kingdom*.[35] In this case, ECtHR ruled that the blanket and

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[33] See Law on Police., Official Gazette of the Republic of North Macedonia, nos. 114/2006, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016, 120/2016, 21/2018, 64/2018., Accessed 25 November 2023.

[34] See Judgment *Trajkovski and Chipovski v. North Macedonia* (2020), Applications nos. 53205/13 and 63320/13 paras. 16-21.

[35] See Judgment *Gaughran v the United Kingdom* (2020), Application no. 45245/15, 13 February 2020, paras. 13-18

indiscriminate nature of the powers of retention, coupled with the absence of sufficient safeguards available to the individual, fails to strike a fair balance between the competing public and private interests. The applicant alleged under Article 8 of the Convention that the indefinite retention of his DNA profile, fingerprints, and photograph in accordance with the blanket policy of retention of personal data of any individual convicted of a recordable offense, amounted to a disproportionate interference with the right to respect for his private and family life. In this case, similar to *Marper*, the Court found that the indefinite retention of biometric and genetic data of persons convicted of an offense punishable by imprisonment was a breach of a person's right to respect for their private life under Article 8. Derenčinović further explains that although both instances concluded that such retention violated Article 8 of the Convention, which protects the right to respect for private and family life, there are several similarities and differences between the two cases. The similarities of the cases include the nature of the violation and the Court's reiteration on the necessity of having clear, proportionate, and necessary regulations when handling of genetic sensitive materials. The differences between these cases lie in the fact that the judgment in the Gaughran case also drew attention to the absence of a review mechanism for the necessity of data retention, which was not a prominent issue in the *S and Marper* case.[36]

The baseline principle in the ECtHR approach of genetic data and privacy is through the lens of fundamental human rights principles, more precisely Article 8 and Article 6 of the European Convention of Human Rights. Apart from the principle of legality, are the principles of proportionality and necessity in a democratic society which scrutinizes whether the intrusion into an individual's right to privacy, particularly within the context of DNA sample collection, is justified by a compelling societal need and is proportionate to the legitimate aims pursued, such as law enforcement or public safety. The court emphasizes the importance of clear legal frameworks, safeguards against abuse, and respect for individual autonomy through informed consent. Also, the ECtHR recognizes the sensitivity of genetic information, the ECtHR underscores the need to shield genetic data from misuse. The Court acknowledges that certain groups, such as minors or individuals with diminished mental capacity, may require additional protection, and urges respective national jurisdictions to enact provisions that would consider the vulnerability of these groups and integrate suitable safeguards and judicial overwatch. Also, the authors here emphasize the delicate balance required to harness the potential of forensic evidence while upholding individual rights and ensuring a just and reliable legal process.

[36] See. Derenčinović, D. *Preispitivanje prakse država glede zadržavanja DNK profila u svjetlu nedavnih presuda Europskog suda za ljudska prava protiv Ujedinjenog Kraljevstva i Sjeverne Makedonije,*" in: Lazetić, G.; Kurtović Mišić, A. (eds.), Ogledi o pravu i pravdi u dvije Europe, 2021, p. 191.

4. GENETIC PRIVACY IN DNA DATABASES

To address the question of whether DNA databasing infringes on privacy rights: it does not necessarily do so. The ECtHR, in the cases of *Van Velden v the Netherlands, Trajkovski and Chipovski v North Macedonia, and S.M. Marper v the United Kingdom*, recognized that DNA databases are valuable for identifying criminals and preventing crime. However, collecting excessive genetic information and retaining it indefinitely may breach privacy. The ECtHR emphasized the need for a balance between the necessity of collecting DNA, the duration of retention, and the purpose of retaining such genetic material. Without this balance, serious violations of privacy rights could occur. With the rise of affordable DNA testing kits from companies like Ancestry DNA[37], the need to safeguard this intimate information has become more important. To better explain the DNA databases, imagine them as virtual libraries storing all the genetic materials for commercial and law enforcement purposes. Commercial purposes are when genetic data is sent to a private company to determine our ancestry, genetic predispositions, or other attributes for fun. On the other hand, law enforcement databases, store genetic profiles from crime scenes, suspects, and perpetrators with an aim to be more effective in solving future crimes by matching the DNA material from the scene of the crime to a known match in the database.[38] DNA databases are an integral component of criminal justice systems that contain profiles of convicted felons and/or suspects depending on the jurisdiction. When they include the entire population of a given country, they are called 'universal' forensic databases. The use of this type of databases allows investigators to match collected samples against previous records to determine if matches are present and helps to deter crime because of the high levels of certainty that an accurate match is able to provide.[39] Police use DNA databases in severe crime cases for identification purposes. In the United States, the FBI established the Combined DNA Index System (CODIS), which collects and assists with the analysis of DNA samples. CODIS regulates the use of DNA samples in the federal database by requiring compliance with quality assurance standards, external audits, and accreditation of laboratories submitting DNA records through a non-profit, nationally recognized forensic science association. Importantly, DNA databases can handle large quantities of data for specific purposes within the context of criminal investigations. According to Ledic, Makar, and Oblescuk, the de-

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37 AncestryDNA is a commercial DNA testing service provided by Ancestry.com, a popular genealogy and family history research platform. AncestryDNA allows individuals to uncover information about their genetic heritage and ancestry by analyzing their DNA. Accessible at: [www.Ancestry.com].

38 See Ledić, A.; Makar, A.; Obleščuk, I., *DNA Databases* in Forensic DNA Applications, 2nd ed., CRC Press, 2023, p. 16.

39 See *ibid.*

velopment of DNA technology and the establishment of a corresponding DNA database on national and transnational levels is one of the most efficient ways to detect and prevent crime.[40]

4.1. DNA Databanks in the United States and the United Kingdom

The science of DNA databases originated in the U.K. and was perfected in the U.S., leading to a unified system for handling DNA profiles. The initial legislation in the U.K. was primarily aimed at identifying individuals involved in a limited number of serious crimes, such as homicide and violent sex offenses. The U.K. has the oldest DNA database in the world, with the retention and use of DNA data governed by several key laws, including the Police and Criminal Evidence Act (PACE)[41], which introduced the requirement of consent before taking DNA samples; the Criminal Justice and Public Order Act[42], enabled collecting DNA swabs of any person charged with a crime, without consent by the law enforcement authorities; the Criminal Procedure and Investigations Act, which expanded the profile of persons from whom a DNA sample can be taken without consent, which included mandatory retention of DNA data by prisoners for violent crimes, as well as suspects of a crime, not yet charged with a crime. The most notable piece of legislation is the Criminal Justice and Police Act[43], which was reformed constantly under the influence of the jurisprudence of the ECtHR in the *S. and Marper and Gaughran v the United Kingdom* cases regarding indefinite retention of DNA data and materials, as well as taking DNA samples from suspects in terrorism cases and organized crime cases. Interestingly, in the Marper case, the ECtHR criticized this law for its blanket and indiscriminate retention of DNA data. The Court noted that it fails to strike a fair balance between competing public and private interests, and the state's response has overstepped any acceptable margin of appreciation. The newly enacted Protection of Freedoms Act[44], addressed partially

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40 *Ibid.*

41 See Police and Criminal Evidence Act 1984 (PACE). (c. 60). London: Her Majesty's Stationery Office. Accessible at: [https://www.legislation.gov.uk/ukpga/1984/60/contents], Accessed 25 November 2023.

42 See Criminal Justice and Public Order Act 1994 (CJPOA). (c. 33). London: Her Majesty's Stationery Office. Accessible at: [https://www.legislation.gov.uk/ukpga/1994/33/contents], Accessed 25 November 2023.

43 See Criminal Justice and Police Act 2001 (CJPA). (c. 34). London: Her Majesty's Stationery Office. Accessible at: [https://www.legislation.gov.uk/ukpga/2001/34/contents], Accessed 25 November 2023.

44 See Protection of Freedoms Act 1994 (PFA). (c. 84). London: Her Majesty's Stationery Office. Accessible at: [https://www.legislation.gov.uk/ukpga/1994/84/contents], Accessed 25 November 2023.

the concerns of the Court concerning the indefinite retention and destruction of DNA materials and samples, striking a difference between the destruction of DNA materials (fingerprints and DNA profiles) from the database, stipulating that the destruction should be *as soon as reasonably applicable*. As to the destruction of DNA samples, the law addresses them separately and the destruction is envisaged as soon as the DNA profile has been derived, but no longer than six months after the sample is taken. It is the authors' opinion that these changes only partially implement the spirit of the Gaughran and Marper decisions and the current legal focus is collecting profiles for future crimes.

On the other hand, the U.S. experience provides the modern tools and know-how for establishing and shaping DNA databases around the world. The U.S. established the CODIS system (Combined DNA Index System) at the federal, state, and local levels, where each state is free to determine its own DNA database, with the obligation to upload every material to the federal database. Furthermore, the CODIS incorporates four separate indexes: the Convicted Offenders Index, the Forensic Index, the Unidentified Human Remains Index, and the Relatives of Missing Persons Index. The retention and use of DNA data on a federal level is governed by several laws. The DNA Identification Act[45], enabled the establishment of a forensic laboratory under the auspices of the FBI, for persons convicted for violent crimes. The DNA Analysis Backlog Elimination Act[46] allowed DNA profiles to be retained and stored for persons incarcerated, and on parole, after being convicted for federal offences. The PATRIOT ACT[47] extended the retention of DNA samples and profiles to people charged and convicted for terrorism offenses under the FISA warrant. Furthermore, the Justice for All Act[48] expanded the retention of DNA profiles to persons charged with violent offenses, and the DNA Collection Act[49] mandated from law enforcement authorities, mandatory fingerprinting and DNA retention for persons charged and convicted of violent crimes. According to Norris, Weintraub and Acker, the issue of this legislation is

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45 See The DNA Identification Act., 1994. Pub. L. No. 103-322, 108 Stat. 1796. Accessible at: [https://oig.justice.gov/reports/FBI/a0632/laws.htm], Accessed 25 November 2023.

46 See The DNA Analysis Backlog Elimination Act, 42 U.S.C. § 14135a (2008). Accessible at: [https://www.govinfo.gov/app/details/PLAW-110publ234], Accessed 25 November 2023.

47 See USA PATRIOT Act. 2001. Section 215, Access to Records and Other Items Under FISA, 115 Stat. 272, 50 U.S.C. § 1861. Accessed at: [https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.htm], Accessed 25 November 2023.

48 See Justice for All Act, 18 U.S.C. §§ 3771 et seq. (2004). Accessible at: [https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/factshts/justforall/welcome.html], Accessed 25 November 2023.

49 See Collection and use of DNA identification information from certain Federal offenders. (n.d.)., 34 U.S. Code § 40702 - Accessible at: [https://www.law.cornell.edu/uscode/text/34/40702], Accessed 25 November 2023.

that it failed to consider automatic removal or destruction of DNA profiles after the serving of the prison sentence. Furthermore, there are no provisions relating to the automatic removal of the DNA materials in cases where the persons were exonerated.[50] The Justice for All Act, envisages individual removal by mandating a court order, proving that the individual was indeed exonerated or charges against him were dropped. Similar to the Maprer case, in the U.S. a landmark decision in protecting privacy from unreasonable searches is the case of *Maryland v. King* of the U.S. Supreme Court (hereinafter SCOTUS).[51] The case decided the constitutional implications of the Fourth Amendment[52] against the Maryland DNA Collection Act, which envisaged collection from individuals under arrest before their convictions. King was arrested and convicted of rape after his DNA profile matched a DNA sample found at the crime scene. He challenged the conviction, arguing that collecting his DNA without a warrant or suspicion constituted an unreasonable and unconstitutional search. The Maryland Court of Appeals accepted his appeal, applying a balancing test to weigh the degree of intrusion on privacy against the legitimate government interest. The Appeals Court made two key points: first, that arrested individuals have a greater expectation of privacy than convicted criminals but less than the general public; and second, that collecting DNA is not the same as collecting fingerprints, as they are fundamentally different in nature. The court found that while the government's interest in solving cold cases was legitimate, it did not justify warrantless DNA collection from a suspect. Consequently, the Appeals Court ruled that King's Fourth Amendment rights had been breached. However, the Supreme Court of the United States, in a narrow 5-4 decision, reversed this ruling. The Supreme Court acknowledged that the DNA testing was performed without a warrant but deemed it a reasonable search with a legitimate government aim. Additionally, the Supreme Court disagreed with the Appeals Court's distinction between fingerprinting and DNA testing, viewing them as equivalent methods. This decision set a controversial precedent, influencing the development of DNA retention and collection laws, including provisions for reversing convictions based on wrongful DNA matches.

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50 See Norris, R. J.; Weintraub, J. N.; Acker, J. R.; Redlich, A. D.; C. L. Bonventre. *The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting the Innocent?* Criminology & Public Policy, Vol. 19, No. 2, 2020, pp. 367-388.

51 See Judgment *Maryland v. King*, 425 Md. 550, 42 A. 3d 549, reversed., Accessible at: [https://www.law.cornell.edu/supremecourt/text/12-207], Accessed 25 November 2023.

52 See the Fourth Amendment safeguards individuals against unreasonable searches and seizures. The question before the Court was whether the collection of DNA without a warrant from individuals merely under arrest constituted a violation of this constitutional protection.

5. DNA DATABASING PRACTICES IN EUROPE

The relevant legislation governing the principles of retention, storage, and utilization of DNA data in Europe is shaped by the Council of Europe (CoE) and the European Union (E.U.). The mutual trait of these legislations is the treatment of DNA data as a special, sensitive type of data. The CoE's, ETS No. 108 Convention established in 1981[53], places a profound emphasis on safeguarding individuals' fundamental rights and freedoms in the context of automated data processing by outlining the principles governing data collection, storage, and usage, with a keen focus on ensuring data quality, and security, and respecting individual rights. Notably, it acknowledges the unique sensitivity of DNA data, designating it as a special category while allowing processing under appropriate safeguards. Expanding on this commitment, The CoE introduced Convention 108+ in 2018[54], aligning its data protection provisions with the General Data Protection Regulation (GDPR). This expansion further bolsters and fosters international cooperation in recognizing the global nature of genetic information sharing. Recommendation No. R(92)1, offering crucial guidance on DNA analysis in criminal investigations, where the principles of human rights, legal frameworks, and cross-border cooperation are in focus.[55] The principle of Equality of Arms, central to this Recommendation, ensures that DNA analyses as evidence are equally accessible to both the defense and the prosecution, reinforcing a fair and balanced legal process. From a jurisprudence perspective, while the Marper and Gaughran cases emphasize the significance of privacy safeguards and proportionality in the European context, *Maryland v King* prioritizes law enforcement objectives. In *Marper v the United Kingdom*, the ECtHR addressed the issue of indefinite retention of DNA samples and profiles from individuals arrested but not convicted, including minors. Emphasizing the right to respect for private life, the court ruled against the UK's policy, highlighting the necessity of proportionality and safeguards. This landmark decision set the stage for *Gaughran v the United Kingdom*, which dealt with the

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53 See The Council of Europe's Convention for the Protection of Individuals Regarding the Automatic Processing of Individual Data and Protocols, ETS. No. 108 +, available at: [https://www.coe.int/en/web/data-protection/convention108-and-protocol], Accessed 25 November 2023.

54 See The Council of Europe's Convention 108 + Convention for the protection of individuals with regard to the processing of personal data, available at: [https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf.], Accessed 25 November 2023.

55 See Council of Europe Committee of Ministers. Recommendation No. R (92) 1 of the Committee of Ministers to Member States on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system. Adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of the Ministers' Deputies. Available at: [https://rm.coe.int/09000016804e54f7], Accessed 25 November 2023.

retrospective application of the Marper ruling. Gaughran underscored that legal advancements protecting individual rights should extend retroactively, ensuring equitable treatment for those affected by changes in the law. In contrast, *Maryland v King* presented a different narrative within the U.S. constitutional framework. The U.S. Supreme Court examined the constitutionality of collecting DNA samples from individuals arrested for serious offenses, even before conviction. The majority decision, unlike the European cases, upheld the practice, citing the government's compelling interest in identifying individuals and solving cold cases.

The European Union has a robust framework for DNA analysis in criminal investigations, focusing on efficient information exchange among member states. Key EU Resolutions emphasize the importance of sharing DNA analysis results for successful criminal investigations, with a strategic emphasis on privacy by limiting information exchange to the non-coding part of the DNA molecule.[56] The 2005 Prum Convention underscores the EU's commitment to cross-border collaboration against terrorism, transnational crime, and illegal migration. Ledic and Makar argue that the Convention places a specific focus on the non-coding part of the DNA molecule, aligning with the EU's broader strategy to bolster security measures and foster information sharing among member states.[57] Council Decision 2008/615/JHA, integrated into the EU's acquis, facilitates direct access to national DNA databases, and makes crucial distinction between direct access to a DNA database and access to all stored data, ensuring member states retain control over information associated with DNA profiles.[58] The most prominent EU instrument in safeguarding genetic and biometric data is the General Data Protection Regulation (GDPR), enacted in 2016.[59] GDPR governs the processing of personal data, including biometric and DNA data, with a focus on protecting individual privacy and ensuring responsible data handling. It imposes strict requirements for lawful processing, emphasizing explicit consent, enhanced security measures, and upholding individual rights.

Both the Council of Europe and the European Union's commitment is visible to fostering cooperative, secure, and ethically sound practices in the realm of DNA

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56 See Notable is the Resolution on the Exchange of DNA analysis results between the member states. Council of the European Union. "Council Resolution of 9 June 1997 on the Exchange of DNA Analysis Results." Official Journal of the European Communities L193 (1997).

57 See Ledić, A.; Makar, A.; Obleščuk, I., *op. cit.*, note 38, p. 32.

58 See Council of the European Union. "Council Resolution of 30 November 2009 on the exchange of DNA analysis results (2009/C 296/01)." Official Journal of the European Union, Vol. 52, No. C 296, 1 Dec. 2009.

59 See General Data Protection Regulation, Official Journal of the European Union, No. L119/1, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679], Accessed 25 November 2023.

analysis and criminal investigations. The difference in the treatment of DNA materials is noticeable. While the former focuses on collection and processing the latter is more focused on the automatic removal of the DNA profiles from the national database and safeguarding the right to privacy. Evident from Maryland v King, in the U.S. practice is more focused on unlawful searches, rather than the protection of the right to privacy, as is the case in the jurisprudence of the ECtHR. Authors agree with the evolving landscape surrounding DNA data, privacy, and law enforcement practices. Much can be learned by combining the positive practices on emphasis on safeguards and proportionality and the unique role of DNA in criminal investigations.

5.1. Genetic Privacy and DNA Databanks in Croatia

In Croatia, the handling of DNA materials in criminal proceedings is regulated by the Law on Criminal Procedure, the Law on Sanctions Enforcement, the GDPR, and relevant bylaws. These laws govern the collection, distribution, sharing, and storage of DNA materials, as well as the protocols at the Center for Forensic Expertise and Research Ivan Vucetic in Zagreb. A crucial decision by the Croatian Constitutional Court in 2012 highlighted issues with the Law on Criminal Procedure regarding the handling of DNA materials. The court argued that the law's definitions were too broad and vague, granting excessive powers to the police, state prosecution, and courts to collect, store, and process personal data, including DNA, without clear limitations based on the severity of the criminal offense. This decision emphasized the need for more precise legal boundaries to protect individuals' privacy rights.[60] Furthermore, Derencinovic, Primorac and Becker argue that the Constitutional Court noted the departure from the *Marper* standards and also highlighted that this provision deviated from EU guidelines on personal data protection, emphasizing the lack of specified purposes for data collection and processing, absence of rules for periodic assessments of data, and insufficient restrictions on access, especially concerning sensitive information like racial or ethnic origin, political beliefs, religious beliefs, and sexual life.[61] Considering genetic privacy, it becomes crucial to examine the positive experiences and practices in Croatia concerning legislation that governs genetic privacy in criminal proceedings. This includes the regulation of genetic samples and material storage, collection, and usage stipulated in the Law on Criminal Procedure, along with the privacy protections provided by the GDPR and the Law on Protection of Privacy.

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60 See Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/2014., U-I-448/2012.

61 See Becker, S.W.; Derenčinović, D., Primorac, D., *op. cit.,* note 6, p. 16.

Subsequently, delving into Croatian experiences with the DNA databank housed at the Ivan Vučetić Center for Forensic Research in Zagreb is essential for a comprehensive understanding.

5.2. The Croatian DNA Database – An Overview

DNA databasing in the Western Balkans has been the subject of extensive research, with notable contributions from Professor Dragan Primorac on its efficacy. Despite advancements in DNA technology, legislative progress and the establishment of DNA databases in the region have lagged. Many countries have not prioritized the development of efficient national forensic DNA databases and robust expert networks within their forensic scientific communities. Croatia was the first country in the region to establish a fully operational, independent, and successful DNA database in 2001, located at the Forensic Laboratory of the Ministry of the Interior within the Forensic Science Center "Ivan Vučetić." To ensure international compliance, all DNA profiles within the database are stored according to the recommendations set forth by the European Network of Forensic Science Institutes (ENFSI) and INTERPOL.[62] The Croatian DNA database is structured into distinct categories, including suspect profiles, forensic sample profiles, forensic mixture profiles, staff profiles, and others. Since its inception, the database has facilitated over 1,000 matches, contributing to the resolution of criminal cases through DNA evidence. DNA samples and profiles undergo storage, utilization, and deletion processes based on valid court orders or prosecutorial notifications, particularly when investigations are halted by the public prosecutor. To prevent potential illegal practices related to genetic data, the Commission for Supervision of Storing, Processing, and Safekeeping of the Data Obtained from Molecular Genetic Analysis, consisting of five members appointed by the Minister of Interior in collaboration with the Minister of Justice, oversees these procedures for a four-year term. The Ordinance on Organization and Managing of Collections with Automatic Data Processing Related to Identification of Suspects outlines the structure, content, and procedures for handling collections involving the automatic processing of data related to the identification of accused individuals.[63] The Ministry of Interior oversees two specific collections: the Papillary Line Collection and the Collection of Data Obtained from Molecular Genetic Analysis. The Ivan Vučetić Forensic Centre manages these collections according to specified regulations. The Collection of Data Obtained from Molecular Genetic Analysis

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62 Marjanović, D., *et al. Forensic DNA databases in Western Balkan region: retrospectives, perspectives, and initiatives,* Croatian Medical Journal, Vol. 52, No. 3, 2011, pp. 235-244.

63 See *infra* note 65, p. 480.

is maintained digitally by the CODIS system (Combined DNA Index System) and contains the DNA profile of suspects, the type of biological sample (blood or oral mucous membrane swab), and information on the individual from whom the sample was taken (full name, birth date, register number, and national identification number).

The head of the Ivan Vučetić Forensic Centre appoints a single police officer to be the sole person authorized to enter, delete, or update the data. All data must be entered immediately after the molecular genetic analysis. Special attention is given to protecting the data in both the Papillary Line Collection and the Collection of Data Obtained from Molecular Genetic Analysis. Every access to these collections is logged, ensuring subsequent verification of the legality of data usage.[64]

5.3. Genetic Privacy in the Croatian Legal Framework

The General Data Protection Regulation (GDPR) governs genetic data processing, imposing obligations such as explicit consent, data security, and minimizing data collected for intended purposes. Croatia's Law on Sanction Enforcement[65], outlines the collection and storage of biological samples from convicted prisoners for crime prevention and investigation. These samples are stored in a national database to prevent future offenses by the same individuals and aid in criminal investigations. Importantly, the use of these samples is restricted to identifying or verifying the identity of a convicted prisoner or for use in criminal proceedings.

Genetic privacy in DNA data is regulated by the Law on Criminal Procedure, which governs the treatment of biometric and DNA data in criminal proceedings in Croatia. Although the law establishes detailed and current conditions for collecting and processing personal data, there are concerns regarding the handling of DNA data in terms of genetic privacy. Article 327-a stipulates that DNA data obtained from a legally convicted person are retained for 20 years after the final judgment. For offenses carrying a prison sentence of ten years or more, or for criminal offenses against sexual freedom with a prison sentence exceeding five years, the data can be retained for up to 40 years. In the event of a final acquittal, suspension of criminal proceedings, or dismissal of charges, the data is kept for 10 years after the conclusion of the proceedings, after which it must be deleted by the competent authority. The law clearly distinguishes criminal offenses by severity,

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64 *Ibid*. For further read see also Becker; Derenčinović; Primorac, *op. cit.,* note 6, p. 16.

65 See Act on the execution of the prison sentence, Official Gazette No. 14/21, available at: [https://www. zakon.hr/z/179/Zakon-o-izvr%C5%A1avanju-kazne-zatvora], Accessed 25 November 2023.

affecting the retention period of DNA profiles. For severe offenses, such as those against sexual freedom with imprisonment of more than five years, retention is longer. However, Derencinovic argues that it is not entirely justified to treat less severe criminal offenses (e.g., punishable by up to one year of imprisonment, such as serious bodily harm due to negligence under Article 127, paragraph 1, of the Criminal Code) in the same category as more severe offenses (e.g., punishable by up to ten years of imprisonment, such as slavery under Article 105, paragraph 1, of the Criminal Code).[66]

A further analysis of the provisions will show that improvements are needed to align with the standards established by the European Court of Human Rights (ECtHR). Unlike biometric data, DNA remains in databases until the expiration of the prescribed periods without the possibility of periodic reassessment of the need for further retention. According to the ECtHR's position in the Gaughran case, this practice is unjustified given the sensitive nature of the data and the implications for genetic privacy. The legislator should revise this stance and introduce control mechanisms for DNA data, including differentiation between adult and minor perpetrators of criminal acts. The age of the perpetrator is crucial, as evident in the Marper case and the laws regulating minor offenders. Additionally, there is an issue with the inability to request deletion of genetic data from the database after the rehabilitation period for a committed crime. The purpose of rehabilitation is the reintegration of the offender into society, making the retention of DNA data long after the rehabilitation period problematic. This is another issue that the legislator should address. Moreover, the retention of DNA data after a person is found innocent by the court does not meet the criteria of a pressing social need. Current national legislation lacks mechanisms to reassess the need for retaining such data once a person is acquitted. Derencinovic further highlights that the retention of DNA profiles of victims is particularly contentious, as these are kept for the same duration as for individuals who have not been convicted—ten years (Article 327a, paragraph 3, of the Criminal Procedure Act). According to Article 327, paragraph 2, points 3 and 4, of the Criminal Procedure Act, biological material samples are taken from both victims and other individuals. Paragraph 6 specifies that the collection of biological material from these individuals requires their written consent, and the molecular-genetic analysis of these samples is mandated by the public prosecutor. If individuals refuse consent, the court can order DNA analysis upon the prosecutor's proposal. All the arguments regarding the retention of DNA profiles for non-convicted individuals are even more applicable to victims of criminal offenses, as it is challenging to establish constitutionally convincing reasons for such a significant intrusion into their privacy.

[66] See *supra* note 33, p. 195.

5. CONCLUSION

Thanks to the Croatian Innocence Project, the authors managed to get into practical dialogues with legal practitioners on safeguarding genetic privacy, compare several experiences as well, and do a retrospective on our practices to determine what can be improved in the national legal framework. As presented in this paper, genetic privacy is about the delicate balance between leveraging genetic information for crime-solving and safeguarding individual privacy rights to avoid wrongful convictions. Neglecting genetic privacy in DNA forensic practices can lead to miscarriages of justice and serious human rights implications. The jurisprudence of the ECtHR reflects the evolving landscape where the removal of DNA profiles from databases grapples with a shifting focus toward databasing for future crimes. This position plays a pivotal role in shaping the comprehension and safeguarding of genetic privacy, especially within the realm of criminal proceedings. As evident from the case studies presented in this paper, the Court underscores the importance of ensuring that the retention, utilization, and storage of DNA data adhere to the criteria of legality, proportionality, necessity in a democratic society, and the existence of a pressing social need in managing such data. It emphasizes that while such data is vital for solving crimes and should be employed for law enforcement purposes, it should be retained only until its intended purpose is fulfilled. Further, the ECtHR stresses the need for a clear differentiation, including whether the data is obtained from an adult or a minor, the purpose of data collection, the duration of data storage, and the national control mechanisms governing such data, among other considerations.

DNA databases play a crucial role in the criminal justice system, storing DNA profiles of individuals who have been convicted or are suspected, depending on the jurisdiction. These databases enable investigators to compare collected samples with existing records, ensuring the identification of matches and contributing to crime deterrence due to the high certainty levels associated with accurate matches. In the context of genetic privacy, experiences from the UK, US, and Europe underscore the paramount importance of prioritizing the protection of privacy rights and handling of genetic data. Concerning human rights implications to privacy, control mechanisms for the deletion of DNA data within these databases are necessary, along with the automatic removal of such data. This approach ensures a proactive stance in safeguarding the right to privacy, as seen from the Marper standards of the ECtHR.

Croatian legislation demonstrates a forward-looking approach and adherence to contemporary standards in safeguarding genetic data within the realm of DNA databasing. Croatia holds the distinction of being the first country in the region to

successfully establish a DNA database, certified in accordance with international standards and conventions. The Croatian experience in databasing has significantly contributed to the establishment of DNA databases in other Western Balkan countries. However, there is an immediate imperative to focus on the provisions governing the treatment of DNA data. As evident from the jurisprudence of the Court, distinctions should be made concerning the age of the perpetrator, the gravity of the crimes committed, and the permissibility of databasing DNA data from crime victims. The retention of DNA profiles of victims for the same duration as those of non-convicted individuals, i.e., ten years is particularly controversial. According to Article 327, paragraph 2, points 3 and 4 of the Criminal Procedure Act, biological material samples are collected from both victims and other individuals. If these individuals refuse consent, a court may order DNA analysis upon the proposal of the public prosecutor. All arguments raised concerning the retention of DNA profiles of non-convicted individuals equally, if not more so, apply to victims of criminal offenses. It is challenging to identify constitutionally convincing reasons for such extensive intrusion into their privacy.

Although the cases mentioned in this paper do not create any legal obligations for the Republic of Croatia, it is undisputed that the interpretative dimension of the Convention as a living instrument allows all states that have ratified it to adapt their policies, practices, and legislative frameworks to the standards established in the Court's practice before being sued on that basis.

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Original scientific paper

SOME ASPECTS OF PLEA AGREEMENT IN CROATIAN MISDEMEANOUR PROCEEDINGS IN DOMESTIC VIOLENCE CASES*

Ante Novokmet, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
ante.novokmet@pravos.hr

ABSTRACT

This paper is dedicated to the issue of violence against women and domestic violence in the context of the plea agreement of the parties and the procedural position of the victim in these proceedings. Therefore, this paper first analyses the European legal standards that weave the positive legal basis for the limitation of alternative ways of solving cases in the domain of domestic violence. The two pillars of the Convention's supervisory mechanism are then considered, which ensure the effective implementation of the proclaimed standards, with special reference to the results of the evaluation of the legal systems of the member states of the Convention from the perspective of the victim's right to effective investigation and the prohibition of alternative dispute resolution processes in the context of entering into plea agreements in cases of violence against women and domestic violence. Finally, the current normative framework of the Misdemeanour Act on the procedure for entering into a plea agreement and sanction is critically analysed, shortcomings and inconsistencies of the current procedural solutions are pointed out, and proposals are made for the future aimed at reviving international legal standards in the Croatian Misdemeanour Act.

Keywords: *domestic violence, GREVIO, Istanbul convention, misdemeanour proceedings, plea agreement, violence against women*

1. INTRODUCTION

One of the characteristics of modern criminal justice is the generally accepted trend of implementing various procedural institutes that emphasise the initiative

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of the parties with an impact on the course and outcome of criminal proceedings.[1] This trend of the re-privatisation of criminal justice is particularly evident in the institution of plea agreements as the European counterpart of the American plea bargaining.[2] By accepting this consensual form, many European countries tried to overcome the problem of excessively long criminal proceedings.[3]

The Croatian legislator did not resist this idea either, so in 2008, the Croatian Criminal Procedure Act introduced the institution of judgement based on agreement of the parties,[4] and a few years later, in 2013, an almost identical normative model of negotiation was implemented in the Croatian Misdemeanour Act.[5] By amending and supplementing the Misdemeanour Act, the Croatian legislator clearly disclosed his intention to relieve the misdemeanour branch of trials from a large number of cases to speed up and simplify daily procedures, thus further contributing to the efficiency of misdemeanour proceedings.[6]

Misdemeanours, generally speaking, are minor violations of public order, social discipline and social values that sanction those behaviours that do not meet the characteristics of criminal offence.[7] Therefore, in principle, the legislator's idea that by implementing various consensual forms, and especially the plea agreement of the parties, it is possible to speed up misdemeanour proceedings for a wide range of misdemeanours, regardless of the extent to which individual misdemeanours actually harm the interests of the social community.

However, in the Croatian legal system, there is one specific group of offences that, in a very complex way, violate not only public order as such, but at the same time strongly affect the private sphere of the victim, and these are offences in the domain of domestic violence. Today, these offences are prescribed by a special law on protection against domestic violence.[8] By prescribing this group of misdemean-

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5 Misdemeanour Act, Official Gazette 107/07, 39/13, 157/13, 110/15, 70/17, 118/18, 114/22.

6 Rašo, M.; Korotaj G., *Novosti u postupovnim odredbama Prekršajnog zakona*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2, 2013, pp. 779-793.

7 Veić, P.; Gluščić, S., *Prekršajno pravo*, Narodne novine, Zagreb, 2013, pp. 3-4.

8 Law on Protection from Domestic Violence, Official Gazette 70/17, 126/19, 84/21, 114/22, 36/24.

ours, the legislator tried to effectively offer a preventive and repressive response to the growing occurrence of domestic violence in everyday life, while at the same time preserving a stricter reaction in the domain of criminal law.[9]

Nevertheless, the repressive character of that special law seems questionable because the legislator, with an uncritical and comfortable approach to the matter of negotiation in the Misdemeanours Act, made it possible to enter into agreements on admission of guilt and sanctions for all misdemeanours, including misdemeanours in the domain of domestic violence.[10] The significant social harmfulness of precisely these offences, as well as the fact that their commission breaks the cohesion of the family community and infringes on the individual's rights,[11] was reason enough to highlight at the international level not only the zero tolerance rate for domestic violence but also the clear position that in cases of domestic violence, there is no room for entering into a plea agreement.[12]

By signing the Council of Europe Convention on preventing and combating violence against women and domestic violence on January 22, 2013 and ratifying it on May 16, 2018,[13] Croatia accepted the obligations prescribed by the Convention, including the provision from Art. 48, which obligates the parties to undertake "the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention."[14] Despite this, even six years after the ratification of the Convention, the Croatian Misdemeanour Act still leaves open the possibility of entering into an agreement on admission of guilt and sanction when it comes to offences of domestic violence.

Therefore, this paper first analyses the European legal standards that weave the positive legal basis for the limitation of alternative ways of solving cases in the domain of domestic violence. The two pillars of the Convention's supervisory

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9 Dragičević Prtenjača, M.. *Dihotomija pristupa u rješavanju nasilja u obitelji putem prekršajnopravne i kaznenopravne regulative*, Hrvatski ljetopis za kaznene znanosti i praksu Vol. 24, No. 1, 2017, pp. 141-175.

10 Rašo, M., Korotaj, G., *op. cit.* note 6, p. 788.

11 Bo L, Yating P. *Long-Term Impact of Domestic Violence on Individuals-An Empirical Study Based on Education, Health and Life Satisfaction*. Behav Sci, 13, 137, pp 1-17.

12 Suntag D., *Pleas, Plea Bargaining, and Domestic Violence: Procedural Fairness as an Answer to a Failing Process*, Court Review: The Journal of the American Judges Association, Vol. 57, No. 1, 2021, pp. 58-62.

13 Law on the ratification of the Council of Europe Convention on preventing and combating violence against women and family violence, Official Gazette – International agreements, 3/18.

14 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, CETS No.210, [https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence], Accessed 10 February 2024.

mechanism are then considered, which ensure the effective implementation of the proclaimed standards, with special reference to the results of the evaluation of the legal systems of the member states of the Convention from the perspective of the victim's right to effective investigation and the prohibition of alternative dispute resolution processes in the context of entering into plea agreements in cases of violence in the family and violence against women. Finally, the current normative framework of the misdemeanour law on the procedure for entering into a plea agreement and sanction is critically analysed, shortcomings and inconsistencies of the current procedural solutions are pointed out, and proposals are made for the future aimed at reviving international legal standards in the Croatian Misdemeanour Act.

2. CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE AS A EUROPEAN LEGAL STANDARD

2.1. Procedural Duty to Carry Out Effective Investigation

The Convention of the Council of Europe on preventing and combating violence against women and domestic violence is the first supranational instrument by which the Council of Europe seeks to establish minimum European rules aimed at preventive and proactive action to suppress domestic violence.[15] These rules are primarily focused on preventing violence against women and domestic violence, the prevention and protection of the victim from secondary victimisation, and the prosecution of the perpetrators of these acts.[16]

Special emphasis is placed on the investigation and prosecution of perpetrators of criminal acts and misdemeanours. Namely, states have an obligation to ensure that an investigation is carried out without unnecessary delay and that court proceedings are initiated to determine the guilt of the perpetrator.[17] Such a strict attitude was expressed because it was noticed that cases of violence against women and domestic violence are given a low priority in investigations and court proceed-

[15] For the European experiences see: Melnyk, Mariia B., Stasiuk, Nadiia, Medvedska, Victoria V., Rufanova, Viktoriia M. Pletenets, Viktor M., *European experience of prevention and combating domestic violence*, Estudios constitucionales, Vol. 21, No. 2, 2023, pp. 195-220, [https://dx.doi.org/10.4067/S0718-52002023000200195], Accessed 10 February 2024.

[16] See: Grans L., *The Istanbul Convention and the Positive Obligation to Prevent Violence*, Human Rights Law Review, Vol. 18, No. 1, 2018, pp. 133-155.

[17] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, Council of Europe Treaty Series - No. 210, § 252.

ings, which significantly contributes to the feeling of impunity among perpetrators and, in the long term, contributes to maintaining a high level of acceptability of such violence.[18] Such an approach expresses a clear demand that the state must carry out an effective investigation of domestic violence and violence against women, which will ultimately affect the collection of all key evidence, increase the conviction rate and remove the impression of impunity.[19] The procedural obligation to conduct an effective investigation implies, in this case, the establishment of relevant facts, interviewing all available witnesses, conducting forensic expert examinations based on a multidisciplinary approach and using the latest criminal research methodology to ensure a comprehensive analysis of the case.[20]

2.2. Prohibition of Implementing Alternative Procedures in Cases of Domestic Violence and Violence Against Women

The obligation to conduct an effective investigation requires the member states to arrange their domestic legal order such that a detailed, circumstantial and careful investigation of all the circumstances of the committed criminal offence and misdemeanour will be ensured.[21] Therefore, it is completely understandable to expect that the determination of guilt or innocence for an alleged violation of the legal order in the form of domestic violence should be carried out in a procedure before an independent and impartial court that will impose an appropriate sanction that will have a deterrent effect and send a message about the danger and social harm of domestic violence. This attitude corresponds to the idea of placing a strong emphasis on the prohibition of mandatory alternative dispute resolution procedures, including mediation and conciliation in relation to all forms of violence.[22]

Although it is clear that the modern judiciary, in the era of excessively long court proceedings and the daily influx of new cases, is looking for a way to relieve the heavy congestion, it is still necessary to note that not all cases are the same. Namely, the upper limit of the prescribed sentence for a specific criminal offence or misdemeanour is not the only factor that determines the severity of the offence

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18 Ibid., § 255.

19 Grans L., *loc. cit.*, note 16.

20 Explanatory Report, *op. cit.* note 17, § 256.

21 For the first ECtHR landmark judgement on violence against women see: Abdel-Monem, T., *Opuz v. Turkey: Europe's Landmark Judgment on Violence Against Women.* Human Rights Brief, Vol.17, no. 1, 2009, pp. 29-33.

22 See: Pichard Marc J., *Article 48 Prohibition of mandatory alternative dispute resolution processes or sentencing,* in: De Vido, S.; Frulli M., (eds.), Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention, Edward Elgar Publishing, 2023, pp. 568-577.

committed. That is why it is necessary to take into account some other factors, such as the harmful consequences that arise for the victim of the crime and society as a whole, in the case of certain criminal acts and misdemeanours. In addition, the sanction prescribed by law and pronounced in court proceedings must achieve not only a special preventive effect in the form of correction of the offender but also a general preventive effect that is achieved through the favourable educational action of the judiciary on mature personalities.

Therefore, when choosing between different forms of alternative ways of solving individual cases, it is necessary to consider some other interests, not only the economy of the procedure and the speed of solving the case. Namely, alternative ways of resolving cases, including different forms of plea agreements, can have significant negative effects in cases related to domestic violence and violence against women.[23] That is why the Explanatory report particularly highlights the negative effects of alternative procedures in cases of various forms of violence, especially if such practice regularly avoids adversarial court proceedings:[24] "Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator.[25] It is in the nature of such offenses that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance.[26] To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force."[27]

2.3. Plea Agreements in Cases of Violence Against Women and Domestic Violence – Stumbling Block

From the perspective of the plea agreement, the aforementioned request to limit alternative ways of ending criminal and misdemeanour proceedings comes to the fore even more. Prosecution of perpetrators in criminal and misdemeanour proceedings is an expression of the sovereign power of the state and its monopoly to carry out the activity of public punishment of perpetrators in the interest of the

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23 Keenan M.; Zinsstag, E., *Sexual Violence and Restorative Justice*, Oxford University Press, 2023, pp. 95-97.

24 Explanatory Report, *op. cit.* note 17, § 252.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

state and its citizens.[28] However, in the case when the prosecutor and the defendant enter into negotiations regarding the possible end of the proceedings in an alternative way, such as a plea agreement, it is clear that the public interest of prosecuting and punishing the perpetrator gives priority to the private initiative of the parties.[29] In such a situation, the prosecutor and the defendant become masters of the course and outcome of the proceedings, and the role of the court is often limited to confirming the will of the parties without a prior assessment of whether the purpose of punishment is achieved with the proposed sanction. The victim of a criminal offence is often neglected and does not have the opportunity to exercise the right to seek justice in the true sense of the word.[30]

Although the process of agreeing on guilt and sanction has its place in modern criminal justice as a faster, simpler, and cheaper way to reach a conviction, such a relativised approach to punishment and the punishing of the perpetrator is unacceptable in light of the emerging forms of domestic violence and violence against women. Although the conclusion of the plea agreement achieves the goal and purpose of the criminal procedure from the perspective of the prosecutor and the defendant, this certainly cannot be said for the sense of justice and fair punishment of the perpetrator expected by the victim and the deterrent effect of the punishment for society as a whole.[31]

The external impression of an insufficiently clear and concrete global response of national legislation and the judiciary to the ubiquitous problem of domestic violence and violence against women requires a more serious and concrete approach to eradicating this social problem. Precisely because of this, the plea agreement is not an acceptable institution that could be used to build society's awareness of the need for zero tolerance for the occurrence of these socially undesirable behaviours. Even more, in many judicial systems, the prior consent of the victim is not prescribed at all as a mandatory checkpoint that the prosecutor must reach before deciding to enter into a plea agreement, which opens the door to wide negotiation discretion between the parties, regardless of the will and interests of the victim.[32]

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28 Daw, R. K., *The "Public Interest" Criterion in the Decision to Prosecute*, The Journal of Criminal Law, Vol. 53, No. 4, 1989, pp. 485-501.

29 Turner, J.I., *Transparency in Plea Bargaining*, Notre Dame Law Review, Vol. 96, No. 3, 2021, pp. 994-997.

30 See: Beloof, D.E., *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: a Response to Professor Michael O'Hear*, Marquette Law Review, Vol. 91, No. 1, 2007, pp. 353-354.

31 See: Alm, D. *Crime Victims and the Right to Punishment*, Criminal Law and Philosophy, Vol. 13, No. 1, 2019, pp. 63-81.

32 Pugach, D.; Tamir, M., *Victims' Rights in Plea Agreements Across Different Legal Systems*, *Oxford Research Encyclopedia of Criminology.* 28 Sep. 2020; Accessed 28 Apr. 2024. [https://oxfordre.com/criminolo-

Although no social problem can be eliminated by repressive actions alone, it is necessary to apply preventive educational action, and at the current level of awareness of the problem of domestic violence and violence against women, ending these cases by agreement is absolutely contraindicated. Therefore, it is necessary to insist on the implementation of criminal proceedings that will give a clear and concrete answer to the public about the social harm and danger of such behaviour and ensure that the victim of a criminal offence has access to the court and just satisfaction, not only by imposing a sentence on the perpetrator but also by satisfying her real needs for protection and the prevention of further victimisation.

3. MECHANISMS FOR MONITORING THE IMPLEMENTATION OF THE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

3.1. GREVIO and Committee of the Parties – Two Pillars of Supervision

The Istanbul Convention is the first legally binding instrument in Europe that establishes the obligation of state parties aimed at preventing gender-based violence, protecting victims and punishing perpetrators of violence against women and domestic violence.[33] However, the written legal act itself is not a sufficient means to ensure that the member states actually implement these requirements in their domestic legislative acts. For this reason, a monitoring mechanism has already been established in the Convention itself, which monitors its implementation and provides recommendations and guidelines for its effective implementation in domestic legal systems.

The convention explicitly established GREVIO, a group of experts on action against violence against women and domestic violence.[34] Its main task is to monitor the implementation of the Convention by the member states.[35] This task is primarily accomplished through the preparation and publication of reports in

gy/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-686], Accessed 20 February 2024.

33 Riccardi, A., *Article 18 General obligations*, in: De Vido S.; Frulli M., (eds.), Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention, Edward Elgar Publishing, 2023, pp. 285-286.

34 Gasimov, I., *Monitoring Mechanism of the Istanbul Convention: Individual Application and Criminal Justice*, 2022, pp. 1-12, [https://ssrn.com/abstract=4254304G, Accessed: 20 February 2024.

35 Petrić N.; Husić S.; Šiljak I., *Toolkit for Monitoring Implementation of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention),* Banja Luka, 2018, p. 10.

which the assessment of legislative and other measures undertaken to implement the fundamental ideas proclaimed in the Convention is given in domestic law. On the basis of the evaluation carried out in this way, GREVIO compiles its report with recommendations to the member states on the direction and method of implementation of individual provisions of the Convention.[36] Furthermore, if GREVIO receives credible information that leads to the conclusion that it is necessary to establish immediate supervision in order to prevent or limit the extent or number of serious violations of the Convention, it may request the urgent submission of a special report on the measures taken to prevent a severe, extensive or persistent pattern of violence against women.[37] Based on the information obtained in this way, GREVIO can appoint one or more of its members to carry out the investigation and urgent reporting to GREVIO, and on the basis of all the information gathered and in consideration of the findings from the investigation, it transmits these findings to the relevant party and, when appropriate, to the Committee of Parties and the Committee of Ministers of the Council of Europe, together with possible remarks and recommendations.[38]

In addition, GREVIO can adopt general recommendations that are not related to individual countries but have meaning for all member states.[39] Although they do not have a binding effect, they serve as a starting point for the state parties, contributing to a better understanding of certain areas covered by the Convention and serving as a guideline that helps the more effective implementation of certain provisions of the Convention.

The second pillar of the monitoring mechanism is the Committee of the Parties, which consists of representatives of the member states to the Convention.[40] It ensures the equal participation of all parties to the Convention in the decision-making process and the monitoring of its implementation in domestic legal systems. In this sense, the Committee of the Parties can adopt recommendations that refer to the measures that the respective Party must take to implement the conclusions of GREVIO if necessary, determine the date for submitting information on their implementation, and promote cooperation to ensure the correct implementation of the Convention.[41]

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36 Explanatory Report, *op. cit.* note 17, § 350.

37 *Ibid.,* § 358.

38 *Ibid*.

39 *Ibid*., § 359.

40 *Ibid.,* § 345-347.

41 *Ibid*., § 357.

3.2. Supervision over the Implementation of the Convention

Shortly after its establishment, the GREVIO group of experts started the Baseline evaluation procedure 2016–2028.[42] This evaluation procedure is carried out country by country, in which the level of implementation of the Convention is determined, as well as the weaknesses and shortcomings of the domestic legal system in strengthening and protecting Convention rights. The country evaluation procedure has several rounds of evaluation. In this context, GREVIO considers the information submitted by the parties in response to their questionnaires or any other requests for information, taking into account the information received from the relevant bodies of the Council of Europe, institutions established under other international instruments such as non-governmental organisations and national institutions for human rights. If the collected information is not sufficient, GREVIO can organise country visits.[43] Based on the evaluation carried out in this way, GREVIO prepares its final report and conclusion for each country separately and sends them to interested parties.[44] Particularly valuable are the so-called comparative analyses in which GREVIO shows a collective horizontal review for all evaluated countries and identifies key problems and weaknesses of the current legislation.

3.3. Prohibition of Mandatory Alternative Dispute Resolution Processes or Sentencing – Practical Anomalies and Challenges

During 2022, GREVIO published its first Mid-term Horizontal Review of GREVIO baseline evaluation reports,[45] which is significant because it provided the first overview of the level of implementation of the Convention in the member states and observed shortcomings in the implementation of prescribed standards and certain areas that require improvements and a better and more concrete response from national legislators.

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42 Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), [https://rm.coe.int/grevio-inf-2016-1-eng-first-baseline-questionnaire/1680a60a4bG, Accessed 15 February 2024.

43 Country-monitoring work, [https://www.coe.int/en/web/istanbul-convention/about-monitoring1], Accessed 15 February 2024.

44 Country-monitoring work, [https://www.coe.int/en/web/istanbul-convention/country-monitoring-work], Accessed: 16. February 2024.

45 Mid-term Horizontal Review of GREVIO baseline evaluation reports, Council of Europe, 2022. [https://rm.coe.int/prems-010522-gbr-grevio-mid-term-horizontal-review-rev-february-2022/1680a58499], Accessed: 22 February 2024.

When it comes to the issue of implementing requirements from Article 48 of the Convention, and in particular the prohibition of mandatory alternative dispute resolution process (ADR), GREVIO has established, based on the collected data, that no country has explicitly prescribed the obligation to implement an alternative dispute resolution process.[46] Nevertheless, it is symptomatic to note that the majority of states did not even explicitly prohibit the implementation of such procedures. For this reason, GREVIO observed various practices in which alternative dispute resolution processes come to the fore, deviating from the basic principles set by the Convention.

Thus, it has been observed that in some countries where conciliation is in principle allowed in proceedings related to violence against women and domestic violence, although it is not mandatory, victims often perceive conciliation as a mandatory phase of proceedings due to the lack of initial information about their rights in the proceedings.[47] Equally, it has been observed that many countries know the broad possibilities of proceeding through deferral of prosecution, so in cases characterised by violence against women and domestic violence, decisions are made on the waiver of criminal prosecution only based on the consent of the defendant and without the prior consent of the victim.[48] Cases were also recorded where the court proposed mediation, although the domestic procedure explicitly prohibits such treatment as cases of violence against women and domestic violence are exceptionally excluded from mediation.[49] For this reason, GREVIO expressed concern that such practices send the wrong message: that domestic violence is not a "crime fit for criminal conviction".[50] This particularly stems from the fact that GREVIO has identified as a common challenge the lack of understanding by legal professionals of the dynamics of violence and the dangers of alternative dispute resolution processes in cases of violence against women and domestic violence.[51] On such a basis, in its recommendations, GREVIO strongly encouraged the local authorities to take into account the weaker position of the victim, and especially the noticeable power imbalances, as well as the need to ensure the victim's full respect for her rights and to make additional efforts so that victims receive adequate information about their rights and especially about the non-mandatory nature of mediation. As an isolated case, observed in only one country, GREVIO also noticed the practice of the perpetrator's lawyers trying to make an agreement with

46 *Ibid*. § 408.

47 *Ibid*.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid*., § 408-409.

the victim not to testify in the criminal proceedings, offering them in return a good settlement in the civil proceedings for damages.[52]

In particular, it should be noted that GREVIO observed the practice of concluding plea bargaining agreements in certain countries. In such cases, perpetrators are quickly sanctioned by the pronouncement of a guilty verdict by skipping the trial and without examination of evidence. In doing so, it was noticed that sanctions are often imposed below the legal minimum, while the victims do not have the opportunity to express themselves before the prosecutor and the defendant conclude an agreement.[53] In addition, by conducting such a procedure in which no evidence is presented, the victim cannot exercise the right to be heard before the court before the final decision is made.[54] Such practices directly affect the policy of punishing offences of violence against women and domestic violence, so the sanctions are not commensurate with the gravity of the offence committed, nor do they have a long-term deterrent effect, which is why Article 45 of the Convention is violated.[55] In some countries, GREVIO has also observed the practice of concluding agreements in cases of criminal offences of rape and sexual abuse, which ultimately lead to the imposition of extremely lenient sanctions, even to the extent that fines are imposed instead of imprisonment,[56] which is why GREVIO concluded that such a method does not achieve the deterrent effect of punishment and does not appear proportionate and dissuasive. In some countries, the practice of concluding out-of-court settlements, so-called "transactions", has been observed, in which cases, due to an agreement reached between the plaintiff and the defendant, in the end, proceedings before the court do not take place.[57]

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52 *Ibid*., § 409.

53 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Bosnia and Herzegovina, 2022, § 244.

54 *Ibid.*

55 *Ibid.*

56 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Georgia, 2022, § 288.

57 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Netherlands, 2022, § 242-243.

4. PLEA AGREEMENT OF THE PARTIES IN CROATIAN MISDEMEANOUR PROCEEDINGS – A CRITICAL REVIEW FROM THE PERSPECTIVE OF DOMESTIC VIOLENCE

4.1. Plea Agreement of the Parties in the Croatian Misdemeanour Act

Plea agreements of the parties were implemented in the Croatian Misdemeanour Act in 2013. With this act, the Croatian legislator took an additional step aimed at relieving the misdemeanour courts and increasing the number of resolved cases. Thus, the plea agreement of the parties became just one more of several different procedural instruments aimed at speeding up misdemeanour proceedings.[58] Among them today, the misdemeanour warrant, mandatory misdemeanour warrant, urgent procedure, insignificant offence, and procedural instruments based on the principle of opportunity, such as unconditional and conditional waiver, stand out.[59]

By analysing the normative structure of the plea agreement of the parties in Art. 109.e of the Misdemeanour Act, it can be seen that the role model for prescribing this institute was the institute of the judgement based on agreement of the parties previously known in the Criminal Procedure Act,[60] with minimal differences due to the specificity of the misdemeanour procedure itself.

In this context, the basic determinants of the plea agreement of the parties can be considered from three aspects: the moment of starting the negotiations, the conclusion of the agreement, the statement for passing a decision based on the plea agreement of the parties and the procedure of judicial review of the concluded agreement.

The parties can negotiate in terms of admission of guilt and sanctions after the prosecutor has served the perpetrator of the offence with the notice of rights from Article 109a paragraph 1 of the Misdemeanour Act. It should be noted that the

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58 Bonačić, M.; Rašo M., *Obilježja prekršajnog prava i sudovanja, aktualna pitanja i prioriteti de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 19, No. 2, 2012, pp. 439-472.

59 For detailed overview see: Mršić, Ž.; Posilović D.; Šantek M., *Procesuiranje prekršaja primjenom načela oportuniteta i sklapanjem sporazuma između policije i počinitelja prekršaja o sankciji i mjerama*, Policija i sigurnost Vol. 27, No. 2, 2018, pp. 213-235; Filipović, H., *Primjena oportuniteta od strane policije kao ovlaštenog tužitelja te pregovaranje i sporazumijevanje prije pokretanja prekršajnog progona*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 28, No. 2, 2021, pp. 629-658.

60 Ivičević Karas, E.; Novokmet, A.; Martinović, I., *Judgment based on agreement of the parties in Croatian law: a critical analysis from the comparative legal perspective*, Pravni vjesnik, Vol. 37, No. 1, 2021, pp. 11-34; Ivičević Karas, E.; Novokmet, A.; Martinović, I., *Judgment Based on Agreement of the Parties: Analysis from the Perspective of Practitioners' Experience in Croatia*, Utrecht Law Review, Vol. 19. No. 1, 2023, pp. 31-52; Novokmet, A.; Tripalo D., *Opseg sudske kontrole sporazuma stranaka*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 28, No. 2, 2021, pp. 211-239; Tomičić, Z., Novokmet, A., *Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive*, Pravni vjesnik, Vol. 28., No, 3-4, 2012, pp. 149-190.

law does not specify the latest moment by which a plea agreement could be concluded. In fact, only the law leaves the possibility for the parties to negotiate an agreement during the proceedings before the court, practically until the decision on the offence is made. Interestingly, the parties can negotiate the conclusion of an agreement even at the initiative of the body before which the proceedings are conducted, i.e. the court (Article 109a paragraph 2 MA).

If the prosecutor and the defendant reach an agreement on the terms of admission of guilt and the sanction, they draw up a so-called written statement for making a decision on a misdemeanour based on the agreement of the parties, which contains: 1) a description of the misdemeanour; 2) a statement by the defendant admitting guilt for that misdemeanour; 3) an agreement on the type and measure of punishment or other sanctions or measures; 4) an agreement on the costs of the authorisation of the prosecutor in connection with the determination of the violation and the costs of the body of the procedure when the agreement was reached during the conduct of the procedure; 5) the signatures of the parties (Article 109.e. paragraph 3. MA). The statement prepared in this way is submitted to the court, which will finally decide on the acceptance of the agreement.

After receiving a statement for rendering a verdict based on the agreement of the parties, the court carries out mandatory, *ex officio*, judicial review of the concluded agreement. The court is not obliged to accept the agreement of the parties, that is, it will not accept it if the agreement was concluded taking into account the rules on the choice of the type and amount of the sanction to the detriment of the defendant, if the purpose of punishment will not be achieved, or if the agreement is otherwise illegal. If the court does not accept the agreement, it will conduct a regular procedure, present evidence at the hearing and make a decision. If, on the other hand, the court accepts the agreement, it will make a decision on the offence that must fully correspond to the agreement reached by the parties (Article 109.e. paragraphs 5-8. MA).

4.2. Plea Agreement of the Parties from the Perspective of a Victim of Violence Against Women and Domestic Violence

The presented normative structure of the provisions that regulate the process of agreeing on guilt and sanction shows that the parties can, in this way, end each misdemeanour procedure that was initiated by issuing an indictment.[61] The victim is not at all recognised as a relevant factor that the prosecutor in misdemeanour pro-

[61] Kikić, Suzana. *(Ne)primjena skraćenog postupka, sporazumijevanja i oportuniteta u slučajevima prekršaja obiteljskog nasilja*, Policija i sigurnost Vol. 32, No. 4, 2023, p. 372.

ceedings should take care of when concluding an agreement, so the prosecutor is left with a wide possibility to negotiate on guilt and sanction even in those offences where the victim of that offence is clearly identified. Unlike the Misdemeanours Act, the Criminal Procedure Act somewhat restricts the ability of the prosecutor to make a completely autonomous decision on entering into an agreement, since the law expressly states the circumstances that limit his freedom of agreement, especially if it regards crimes against life and limb and against sexual freedom for which a prison sentence of more than five years is prescribed (Article 360, paragraph 6 of the CPC). It is obvious, namely, that the legislator was aware that there are certain criminal acts that encroach so strongly on the victim's private sphere that without her prior consent, the prosecutor cannot enter into a plea agreement.

This state of affairs is particularly problematic from the perspective of victims of violence against women and domestic violence. Entering into a plea agreement for these offences is not only prohibited by the Convention, but GREVIO, having conducted a comparative analysis of the practice of the countries that signed the Convention in several cases, clearly emphasised that settlements in cases of violence against women and domestic violence should be avoided.[62] The reason for this is the multiple harmful consequences for the victim herself, who not only remains devalued because she is not given the opportunity to have her voice heard before making the decision to conclude an agreement, but the final sanction imposed on the basis of the concluded agreement, which is always milder in comparison to the sanction that would have been imposed in the regular procedure, further traumatises and victimises the victim, due to which there is no confidence that the system has justly punished the perpetrator.[63]

Such conduct, among other things, violates the general provision of Article 5 of the Act on Protection from Domestic Violence, which establishes the duty of all bodies that act on the occasion of domestic violence to act with special consideration towards the victim of domestic violence and, when taking actions, to take appropriate care of the rights of the victim.[64] This provision not only results from the duty of competent authorities to behave in the prescribed manner; but also the victim also has the right to a legitimate request that these authorities really provide her with such protection and care for her interests. This becomes even more evident if we take into account that the Convention establishes the victim's fundamental right to have competent authorities conduct an effective investiga-

62 See supra 3.3.

63 Kikić, S. *loc. cit.,* note 61.

64 See specifically: Radić, I., Radina, A., *Zaštita od nasilja u obitelji: obiteljskopravni, prekršajnopravni i kaznenopravni aspekt,* Zbornik radova Pravnog fakulteta u Splitu Vol. 51, No. 3, 2014, pp. 727-754.

tion of any allegation of violence.[65] In doing so, it should be taken into account that the concept of the right to effective investigation does not refer only to the pre-trial phase of the procedure, since the ECtHR extended the concept of effective investigation to all stages of the procedure, including the trial phase of the procedure before the court, so it concluded in its practice that the investigation was not effective when the defendant was given a relatively mild sanction, which is normally characteristic of procedures that end in a plea agreement.[66]

A further important problem is manifested in the fact that the Misdemeanour Act does not at all recognise the victim of violence against women and domestic violence who needs help, support and protection. Although the Misdemeanour Act stipulates an interesting provision that "if this Act does not contain provisions on certain issues of the procedure, the provisions of the Criminal Procedure Act and the Juvenile Courts Act shall be applied in an appropriate manner, when it is appropriate for the purpose of the misdemeanour procedure" (Article 82, paragraph 3. MA) in practice, the interests of the victim are not taken into account, nor are the rights of the victims guaranteed in the CPA meaningfully applied. This is even more symptomatic when it is taken into account that the Law on Protection from Domestic Violence expressly stipulates that Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime has been transposed into that law, but it is obvious that even if it was transferred, it was not really brought to life in practice.[67]

4.3. A Critical Overview of Practice of Plea Agreement in the Misdemeanour Act and *De Lege Ferenda* Propositions

The analysis of the verdict based on the agreement of the parties in the Croatian Misdemeanour Act and the actual position of victims of violence against women and domestic violence points to serious deficiencies in the existing provisions of the Misdemeanour Act in the context of plea agreements and sanctions.

This is first noticeable in the very provision of Article 109a of the Misdemeanour Act, which represents the backbone of notifying the accused about the fundamental rights of defence. Among the enumerated rights, the defendant is expressly guaranteed, among other things, the right to enter into a plea agreement and sanc-

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65 Explanatory Report, *op. cit.* note 17, § 256.

66 Novokmet, A.; Sršen, Z., *Neučinkoviti kazneni postupak pred sudovima – implementacija presuda Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 24, No. 2, 2017, p. 297.

67 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315 57.

tion as a fundamental right of defence (Art. 109.a paragraph 1. point 9. MA). On the other hand, the very provision of Article 109.e of the MA, which regulates the way of entering into a plea agreement, speaks of plea agreement of the parties as a possibility and not as a mandatory way of proceeding. In other words, it is obvious that there is no obligation on the part of the prosecutor to enter into a plea agreement with the defendant, which leads to the conclusion that the defendant has no right to a plea agreement, because his right does not correspond to the duty of the prosecutor to negotiate and conclude an agreement. In recent literature, it is even emphasised that certain protocols on the manner of handling cases of domestic violence issued by the Ministry of Internal Affairs expressly stipulate that persons accused of a misdemeanour of domestic violence should not be informed of this right of defence at all when given instructions on rights, no matter what is expressly prescribed by law.[68] Such reasoning of the practice confirms the thesis that the existing legal solution is incoherent and unsustainable, since by-laws try to limit its application.[69] The stated state of affairs is of course not good, because the unity of the legal order is violated, legal certainty is called into question and the equality of all citizens before the law is brought into question, since the right that is expressly derived from the law is derogated based on lower legal regulations. In addition, it clearly follows from all of the above that the Croatian legislator was not careful enough when prescribing the rights of the defendant's defence and broad possibilities for negotiation without taking into account the European legal standards that impose the obligation to prevent alternative ways of solving cases from the domain of violence against women and domestic violence.

The next important shortcoming and consequence of the excessively broadly provided plea agreement is manifested in the complete neglect of the victim and her specific position and needs when it comes to violence against women and domestic violence. This is visible first of all in the absence of the general duty of the prosecutor to take care of the interests of the victim when entering into a plea agreement in the process of deciding whether and under what conditions to enter into an agreement. On the other hand, this is also visible in the fact that the law leaves a wide possibility of negotiation for any misdemeanour, regardless of the severity of the sanction, which is equally valid for misdemeanours in the domain of domestic violence and violence against women.

Taking into account the European standards for the protection of victims of domestic violence prescribed by the Convention as well as the recommendations of GREVIO, it is clear that the Croatian legislator must intervene in the relevant

[68] Kikić, Suzana, *op. cit.* note 61, p. 373.

[69] Ibid.

provisions of the Misdemeanour Act and explicitly stipulate that in all offences related to violence against women and domestic violence, the possibility of negotiation for entering into a plea agreement is absolutely excluded. In addition, no half-solution is acceptable in which the possibility of the victim's prior consent would be introduced as a condition for entering into an agreement for those offences, because that would also be against the convention standards on the general prohibition of alternative ways of solving those cases, and it would still be a problematic issue of additional traumatisation and victimisation of the victim.

Based on all of the above, it is necessary for the legislator to intervene in a targeted manner in the provisions of the Misdemeanour Act, which regulate the procedure for negotiating a plea agreement, in order to clearly and unequivocally exclude any possibility of entering into an agreement for offences related to violence against women and domestic violence. Only with such concrete and focused legislative activity can European standards be implemented in the domestic legal order and establish certainty of action in all future cases. This will of course send a strong message to the general public about zero tolerance for violence as such, but also the willingness of the state to use stricter sanctions aimed at the perpetrators of these offences to achieve a beneficial educational effect on the general civil public and send a clear message about the social harm and danger of misdemeanour violence against women and of domestic violence.

5. CONCLUSION

In this paper, a targeted analysis of the implementation of the standards established by the Istanbul Convention was carried out in relation to Article 48 of the Convention, which obliges the parties to undertake the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention in correlation with Article 49 and positive procedural obligation to conduct effective investigation and prosecution in cases of violence against women and domestic violence.

In this sense, the domestic legal framework established by the Misdemeanours Act, which regulates the procedure for entering into agreements on admission of guilt and sanctions, was analysed. It has been noted that the provisions of the Misdemeanour Act are very broad, which is why there is currently no ban on entering into agreements in cases related to violence against women and domestic violence. For this reason, in practice, through various protocols and implementing regulations of the Ministry of Interior, it is emphasised that plea agreements should not be made in these cases.

However, since the law itself clearly prescribes such a possibility, and even constitutes it as a fundamental right of the defence, it is doubtful whether the norm of a higher regulation, i.e. the law, can be derogated from by a by-law. Therefore, in order to protect legal security, the unity of the legal order and the equality of all citizens before the law, it is necessary to make the necessary changes to the Misdemeanours Act in order to expressly limit the possibility of concluding plea agreements in cases of domestic violence and violence against women.

Only such a concrete and specific legislative response can send a clear message to society that the public interest in prosecuting the perpetrators of those categories of offences prevails over the private interest of the individual to be punished more leniently. This will, among other things, give solid support to all preventive and educational efforts on the importance of understanding and eradicating gender-based violence.

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Review article

THE INTERCONNECTION OF THE RULE OF LAW, EUROPEAN CONVENTION ON HUMAN RIGHTS PRINCIPLE OF LEGALITY, AND ARTICLE 7 OF THE ECHR*

Zrinka Erent Sunko, PhD, Full Professor
University of Zagreb, Faculty of Law
Trg Republike Hrvatske 14, Zagreb, Croatia
zrinka.erent.sunko@pravo.unizg.hr, zerent@pravo.hr

Marta Dragičević Prtenjača, PhD, Associate Professor
University of Zagreb, Faculty of Law
Trg Republike Hrvatske 14, Zagreb, Croatia
marta.dragicevic@pravo.unizg.hr, mdragicev@pravo.hr

ABSTRACT

This paper will focus on the intricate interplay, the link between the rule of law, the principle of legality in a broader sense, and the principle of legality in a narrower sense (stricto sensu) contained in Article 7 (no punishment without the law, or nullum crimen, nulla poena sine lege) of the European Convention on Human Rights (ECHR), particularly its elements of foreseeability and accessibility. These three pillars collectively shape legal systems, ensuring justice, protecting human rights, and preventing the arbitrary exercise of power. This study's guiding concept and historical anchor is the rule of law and its connection to the principle of legality. Through a legal and historical analysis, the research seeks to define the core principles of the rule of law and trace its historical trajectory. Understanding the historical context illuminates how the rule of law has evolved, leading to the establishment of transparent, fair, and accountable legal systems. The research investigates how the ECtHR interprets and implements the principle of legality, focusing on accessibility and foreseeability, and the place and role of the judicial safeguards in connection to these two elements of legality. The authors seek to comprehend the ECtHR's scope and interpretation of these principles. In addition to legal analysis, the research incorporates a qualitative approach by reviewing relevant ECtHR case law on Article 7 ECHR and assessing its scope and impact. Therefore, the study applies the legal-historical and qualitative statistical methods, focusing on case studies of specific ECtHR cases that are significant in light of legalities in the broader sense and stricto sensu (Article 7).

***Keywords**: Article 7, European Convention on Human Rights (ECHR), ECtHR, principle of legality, rule of law*

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1. THE ROOTS OF THE RULE OF LAW AS THE FOUNDATIONS OF THE PRINCIPLES OF ITS MODERN CONSTRUCT

The Rule of Law is not only a concept that characterizes contemporary society, but is also a construction that gives meaning to its development. Although it is generally thought that the rule of law is a modern-legal concept, with certain reservations, one can also talk about its development from the earlier times. These reservations concern to the understanding of law in the context of social relations of a particular moment of time, so we can also talk about the rule of law in the old, middle and modern ages. Although today the rule of law implies transparency, justice, and equality, which is not applicable to its past understanding, the question of legality, as a value that transcends the ruler's will, has existed since the very beginning. That question cannot be compared to the rights of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (so called *European Convention of Human Rights* - hereafter referred to as the Convention or ECHR)[1] like the right to liberty (art. 5), right to respect for private and family life (art. 8), prohibition of slavery and forced labour (art. 4), prohibition of discrimination (art. 14) or no punishment without law (art. 7), but it makes a thin thread of their content.

It can be said that with the enactment of the first codes (which were a list of previous customs), despite the execution of the ruler's will as divine, and his mission to execute that will, the laws became an object of legislative action (and not just a product of custom). That is when the principle of legality as an idea, was born - in its simplest form, with a long development ahead. That notion meant that a society should be "ruled by law, not men", but with an open question of the meaning "law". It should be taken into account that legal historical determinants can only partially and generally explain the principle of legality in the sense of art. 7 ECHR. Namely, art. 7. (as well as the Convention of which it is a part), is not only the ultimate expression of the principle of the rule of law in the development of a democratic society, but it also determines the scope of the European Court of Human Rights' (ECtHR) action in the proactive role of protecting democracy through the legal supervision and protection of human rights[2].

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1 *The European Convention for the Protection of Human Rights and Fundamental Freedoms*; [https://www.echr.coe.int/documents/d/echr/convention_ENG], Accessed 19 February 2024.

2 Some schoolars point out that „*belife that Rule of Law should rule is the hardiest to achieve*" and that „*general trust in law must be earned for each generation, again and again, by legal actors living up their legal obligations*". See Tamanaha, Brian, Z., *The History and Elements of the Rule of Law*, Singapore Journal of legal Studies, 2012, pp. 232-247.

The slow emergence of this principle or idea is evident from the historical development of some legal systems, both in the Western tradition and beyond.[3] Even in the codes of theocratic societies, and kingdoms, such as the Babylonian one, it is stated that even the ruler does not act of his own free will, but does so because he was "sent by Marduk to rule over men, to give the protection of the right to the land".[4] Although we are talking about the systems where the will of the ruler is the law (the rule of men), this prologue emphasizes that this rule derived from a higher idea of universal law. Almost 4000 years ago, while submitted to the ruler's will, people emphasized about submission to the universal value built on the notion of equality. But it was a value necessarily related to the development of consciousness and a long-term, even millennial superstructure. Classical Athens (and Greek society as a whole) had already made a significant contribution. By listing customs as laws that apply to all the people of a certain group, a further step was taken. The real shift was made by the construction of the nascent form of a democratic society (appropriate to the level of its historical development). This would not have happened without the Greek philosophers whose perception of social relations in the 5th century BC was rationalized and partially separated from the „world of gods". Investigating social arrangements, their advantages and disadvantages, they also dealt with the question of the nature of law and its importance. Among them stood Aristotle in whose works the Rule of Law took a visible form.[5] He asked himself (Politics, book 3) whether is it better to be ruled by the best leader or by the best laws, and has found good and bad sides to both governing methods. In the end, he still proposed legislation as a better way. Aristotle treated the Rule of Law as a constituent feature of any regime. But in his work, the law has to be moderated, because every law also bears an intrinsic threat of domination. The unjust laws must be disobeyed. The justice of laws, therefore depends on the individual practice of good judgment- in good judgment Aristotle sees the rule of men. The Rule of Law, especially the Constitution, moderates the Rule of Men, and also the Rule of Men moderates the Rule of Law. On the need for the supremacy of the Rule of Law, Aristotle in Politics said:

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3 Elements of this idea could be found in other legal traditions. For more See Brown, N., *The Rule of Law in the Arab World*, Cambridge University Press, 1997; Rutner, K., *Rule of Law Ideas in Early China?,* Journal of Chinese Law. Vol. 6, 2002, pp.1-44.

4 See *The Code of Hammurabi* , Translated by L. W. King, [https://avalon.law.yale.edu/ancient/hamframe.asp] Accessed 12 March 2024.

5 Mańko, R., *Protecting the rule of law in the EU, Existing mechanisms and possible improvement*, European Parliamentary Research Service, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)642280], Accessed 15 March 2024; Mańko quotes: "*The origins of the notion of the rule of law can be traced back to ancient Greek political philosophy, where it was first formulated by Aristotle*."

Therefore it is preferable for the law to rule rather than any one of the citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them; for there must be some government, but it is clearly not just, men say, for one person to be governor when all the citizens are alike. It may be objected that in any case which the law appears to be unable to define, a human being also would be unable to decide. But the law first especially educates the magistrates for the purpose and then commissions them to decide and administer the matters that it leaves over 'according to the best of their judgment,' and furthermore it allows them to introduce for themselves any amendment that experience leads them to think better than the established code. He therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also; for appetite is like a wild animal, and also passion warps the rule even of the best men. Therefore, the law is wisdom without desire…[6]

However, Aristotle did not think of the Rule of Law as a perfect and impeccable principle. For him, the problem with the Rule of law was that general rules can not offer the solution in specific cases. Because of that, *epieikeia* (a principle of equality, and human justice in individual cases) cannot be realized. For those possible exceptions of the Rule of Law principle, Aristotle has found a solution*:*

But the difficulty first mentioned proves nothing else so clearly as that it is proper for the laws when rightly laid down to be sovereign, while the ruler or rulers in office should have supreme powers over matters as to which the laws are quite unable to pronounce with precision because of the difficulty of making a general rule to cover all cases. We have not however yet ascertained at all what particular character a code of laws correctly laid down ought to possess, but the difficulty raised at the start still remains; for necessarily the laws are good or bad, just or unjust, simultaneously with and similarly to the constitutions of states (though of course it is obvious that the laws are bound to be adapted to the constitution)…[7]

Although we have mentioned the indications of the Rule of Law in a simpler form in the time before the rise of Athenian democracy, the Greek phenomenon must be highlighted in the legal-historical dimension. The right to participate in the government, and enjoy judicial protection, as well as a defined procedure for electing and appointing officials can be seen as some of the legal institutes within the legal framework that can be regarded as the roots of the Rule of Law. Although

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6 Aristotle, *Politics*, Book 3, 1287a. [https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D3%3Asection%3D1287a], Accessed 12 March 2024.

7 *Ibid.,* 1287b.

some scholars have argued about the protection of individual rights in classical Athens and emphasized the lack of such protection, in the ancient Greek form of the Rule of Law principle the protection of these rights existed to the extent that the historical development has allowed.[8].

In the Athenian reality, the Rule of Law was born even before democracy. It is evident from Drakon's laws, i.e. the listing of customs. Once written, laws have also bound the Greek courts which later became an essential lever of democratic action. With the arrival of Solon (595. BC) a state was created that was governed by the application of known rules.[9]

Solon was said to have established a state governed by the equality of laws through by the application of known rules.[10] The principles emanating from the Rule of Law have appeared in some form through the Middle Ages as well.[11] But this was largely a reflection of a system in which institutions were stronger than rulers. This is most visible in the English legal system and famous Magna Carta issued in 1215. That document, more than 800 years old, was the first which affirmed that the king and his government were not above the law.[12] The story of the development of the Rule of Law proceeds with medieval theorist John Fortescue and in the reflections of representatives of the Natural Law whose principles influenced the American and French revolutions. One of them was Thomas Hobbes, whose words can be interpreted as a link between the principle of legality itself and art. 7 ECHR (as a subject of our research): "*No law, made after a fact done, can make it a crime*".[13] He also added:" *Because if the fact be against the law of nature, the law was before the fact; and a positive law cannot be taken notice of before it be made, and therefore cannot be obligatory*."[14] The principle of legality has been further developed in historic-legal codes, influencing the development of the Universal Decla-

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8 See Forsdyke, S., *Ancient and Modern Conceptions of the Rule of Law*, pp. 184-212. [https://lsa.umich.edu/content/dam/classics-assets/classicsdocuments/FORSDYKE/ForsdykeRuleOfLaw.pdf], Accessed 22 March 2024; Others point out that concept of natural human rights was found in the medieval *ius commune*. For example Helmholz, R., H., *Fundamental Human Rights in Medieval Law*, University of Chicago Law School, Fulton Lectures, 2001, pp. 1-2. [http://chicagounbound.uchicago.edu/fulton_lectures], Accessed 12 March 2024.

9 Walker, Geoffrey de Q., *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988. p. 93.

10 Aristotle, *Athenian Constitution*, The original text available at [http://www.perseus.tufts.edu.], Accessed 12 March 2024.

11 The first several centuries of this period are known as the Dark Ages.

12 See the text *Magna Carta Libertatum* [https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf], Accessed 15 March 2024; The most famous clauses are art. 39. and 40.

13 Hobbes, *Leviathan*, chap. 27, 28.

14 More of principle of legality, crime and punishment in Leviathan in: Yates, A., *A Hohfeldian Analysis of Hobbesian Rights*, Law and Philosophy, Vol. 32, No. 4 ,2013, pp. 405-434.

ration of Human Rights[15] as well as the US Constitution. In the 17th century British Parliament adopted several constitutional acts, namely, the Petition of Rights (1628), the Bill of Rights (1689), and the Habeas Corpus Act (1679), according to which no one can be arrested and imprisoned without *writ of habeas corpus*[16], the arrest warrant. The provisions of the latter document concerns a guarantee of personal freedom from 17th century onward.

In the second half of 19th century, Albert Venn Dicey (a British lawyer and schoolar), made a significant contribution with his work "The Rule of Law". He concluded that the term Rule of Law includes the supremacy of the law (as opposed to arbitrariness), the equality of all persons before the law, as well as the principles establishing the rights of individuals developed through the centuries-long case law (in England).[17] In the 20th century (more precisely in 1960), Austrian economist and political theorist Friedrich von Hayek has emphasized the importance of Aristotle's work regarding the introduction of the separation of powers and supremacy of law concepts as essential features of a free state.[18] He also attributed to Aristotle the phrase, "government by laws and not by men."[19] Famous American justice *Sandra Day O'Connor*, talking about the independent judiciary[20], identified several "values" within the rule of law. According to her, „*the Rule of Law requires that legal rules be publicly known, consistently enforced and even-handedly applied, the separation of powers is "essential in maintaining the Rule of Law" in large part because it ensures decisions are made non-arbitrarily and the law is superior to any group or person "however powerful." The law should "always constrain the rule of man.*"[21] Her definition contains the concepts identified by the Greek, Roman, and British writers. For Justice O'Connor the independent judiciary is more than just an element of the rule of law, it is "*the foundation that underlies and supports the Rule of Law*."[22]

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15 Universal Declaration of Human Rights, [https://www.un.org/en/about-us/universal-declaration-of-human-rights], Accessed, 10 March 2024.

16 Habeas corpus means „bring out the body" – to bring the prisoner to court and let him know the reason, to prove the legality of imprisonment.

17 Venn Dicey, A., *The Rule of Law*, Introduction to the Study of the Law of the Constitution, St. Martin's Press, Vol. 181, 1959. pp. 188-196.

18 Hayek, F., *The Origins of the Rule of Law*, The Constitution of Liberty, University of Chicago Press, 1960., p. 162; Hayek traced the development of the Rule of Law through many centuries from the Greek and Roman world to the work of Edward Coke, William Blackstone, David Hume, and John Locke.

19 Stein, R., *Rule of Law: What Does It Mean*?, Minn. J. Int'l L. 18, No. 2, 2009, p. 297. [https://scholarship.law.umn.edu/faculty_articles/424], Accessed 19 March 2024.

20 She called independent judiciary the „lynchpin" of the Rule of Law.

21 See Stein, *op.cit*., note 19, p. 300; Stein quotes O'Connor. Day O'Connor, S., *Vindicating the Rule of Law: The Role of the Judiciary*, Chinese J. Int' l L, Vol. 2, No. 1, 2003.

22 Day O'Connor, *Ibid.,* p. 3

The historic emergence and development of the Rule of Law principle is an extensive and complex topic that we can not deal with in detail here. Precisely because of a need to shed the light on art. 7 ECHR we cannot avoid mentioning Beccaria whose work *Dei delitti e delle pene* (*On Crimes and Punishments*) was published in in 1764. He argued that penal practices were only justified if authorized by law: *"[L]aws alone can decree punishments for crimes, and … this authority resides only with the legislator, who represents the whole of society united by the social contract. Criminal laws should be framed in general terms, applying equally to all members of society, and the laws should only be applied by an impartial magistrate."*[23] Beccaria thought that criminal laws should be framed in general terms, applying equally to all members of society, and should only be applied by an impartial magistrate. Finally he concluded that *„[i]n order that punishment not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law"*.[24] The principle of legality was incorporated in many constitutions and penal codes enacted from the end of 18th century onward. It was also included in the aforementioned French Declaration of the Rights of Man and the Citizen (1789) which declared that "*no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offens*e".[25]

Further development of the Rule of Law principle has been reached in the Universal Declaration of Human Rights (1948) as well in the Art. 7. of the European Convention, which is brought to life by the practice of ECtHR (whose task is to ensure the scrutiny of domestic laws, promote the judicial review and uphold democratic ideals while respecting the authority of national bodies and the principle of subsidiarity).

The objective of this paper is to establish, show, and analyse the connection between the rule of law and the principle of legality in ECtHR case law, particularly referring to both principles of legality - in a broader sense and a narrower sense (*stricto sensu*), last embodied in Article 7 of the ECtHR (*nullum crimen, nulla*

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[23] This and the following Beccaria's quotes taken from Farmer L., *Punishment in the Rule of Law*, The Cambridge Companion to the Rule of Law, in: Meierhenrich, J.; Loughlin, M. (eds.), Published online by Cambridge University Press, 2021, [https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/punishment-in-the-rule-of-law/A551676E9240E44DE4E627EC73CC14F3], Accessed 1 March 2024.

[24] *Ibid*.

[25] Déclaration des Droits de l'Homme et du Citoyen de 1789. [https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789], Accessed 15 March 2024.

poena sine lege). Additionally, the authors intend to examine how the elements of legality (in both broader and strict senses), foreseeability, and accessibility are interpreted in ECtHR case law, focusing specifically on select cases of particular interest. Therefore, the intended analysis methods are the legal-historical and quantitative statistical (case law) methods.

2. INTERSECTING: RULE OF LAW, DEMOCRACY, AND ECTHR LEGALITY

The rule of law asserts that all individuals and entities, irrespective of their social status, wealth, or power, are bound by the law. It reinforces the idea that everyone is equal in the eyes of the law.[26] As *Smerdel* notes, 'the rule of law' signifies a political system where citizens and state authorities (as addressees of legal norms) must respect the constitution, laws, and other regulations.[27] It guarantees that laws are enforced uniformly and fairly, without bias or favoritism. It is the cornerstone of democratic societies, ensuring all individuals are treated equally under the law.[28] In addition, it encompasses the requirement that laws must be clear, predictable, and applied consistently to all people and entities.[29] In that regard, *Zand* emphasizes that "democracy does not simply entail the majority always prevailing",[30] but demands a balance ensuring fair treatment of minorities and preventing the abuse of dominant positions. This perspective resonates with the ECtHR's commitment to the rule of law, emphasizing the protection of minority rights and upholding principles of justice, equality, and prevention of arbitrary power.[31]

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[26] Omejec J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: Strasbourški acquis,* Novi informator, Zagreb, 2013, p. 1087.

[27] Smerdel, B., *Ustavno uređenje europske Hrvatske*, II izmijenjeno i dopunjeno izdanje, Narodne novine d.d., Zagreb, 2020, p. 9.

[28] Omejec, *op.cit*., note 26, p. 1087.

[29] *Ibid.*

[30] Zand, J., *The Concept of Democracy and the European Convention on Human Rights*, University of Baltimore Journal of International Law, Vol. 5, No. 2, 2017, Article 3, p. 200; [https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1058&context=ubjil], Accessed 20 February 2024.

[31] In addition The UN definition of the rule of law by the Report of the Secretary General of the United Nations,refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. -UN The rule of law and transitional justice in conflict and post-conflict societies: *Report of the Secretary-General*, p.4, §6, available at: [https://www.unhcr.org/media/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secretary], Accessed 1 June 2024.

Lauc highlights the importance of the 2011 Report on the Rule of Law by the Venice Commission of the Council of Europe,[32] which outlined "necessary elements of the rule of law"[33]. One of the primary principles is legality, and the report identified *Rechtstaat* principles that are both formal and substantial, suggesting areas where consensus could be achieved.[34]

Furthermore, he notes that all laws, regulations, and authorities' actions should be based on regulations consistent with the law and constitution, as they form the foundation for upholding the principle of the rule of law.[35] However, *Boka's* proposal to integrate alternative reasoning methods, like the comparative method, into national constitutional law systems can be risky. [36] While it may offer advantages, it also opens the door to influence by interest groups. Allowing entities to tailor laws to their interests threatens the rule of law principle. However, checks and balances typically mitigate such potential abuses. In connection to this, *Omejec* notes Radbuch's 1946 formula, which proposes that legal norms conflicting with justice requirements or intentionally crafted to deny equality should be abolished, reflecting values emphasized by the European Court of Human Rights (ECtHR).[37] Germany's *Rechtsstaat* tradition, emblematic of rule-based governance, exempli-

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32 Report on the Rule of Law, European Commission for Democracy through Law (Venice Commission) 86th plenary session (Venice, 25–26 March 2011), Study 512/2009, CDL-AD(2011)003rev. Strasbourg, 4 April 2011.

33 For more see Craig, 2019, pp 156-187.

34 Lauc, Z., *Načelo vladavine prava u teoriji i praksi*, Pravni vjesnik, Vol. 32, No. 3-4, 2016, p. 57: The Venice Commission of the Council of Europe (2011), which outlined the "necessary elements of the rule of law", namely: "1. legality, including a transparent, accountable, and democratic process of passing laws; 2. legal certainty; 3. prohibition of arbitrariness; 4. access to justice before independent and impartial courts, including judicial review of administrative acts (access to justice before independent and impartial courts, including judicial review of administrative acts); 5. respect of human rights and 6. prohibition of discrimination and equality before the law (non-discrimination and equality before the law)." Later, this definition was further developed to include eight "constituent parts" of the rule of law, elaborating on specific elements essential for its understanding and implementation: "1. accessibility of the law, which means that it must be intelligible, clear, and predictable; 2. questions of legal right must normally be decided based on the law, not based on discretion; 3. equality before the law; 4. powers must be exercised lawfully, fairly and reasonably; 5. human rights must be protected; 6. means must be provided to resolve disputes without excessive cost or delay; 7. trials must be fair and 8. the duty of the state to comply with its obligations under international and national law."

35 *Ibid.,* p. 51

36 Bóka, J., *Use of the Comparative Method by the Hungarian Constitutional Court-Conceptual and Methodological Framework for an Ongoing Research Project*, Internationale Konferenz zum zehnjährigen Bestehen des Instituts für Rechtsvergleichung der Universität Szeged, No. 1, 2014, p. 103, [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/7363/file/S93-107_aiup01.pdf], Accessed 24 February 2024; See also Bóka, J., *Forcible Measures Against International Terrorism and the Rule of Law,* Proc. Am. Soc. Int. L., 1963, Vol. 13, 2002, [https://www.uni-miskolc.hu/uni/res/e_publications/pdf/boka.pdf], Accessed 24 February 2024.

37 Omejec, *op.cit.*, note 26, p. 1086.

fies the necessity for adherence to established laws within legal and constitutional frameworks. *Meierhenrich* underscores the significance of Germany's post-World War II Rechtsstaat tradition, aimed at holding elites accountable and preventing the recurrence of dictatorship, mirroring principles upheld by the ECtHR.[38] *Deinhammer* echoes this sentiment, stressing the importance of political authority and governance aligning with established laws within legal and constitutional frameworks, akin to the mission of the ECtHR, which seeks to mitigate arbitrary authority and its ensuing harm. [39] However, *Varga* raises a pertinent question about the adaptability of longstanding legal values to modern challenges. He explores traditional limitations of the rule of law in addressing contemporary issues such as media influence and global financial coercion.[40]

Further discourse on the relationship between the rule of law and the European Court of Human Rights (ECtHR) centers on aligning human rights and legal principles.[41] Establishing the European Convention of Human Rights (the Convention or ECHR) framework for safeguarding human rights has been pivotal in fostering a broader acceptance of judicial oversight concerning human rights issues and strengthening the rule of law. The ECtHR is integral to upholding the rule of law, legality (in the broader sense), and legality *stricto sensu* in Article 7 of ECHR. The ECHR framework promotes judicial oversight of human rights issues, facilitated by legality and judicial review. With its roots in the principle of legality, this framework plays a significant role in promoting judicial review of governmental actions,[42] thereby upholding the rule of law. ECtHR also, by its judgment, makes a law that then becomes part of the rule of law. Therefore, it can be said that ECtHR simultaneously acts according to the rule of law principles and makes a law that is then integrated into the rule of law. However, the ECtHR's effectiveness relies on member states' consent despite its significant role in advancing law and constitutional scrutiny.[43] According to *Lautenbach,* the ECtHR cannot function as a court of final appeal (fourth-instance court), and the duty of

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38 Meierhenrich, J. *Rechtsstaat versus the Rule of Law*, in: Meierhenrich, J.; Loughlin, M. (eds.), The Cambridge Companion to the Rule of Law, Cambridge University Press, 2021, p. 40.

39 Deinhammer, R., *The Rule of Law: Its Virtues and Limits*, Obnovljeni život, Vol. 74, No. 1, 2019, pp. 33, 36.

40 Varga, Cs., *Rule of Law: Contesting and Contested*. Budapest: Ferenc Madl Institute of Comparative Law, 2021, pp 95-99, [https://doi.org/10.47079/2021.csv.rolcac], Accessed 20 February 2024.

41 See Leloup, M., *The Concept of Structural Human Rights in the European Convention on Human Rights,* Human Rights Law Review, Vol. 00, No. 1–22, 2020.

42 Lautenbach, G., *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013, p. 190.

43 See Lautenbach, *Ibid.,* p. 189

interpreting national law primarily rests with national authorities.[44] In balancing its oversight role with the authority of national courts in interpreting domestic laws, the ECtHR faces a challenge.[45] While national authorities are responsible for applying domestic legislation, the Convention requires interference with Convention rights to conform to national legal frameworks. This delicate balance, as noted by *Gerards,* underscores the need for effective oversight while respecting the primary role of national courts[46]. To ensure robust human rights protection, the ECtHR may need to examine how national authorities interpret and enforce domestic laws while also considering the principles of legality (in the broader sense) and Article 7 of the ECHR (principle of legality *stricto sensu*).[47] In its broader sense, the principle of legality encompasses the law's existence and quality. The quality of the law also includes accessibility and foreseeability. In addition, *Lauc* outlines three criteria for assessing law quality as one of the legality elements: enactment manner, [48] legal solution quality, [49] and law stability. [50]

However, only two of the mentioned elements (subprinciples) of legality – accessibility and foreseeability – will be addressed further in the text. These are the most important and the most common in the ECtHR jurisprudence when assessing the principle of legality.

2.1. ECtHR's Definition of the Rule of Law

The ECtHR's definition of the rule of law lacks a singular comprehensive definition, as pointed out by *Lautenbach*.[51] While the ECtHR doesn't extensively define

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44 *Ibid*., p. 190.

45 Gerards, J., *The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility*, in: Gerards, J.; Fleuren, J. (eds.), Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law - A comparative analysis, Intersentia, Cambridge-Antwerp-Portland, 2014, p. 23; Lautenbach, *Ibid.,* p. 85

46 Gerards, *Ibid.,* p. 23.

47 Lautenbach, *op. cit.,* note 42, pp 85, 86.

48 Lauc, *op. cit.,* note 34, p. 58: Timely adoption, the possibility of influence of all interest groups on the adoption of legal solutions, the availability of the proposed law to the public and the holding of a public debate on the proposal, leaving enough time from the passing of the law to its application so that citizens can become familiar with content of the law, preparation of detailed explanations of proposals for better interpretation).

49 *Ibid.*: That the provisions are written in a clear language that everyone can understand, that they are specific and do not limit the freedom of citizens to an excessive extent, that they do not leave legal gaps, that the laws are harmonized with each other, that adequate means are provided for the application of the law and to foresee the control mechanisms of its implementation as well as sanctions for non-implementation. -

50 *Ibid*.: Requirement that laws do not change often. -

51 Lautenbach, *op. cit.,* note 42, p. 17

concepts in its judgments, it frequently references the rule of law across various topics.[52] It uses this principle to justify interpretations of Convention rights and enhance human rights protection as noted by *Goldstein* and *Ban*.[53] The ECtHR's flexible perspective on law allows it to accommodate differences between legal systems, ensuring legal certainty and equality before the law.[54] Adhering to "rigid regulation" alone is insufficient for the rule of law, as noted by *Lauc*.[55] *Nagy* emphasizes that the ECHR and the ECtHR are designed to benefit a broad range of countries.[56] The European Court of Human Rights (ECtHR), in the case *Golder v. United Kingdom*,[57] emphasized the importance of considering the preamble as integral when interpreting international treaties.[58] This principle highlights the significance of not overlooking the preamble, as it provides crucial context and insights into the treaty's objectives and principles as part of the rule of law principle. This standpoint on the rule of law aligns with the substantive element of the rule of law, according to Stein's perspective. *Stein* suggests that the rule of law encompasses both procedural and substantive aspects. [59] Procedurally, laws must be supreme, publicly announced, and applied impartially, strictly adhering to the separation of powers. Substantively, laws must align with international human rights norms (and its preamble) to ensure justice and prevent arbitrariness.

Sicilianos discussed the rule of law and the ECtHR, particularly the judiciary's independence, which has empowered it and enhanced acceptance of judicial review.[60]

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52 *Ibid.*

53 Goldstein, L.; Ban, C., *The Rule of Law and the European Human Rights Regime*, JSP/Center for the Study of Law and Society Faculty Working Papers, University of California, Berkeley, paper 13, 2003, p. 3 [https://biblioteca.cejamericas.org/bitstream/handle/2015/986/rule-law-europe.pdf?sequence=1&isAllowed=y], Accessed 26 February 2024.

54 Lautenbach, *op. cit.,* note 42, p. 85.

55 Lauc, *op. cit.,* note 34, p.58.

56 Nagy, C. I., *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à L'Européenne*, German Law Journal, Vol. 21, No. 5, 2020, p. 842, fn 12; [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/86606E9A6973BE6437E54A9FB4BD5F4B/S2071832220000449a.pdf/the-diagonality-problem-of-eu-rule-of-law-and-human-rights-proposal-for-an-incorporation-a-leuropeenne.pdf], Accessed 20 February 2024.

57 ECtHR Judgment, *Golder v. United Kingdom*, (Appl. no. 4451/70), 21 February 1975, § 34; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Golder%20v.%20United%20Kingdom%22],%22itemid%22:[%22001-57496%22]}], Accessed 26 February 2024.

58 Lauc, *op. cit.,* note 34, p. 58.

59 Stein, R. A., *What Exactly Is the Rule of Law?,* 57 Hous. L. Rev. 185, Vol. 57, Issue 1, 2019, CDT, [https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law], Accessed 29 February 2024.

60 The Council of Europe's Parliamentary Assembly has addressed the rule of law issues, including the independence of the judiciary, in its 2017 Resolution on New threats to the rule of law in Council of Europe Member States, with a special focus on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania, and Turkey. The Venice Commission has tackled these issues in its opinions on Bul-

An independent judiciary[61] is crucial for upholding the rule of law.[62] Considering the significance of the independent judiciary, as well as the importance of international treaties when discussing and implementing the principle of the rule of law, there has been one interesting case regarding judicial independence in Poland. The *Grzęda v. Poland* case[63] drew attention on December 20, 2017, when the European Commission initiated proceedings under Article 7(1) of the Treaty on European Union (TEU).[64] This marked the first such action by the Commission.[65] In its proposal to the Council of the European Union, the Commission highlighted a distinct and substantial risk of a serious breach of the rule of law in Poland, particularly regarding the independence of the judiciary. [66] The Commission expressed concern over Poland's enactment of more than thirteen consecutive laws within two years, systematically granting the executive and legislative branches significant authority to interfere with the judicial system's structure and operations.[67] This revision emphasizes the importance of the rule of law and highlights the specific concerns raised by the European Commission regarding Poland's judiciary, which aligns more closely with the theme of the ECtHR and its focus on legality and the rule of law.

2.2. ECtHR's Legality Issues

Addressing legality concerns within the ECtHR framework is essential for upholding the rule of law.[68] *Lautenbach* notes that while the Convention articles and

garia (2016), Poland (two in 2016 and two in 2017), Turkey (two in 2017), Romania (2018 and 2019), Malta (2018) and Serbia (2018)"- Speech by Linos-Alexandre Sicilianos (2020), The Rule of Law and the European Court of Human Rights: the independence of the judiciary; [https://www.echr.coe.int/Documents/Speech_20200228_Sicilianos_Montenegro_ENG.pdf], Accessed 26 February 2024; See also [https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en], Accessed 26 February 2024.

61 See Sillen, J., *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, European Constitutional Law Review, Vol. 15, No. 1, 2019, pp 104-133, [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/384E519248A7571C6126628A345C324D/S1574019619000014a.pdf/the-concept-of-internal-judicial-independence-in-the-case-law-of-the-european-court-of-human-rights.pdf], Accessed 20 February 2024.

62 Fore more see Padjen, I., *Vladavina prava i tajnost pravosuđa*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. XIII, No.1, 2020, pp 1-12.

63 ECtHR Judgment, *Grzęda v. Poland* (Appl. no. 43572/18), 15 March 2022; § 24; [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22rule%20of%20law%22],%22itemid%22:[%22001-216400%22]}], Accessed 20 February 2024.

64 Judgment, *Grzęda v. Poland*, § 24

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 Lautenbach, *op. cit.,* note 42, p. 70

ECtHR rulings do not explicitly mention "legality," they refer to variations of the term "lawfulness." [69] However, "legality" is used instead of "lawfulness" due to its broader connotation.[70] While "lawfulness" emphasizes compliance with laws and procedures, "legality" also requires alignment with external requirements like generality and certainty. [71] This term better reflects how the ECtHR evaluates compliance with national laws and procedures, considering the overall quality of those laws and external principles associated with the rule of law.

When discussing legality, we can distinguish between 'legality in the broader sense' and 'legality *stricto sensu*', the latter encompassing the principles outlined in Article 7 of the Convention. Two key aspects of legality must be considered to ensure compliance with Convention rights.[72] Firstly, how was the national law enacted (existence of the law)? Secondly, this law must meet specific quality criteria (quality of the law). An autonomous legality review is preferred over one solely based on national law.[73] These steps must be followed and exist for both legalities in a broader and narrower sense.

The ECtHR can assess the legality of all the rights and freedoms in the Convention. Therefore, all articles of the ECHR that regulate specific rights or freedoms are subject to legality assessment. In ECtHR case law, legality means that rights violations must be based on national laws that meet specific quality standards. It emphasizes the quality of national laws rather than their substance, enabling the ECtHR to scrutinize and protect Convention rights effectively. Derived from the broader concept of the rule of law, legality ensures fair and just procedures, thereby upholding the integrity of the Convention as a supra-constitutional framework.[74]

In the context of Article 7 of the Convention (legality in *stricto sensu, nullum crimen, nulla poena sine lege*),[75] legality primarily demands the existence of national law as the basis for deprivation of liberty or punishment, alongside quality stan-

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69 *Ibid.,* p. 42

70 *Ibid*., p. 73

71 *Ibid.*p. 42

72 Murphy, C. C., *The Principle of Legality in Criminal Law Under the ECHR*, European Human Rights Law Review, Vol. 2, 2010, p. 192, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513623], Accessed 26 February 2024.

73 Lautenbach, *op. cit.,* note 42, p. 124.

74 *Ibid.,* pp 85, 87, 122, 189.

75 Krstulović Dragičević, A.; Sokanović, L., *Načelo zakonitosti pred izazovima Europskog kaznenog prava*', Zbornik radova s međunarodnog znanstvenog savjetovanja „Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija, Pravni fakultet Sveučilišta u Splitu, 2017, pp 25-45.

dards for laws affecting Convention rights.[76] The ECtHR first confirms the presence of national law and then evaluates its quality. Legality also applies to limitation clauses in Convention provisions, including Article 7, determining permissible interferences with human rights. Such interferences must be lawful, serve a legitimate aim, and be necessary in a democratic society. The ECtHR evaluates whether the government aims to align with the rule of law and ensures proportionality between interference and the aim pursued. This includes assessing national law's quality and proportionality in justifying interferences with individual rights.[77]

2.3. Accessibility and Foreseeability as Legality Elements (The Legality in Broader Sense and *Stricto Sensu*)

The ECtHR evaluates the quality of national law through the lens of legality, with accessibility and foreseeability as key factors. These requirements derive from the concept of the rule of law.[78] The rule of law serves as a crucial safeguard against excessive government intrusion. However, its primary emphasis lies in ensuring the proper structure of national law rather than controlling its substance. Legality in ECtHR jurisprudence requires law within the national legal system and adherence to specific quality benchmarks.[79]

Accessibility is also crucial, requiring laws to be accessible and accompanied by adequate judicial safeguards, especially with broad discretionary powers.[80] Hence, accessibility is essential in the ECtHR's assessment of national law. It demands that individuals affected by legislation be sufficiently aware of its contents.[81] While publication isn't always required, the ECtHR considers the circumstances of each case.[82] However, accessibility standards may vary, except for technical or professional areas. Instructions and administrative practices are also relevant if individuals are aware of their contents. Furthermore, accessibility standards may be less stringent for professionals and technical domains within the legal framework,[83] as it can be seen in the following cases. For instance, in the *Groppera Radio Ag and others v. Switzerland* case,[84] the ECtHR ruled that accessibility was satisfied even though the

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76 Lautenbach, *op. cit.,* note 42, pp 70-72

77 *Ibid.*

78 *Ibid.*

79 *Ibid*., p. 70.

80 *Ibid*., p. 89.

81 Fore more see: Krstulović Dragičević; Sokanović, *op. cit.,* note 75, pp 25-45.

82 *Ibid*.; Lautenbach, *op. cit.,* note 42, p. 88

83 Krstulović Dragičević; Sokanović, *Ibid.;* Lautenbach, *Ibid.*

84 ECtHR Judgment, *Groppera Radio Ag and others v. Switzerland*, (Appl. no. 10890/84), 28 March 1990, § 68 and 75; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Groppera%20Radio%20

regulations were not published due to the exceptional nature of the case.[85] Lower-ranking instructions and administrative practices can also be relevant to assessing the quality of the law, provided that individuals affected by them are adequately informed of their content.[86] However, it can be said that if the accessibility principle is not satisfied, it is unlikely that the foreseeability principle will be satisfied.

In the *Kononov v. Latvia* case,[87] the ECtHR held a former military officer, Kononov, accountable for not being aware of fundamental customary rules.[88] Specifically, Kononov, a former member of the Soviet army, was expected to be aware of the fundamental customary rules of *jus in bello*.[89] Even though international laws and customs of war were not published, the ECtHR's decision emphasized that Kononov, as a commanding military officer, should have been aware of the unlawfulness of ill-treatment and killing of civilians under the laws and customs of war.[90] The fact that international laws and customs of war were not published (were not accessible) did not affect the ECtHR decision.[91] Accessibility is crucial, and the ECtHR evaluates it meticulously, considering each case's specifics.[92]

It seems that ECtHR has relativized the accessibility principle depending on the context, such as technical or professional areas and international humanitarian law. The ECtHR carefully considers the circumstances of each case when evaluating accessibility standards, recognizing that publication is not always necessary. Lower-ranking instructions and administrative practices may also be relevant in assessing the quality of the law, provided that individuals affected by them are adequately informed. In cases such as *Groppera Radio Ag and others v. Switzerland*, the ECtHR may deem accessibility satisfied even without publication, considering the exceptional nature of the case. Further, in cases like *Kononov v. Latvia,* individuals, especially those in positions of authority, are expected to be aware of fundamental legal principles, even if they are not explicitly published.

Foreseeability, also a key aspect or subprinciple of both legalities (in the broader sense and the *stricto sensu*) within the Convention's framework, involves clarity

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Ag%20v%20Switzerland%20case%22],%22itemid%22:[%22001-57623%22]}], Accessed 24 February 2024.

85 See also: Lautenbach, *op. cit.,* note 42, pp 87-88.

86 *Ibid*.

87 ECtHR Judgment, *Kononov v. Latvia*, (Appl. no. 36376/04), 17 May 2010, §§ 245-246; [https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-98669%22]}], Accessed 24 February 2024

88 Fore more see: Krstulović Dragičević; Sokanović, *op. cit.,* note 75, pp 25-45.

89 Lautenbach, *op. cit.,* note 42, p. 88

90 *Ibid.*

91 ECtHR Judgment, *Kononov v. Latvia*, §§ 245-246

92 *Ibid*., §§ 185-187, and 235-244; see also Lautenbach, *op. cit.,* note 42, p. 88.

and precision in laws to ensure individuals understand their rights and legal consequences. The ECtHR examines foreseeability by assessing clarity and flexibility, particularly focusing on cases involving discretionary powers.[93] The ECtHR examines two aspects of foreseeability: precision and generality, seeking a balance between clarity and flexibility.[94] Retroactive law application is typically prohibited in criminal cases unless it involves lenient criminal laws aiming to maintain fairness. Foreseeability emphasizes individuals' understanding of legal consequences without requiring legal expertise or a single interpretation. [95]

2.4. Cohesion between Legality- Accessibility, Foreseeability, and Judicial Safeguards in ECtHR in the Context of the Rule of Law

The rule of law mandates the presence of judicial safeguards across all Convention articles.[96] Nearly all articles of the Convention encompass substantive and procedural dimensions, with Articles 6 and 13 exclusively focusing on procedural aspects. Therefore, judicial safeguards are crucial for legality and upholding the rule of law within the Convention, ensuring that individuals' rights are protected effectively. According to *Lautenbach*, the ECtHR's consistency in mentioning judicial safeguards as part of legality is questioned. [97] However, legality inherently requires the implementation of such safeguards.[98] This is emphasized by the ECtHR, particularly in cases involving extensive governmental discretion, as demonstrated in *Klass and others v Germany*,[99] in which ECtHR elaborated on whether German laws regarding secret surveillance methods violated the applicant's right to privacy (Art. 8 ECHR), and a critical question was whether Art. 8 necessitated judicial control over the use of secret surveillance methods.[100]

In certain instances, the necessity of judicial safeguards becomes apparent when examining the application of *accessibility and foreseeability* principles to specific

93 Lautenbach, *op. cit.,* note 42, pp 70, 88, 121.

94 *Ibid*., p. 88.

95 *Ibid.,* p. 89.

96 *Ibid*., p. 101.

97 *Ibid*.

98 *Ibid*.

99 ECtHR Judgment, *Klass and others v. Germany*, (Appl. no. 5029/71), 6 September 1978, §§ 37-38 and 39-60; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Klass%20v%20Germany%22],%22itemid%22:[%22001-57510%22]}], Accessed 22 February 2024.

100 *Ibid.*

case circumstances.[101] For example, in the *Amuur v France*[102] In the case regarding administrative detention, the ECtHR underscored the importance of national law in meeting quality standards and adhering to the rule of law. [103] The inability of ordinary courts to review detention conditions or impose time limits led the ECtHR to deem French law inadequate, resulting in a breach of the right to liberty.[104] While judicial safeguards are not explicitly mentioned in such cases, their presence is implied from the foreseeability of the law. This inclusion of judicial safeguards as part of legality overlaps with the right to a fair trial (Art. 6) and the right to an effective remedy (Art. 13). While some find this overlap problematic, Article 6 remains vital for ensuring proper legal procedures, reinforcing the significance of accessibility, foreseeability, and legality under Article 7 of the ECHR.[105]

Judicial safeguards are essential for legality, ensuring that laws are applied fairly and within legal limits.[106] This is particularly pertinent in the context of Article 7 of the ECHR, which safeguards individuals from retroactive criminal laws.[107]

3. EXPLORING RULE OF LAW CHALLENGES –ARTICLE 7 OF THE ECHR (LEGALITY PRINCIPLE –*STRICTO SENSU*)

The principle of legality, enshrined in Article 7 of the Convention (No punishment without law; *nullum crimen, nulla poena sine lege*), stands as a cornerstone of the rule of law, particularly within the realm of criminal substantive law.[108] It must be noted that both elements of foreseeability and accessibility must be present; otherwise, it will constitute a violation of legality and Article 7 of the ECHR. According to the case law of the ECtHR the principle of legality, as prescribed by Article 7 of the Convention, means that only those criminal acts and sanctions already prescribed by law can be committed and imposed. The offense must be precisely defined, meaning that individuals must be able to understand clearly from

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101 *Ibid.*

102 ECtHR Judgment, *Amuur v. France*, (Appl. no. 19776/92), 25 June 1996, §§ 28 and 63; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Amuur%20v%20France%22],%22itemid%22:[%22001-57988%22]}], Accessed 22 February 2024.

103 See also Lautenbach, *op. cit.,* note 42, p. 101.

104 *Ibid.*

105 *Ibid*., p. 102

106 *Ibid.,* p. 101

107 *Ibid.*

108 See Polacchini, F., *The Relationship Between Positive Obligations of Incrimination Under the ECHR and the Constitutional Principle of Legality in Criminal Matters in the Italian Legal System*, in: Arnold, R.; Martínez-Estay, J. (eds.), Rule of Law, Human Rights and Judicial Control of Power. Ius Gentium: Comparative Perspectives on Law and Justice, Springer, Cham, Vol. 61, 2017, pp 377–389, [https://doi.org/10.1007/978-3-319-55186-9_21], Accessed 26 February 2024.

the wording of the relevant legal provision when their actions or omissions will lead to criminal liability.[109] To maximize the protection of individuals from the arbitrary interpretation of regulations by national authorities and, in connection with that, from arbitrary prosecution, conviction, or punishment, regulations, and judicial practice must be accessible and foreseeable (clear and predictable). This ensures that individuals are aware of their rights and obligations and enables them to have a fair trial and fair application of the law.[110]

It holds paramount importance within the Convention's protection system, [111] highlighted by its non-derogable status even in times of war or public emergency,[112] as underscored in cases such as *S.W. v. the United Kingdom*,[113] *Del Río Prada v. Spain*,[114] and *Vasiliauskas v. Lithuania*[115]. This principle serves as a vital safeguard against arbitrary prosecution, conviction, and punishment, aligning with the overarching object and purpose of the Convention. [116] The European Court of Human Rights (ECtHR) interprets non-retroactivity and the principle of *nulla poena sine lege* to mandate that offenses be clearly defined by law and that the law be readily *accessible* and *foreseeable*. [117] This interpretation underscores the imperative for legal certainty and predictability within the criminal justice system, thereby safeguarding the rights of individuals under the Convention.[118] Article 7 necessitates that criminal statutes be interpreted restrictively, ensuring that individuals are not unfairly disadvantaged through expansive interpretations or analogies.[119] In the

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109 Krstulović Dragičević, A., *Načelo zakonitosti u praksi Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, pp. 403-433.

110 Bonačić, M.; Tomašić, T., *Implementacija standarda Europskog suda za ljudska prava u hrvatskom prekršajnom pravu i praksi*, Hrvatski ljetopis za kaznene znanosti i praksu, Zagreb, Vol. 24, No. 2, 2017, p. 395.

111 Guide on Article 7 of the European Convention on Human Rights - No punishment without law: the principle that only the law can define a crime and prescribe a penalty, Updated on 30 April 2022, § 1.

112 *Ibid.*

113 ECtHR Judgment, *S.W. v. the United Kingdom*, (Appl. no. 20166/92), 22 November 1995, § 34; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22S.W.%20v.%20the%20United%20Kingdom%22],%22itemid%22:[%22001-57965%22]}], Accessed 22 February 2024.

114 ECtHR Judgment, *Del Río Prada v. Spain*, (Appl. no. 42750/09), 21 October 2013,§ 77 [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Del%20R%C3%ADo%20Prada%20v.%20Spain,%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-127697%22]}], Accessed 22 February 2024.

115 ECtHR Judgment, *Vasiliauskas v. Lithuania*, (Appl. no. 35343/05), 20 October 2015, § 153; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Vasiliauskas%20v.%20Lithuania%22],%22itemid%22:[%22001-158290%22]}], Accessed 22 February 2024

116 Guide on Article 7, § 1.

117 *Ibid.*

118 *Ibid.*

119 Lautenbach, *op. cit.,* note 42, p. 72.

context of criminal law, the principle of legality constitutes a fundamental component of the Convention's rule of law framework.

Therefore, the paper will elaborate further on how the ECtHR interprets the scope and reach of the principle of legality *stricto sensu* and its elements of foreseeability and accessibility in certain cases.

3.1. Judicial Interpretation of Art. 7 in the Case of *Yüksel Yalçinkaya v. Turkey*

The foreseeability as an element of legality was challenged in the case of *Yüksel Yalçinkaya v. Turkey*.[120] The European Court of Human Rights (ECtHR) emphasized the significance of the guarantee enshrined in Article 7 of the Convention, highlighting its pivotal role within the rule of law and providing robust protections against arbitrary prosecution, conviction, and punishment.[121] The applicant was convicted of terrorism solely on the grounds of membership in two associations, a trade union and an association that was considered to be affiliated with the FETÖ/PDY, for having a bank account in Bank Asya and the ByLock app on his cellphone. However, under Turkish law, the criminal offense of terrorism must include specific intent, which was not established in the applicant's case. Therefore, the elements of the crime were not met. In addition, insufficient safeguards allowed the applicant to challenge the evidence. Consequently, the ECtHR concluded that there was a violation of Article 7 of the Convention.[122] The ECtHR concluded that despite the challenges posed by combating terrorism, particularly with evolving tactics,[123] and the exceptional difficulties faced by Turkish authorities in dealing with the FETÖ/PDY (an alleged terrorist organization employing covert methods),[124] the core safeguards of Article 7, which constitute a non- derogable right at the heart of the rule of law principle, must be maintained.[125] However, domestic courts applied an extensive interpretation, effectively imposing, in fact, strict liability, which diverged from both domestic law and the Convention's objectives. [126]

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120 ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, (Appl. no. 15669/20), 26 September 2023, §§ 243, 267; [https://hudoc.echr.coe.int/eng#{%22appno%22:[%2215669/20%22],%22itemid%22:[%22001-227636%22]}], Accessed 22 February 2024

121 As indicated in the cases of *Scoppola v. Italy (no. 2)* (Appl. no. 10249/03), 17 September 2009, § 92, and *Del Río Prada,* § 77 - ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, (Appl. no. 15669/20), 26 September 2023, §;237.

122 *Ibid.*, §;272.

123 ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, §;269

124 *Ibid.*

125 *Ibid.*, §;270

126 *Ibid.*

3.2. Judicial Interpretation and Punishment Based on International Criminal Law in *Cases Streletz, Kessler, and Krenz v. Germany, Vasiliauskas v. Lithuania, and Kononov v. Latvia*

The concept of judicial interpretation, even in the context of state succession scenarios, upholds the principle of justice and accountability. In cases where there is a change in State sovereignty or political regime within national territory, it is considered legitimate for a State to initiate criminal proceedings against individuals who committed crimes under a former regime. This principle ensures that justice is upheld and that individuals are held accountable for their actions, regardless of political changes. [127]

Article 7 permits punishment based on international (humanitarian) criminal law,[128] as illustrated in the case of *Kononov v. Latvia*.[129] Contracting Parties are primarily obligated to safeguard this right, as established in various cases such as *Streletz, Kessler, and Krenz v. Germany*,[130] and *Vasiliauskas v. Lithuania*.[131] The tolerance or encouragement of acts considered criminal under national or international legal instruments, along with the impunity it fosters among perpetrators, should not impede their prosecution and punishment, as affirmed by the ECtHR.[132] This legitimacy extends to the successor State's courts, which inherit the responsibility of interpreting and applying legal provisions in accordance with the principles of a State governed by the rule of law. [133] This principle is exemplified by cases such as

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127 Guide on Article 7, § 44

128 Lautenbach, *op. cit.,* note 42, p. 72

129 ECtHR Judgment, *Kononov v. Latvia*, (Appl. no. 36376/04), 17 May 2010, § 241; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Kononov%20v.%20Latvia%22],%22itemid%22:[%22001-98669%22]}], Accessed 25 February 2024

130 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* (Appl. nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, §§ 77-89; https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Streletz,%20Kessler%20and%20Krenz%20v.%20Germany%22],%22itemid%22:[%22001-59353%22], Accessed 25 February 2024; See Derenčinović, D., *Povodom presude Europskog suda za ljudska prava u predmetu Streletz, Kessler i Krenz protiv Njemačke*, pp 21-41, in: Derenčinović, D. (ed.), Ogledi o pravu i pravdi u dvije Europe- putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa, Narodne novine, Zagreb, 2021; *Zupancic* has interesting standpoint regarding this case. *Zupancic* emphasizes that when constitutional courts are criticized for supposedly exceeding their narrow "concretizing" role and venturing into the "abstract" realm of legislative authority, it's paradoxically done in the name of upholding the very "rule of law" they undermine.; Zupancic, B., *Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis*, German Law Journal, Vol. 2, No. 10, 2001, p.4, § 9E2; [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/16073C3FB3168820736EC8BFA2EC139A/S2071832200003576a.pdf/constitutional-law-and-the-jurisprudence-of-the-european-court-of-human-rights-an-attempt-at-a-synthesis.pdf], Accessed 24 February 2024.

131 ECtHR Judgment, *Vasiliauskas v. Lithuania*, §§ 158-162 and §191.

132 Guide on Article 7, § 44.

133 Guide on Article 7, § 44.

Streletz, Kessler, and Krenz v. Germany, [134] and *Vasiliauskas v. Lithuania*[135]. In these cases, the courts of the successor State justified their actions by interpreting and applying the relevant legal provisions in line with the rule of law principles.

Additionally, the European Court of Human Rights (ECtHR) found the convictions of GDR political leaders in *Streletz, Kessler, and Krenz v. Germany*[136] foreseeable. Similarly, convictions of a border guard for murders of East Germans attempting to leave the GDR between 1971 and 1989 were deemed justified. These convictions were based on GDR legislation and pronounced by German courts after reunification.[137] Almost the same conclusion was reached in the *Kononov v. Latvia*[138] case regarding the conviction of a commanding officer of the Soviet army for war crimes during World War II. Latvian courts, operating after Latvia declared independence in 1990 and 1991, were considered legitimate in their interpretation and application of the law. [139]

In the mentioned cases, the ECtHR seems to have relativized the accessibility (and foreseeability) element of the principle of legality and interpreted it in light of or in the 'spirit' of the rule of law. This seemed fair and right and was the only appropriate action at that time, considering the political systems and the severity of the crimes and the atrocities. However, the ECtHR should be careful with such practices, which can eventually lead to the opposite effect, negatively affecting and relativizing one of the main principles — the non-derogable principle of legality — and consequently undermining the rule of law.

3.3. Article 7. and Preventive Detention as Punishment in the *Case of M. v. Germany*

Another case concerning the foreseeability element is worth mentioning. In the case of *M. v. Germany*,[140] a significant legal precedent concerning preventive detention emerged. M had been subjected to preventive detention for nearly eighteen

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134 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* §§ 77-84; see Derenčinović, *Povodom presude…, op. cit.*, note 130, pp 21-41.

135 ECtHR Judgment, *Vasiliauskas v. Lithuania*, § 159.

136 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* §§ 77-89;.

137 Guide on Article 7, § 44

138 ECtHR Judgment, *Kononov v. Latvia*, §§ 240-244

139 Guide on Article 7, § 44.

140 ECtHR Judgment, *M. v. Germany,* (Appl. no. 19359/04) 17 December 2009 (Final 10.5.2010.); [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22M%20v.%20Germany%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-96389%22]}], Accessed 12 February 2024.

years since 1991, following the completion of his prison sentence.[141] Amendments to the German Penal Code in 1998 allowed for the extension of preventive detention, leading to M's continued confinement. The European Court of Human Rights (ECtHR), as elaborated by *Derenčinović*, observed that there was no direct connection between M's initial conviction and the subsequent ten-year extension of his detention, made possible solely by the 1998 amendments to the German Penal Code.[142] M's continued detention was justified by his perceived threat to public safety, and his attempts to challenge this within the German courts proved unsuccessful. [143] Upon appeal to the ECtHR, the Court overturned the German Federal Constitutional Court ruling regarding the legality of preventive detention. The ECtHR scrutinized the nature of preventive detention, going beyond domestic classifications of its punitive nature.[144] In its analysis, the ECtHR determined that the detention constituted a form of punishment, particularly since it was exclusively applied to individuals convicted of serious crimes. [145] While acknowledging that national systems may utilize preventive detention, the ECtHR emphasized that certain conditions must be met. [146] These conditions included reserving preventive detention as a last resort and ensuring the availability of treatment measures.[147] However, the ECtHR ultimately found a violation of Article 7(1) of the Convention, which pertains to the principle of legality and the prohibition of retroactivity as an element of foreseeability. This ruling underscores the importance of adhering to legal principles and safeguards even in preventive detention.[148]

3.4. Violation of Art. 7. in Misdemeanor Proceedings in the case *Žaja v. Croatia*

The foreseeability element was also not met in one case against Croatia. The case of *Žaja v. Croatia*[149] marked the first instance where the European Court of Hu-

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141 ECtHR Judgment, *M. v. Germany,* §§ 7-16 see also Derenčinović, D., '*Sigurnosno zatvaranje 'opasnih' delinkvenata – podsjetnik iz Strasbourga*', pp 169-180 in: Davor Derenčinović (ed.) Ogledi o pravu i pravdi u dvije Europe- putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa, Narodne novine, Zagreb, 2021, pp 174-177.

142 Derenčinović, *Sigurnosno zatvaranje…, op. cit.*, note 141, p. 176.

143 Farmer, L., *Punishment in the Rule of Law*, *op.cit.*, note 23, p. 455.

144 *Ibid.*, p. 455.

145 ECtHR Judgment, *M. v. Germany,* § 133.

146 Farmer, L., *Punishment in the Rule of Law, op.cit.*, note 23, p. 455.

147 *Ibid.*

148 ECtHR Judgment, *M. v. Germany,* §§ 133-135, see also: Derenčinović, *Sigurnosno zatvaranje…, op. cit.*, note 141, p. 176.

149 ECtHR Judgment, *Žaja v. Croatia,* (Appl. no. 37462/09) 4 October 2016 (Final 04.01.2017); available at: [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22\%22CASE%20OF%20%C5%BDAJA%20v.%20

man Rights (ECtHR) found a violation of the prohibition of arbitrariness in Article 7[150] of the Convention against Croatia in the misdemeanor proceeding.[151] In this case, the applicant had been living in Prague since 2000 and was granted permanent residency in the Czech Republic in February 2008.[152] However, he did not deregister his residence in Croatia. In 2008, the applicant purchased a car in Germany and registered it in his name in the Czech Republic. He then entered Croatia with the car the same year. The police stopped him, confiscated the car, and reported the case to the Customs Administration. The Customs Administration, to enforce customs debt recovery, sold the applicant's car and initiated misdemeanor proceedings against him for violating the rules on temporary importation of foreign goods with full exemption (temporary use of foreign goods in the customs territory of Croatia without paying customs duties). Article 5 of Annex C of the Istanbul Convention on Temporary Admission,[153] specifies that it is about residency (domicile residence), while according to the text of the Decree on the implementation of the Customs Act from 2003,[154] the habitual residence (persons

CROATIA\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-166925%22]}], Accessed 12 February 2024.

150 See also Krapac, D. *et al.*, Z., *Presude Europskog suda za ljudska prava protiv Republike Hrvatske u kaznenim predmetima*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013.

151 For more see Bonačić; Tomašić, *op. cit.*, note 110, pp 395-396; see also Bonačić, M.; Rašo, M., *Obilježja prekršajnog prava i sudovanja, aktualna pitanja i prioriteti de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 19, No. 2, 2010, pp 439-472; Derenčinović, D.; Gulišija, M. and Dragičević Prtenjača, M., *Novosti u materijalnopravnim odredbama Prekršajnog zakona*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2, 2013, pp 751-777.

152 For more see Bonačić; Tomašić, *op. cit.*, note 110, pp 395-396.

153 The Istanbul Convention on Temporary Admission of the World Customs Organization, 1990; [https://www.wcoomd.org/en/about-us/legal-instruments/~/media/2D53E23AA1A64EF68B9AC708C6281DC8.ashx], Accessed 2 April 2024; It is effective from June 26, 1990, and in force since November 27, 1993, is an instrument of the World Customs Organization. Temporary importation without payment of customs duties is allowed to minimize border crossing costs and facilitate the free movement of goods across borders. The Istanbul Convention aims to simplify and harmonize temporary importation procedures. According to Article 34(3) of the Istanbul Convention, it is drafted in a single original version in English and French, with both texts being equally authentic.; See Art. 5. Of the Annex C, p. 97.
"The Istanbul Convention entered into force in respect of Croatia on 3 December 1998. It was incorporated into the Croatian legal system by the Government's Decree on Accession to the Convention on Temporary Admission (Uredba o pristupanju Konvenciji o privremenom uvozu, Official Gazette – International Agreements, no. 16/98). The term "persons resident" in Article 5 of Annex C was in the Croatian text of the Istanbul Convention translated on its first occurrence as "osobe s prebivalištem" ("persons having domicile") and on its second occurrence as "osobe koje žive" ("persons living" or "persons who live"). The Croatian version of Article 5 of Annex C to the Istanbul Convention, as published in the Official Gazette – International Agreements (no. 16/1998 of 3 December 1998)…"- ECtHR Judgment, *Žaja v. Croatia*, § 46.

154 The Decree on the implementation of the Customs Act, OG, no. 161/03 with subsequent amendments, which was in force between 1 November 2003 and 30 June 2013; see also ECtHR Judgment, *Žaja v. Croatia*, § 30

having seat)[155] was sufficient.[156] The applicant faced a fine for using a car bought abroad in Croatia, as the Customs Administration determined he wasn't a "person resident" in the Czech Republic. Despite presenting evidence of residency, his arguments were rejected by Croatian courts. The ECtHR found this interpretation of "person resident" unclear and inconsistent, leading to a violation of the legality principle, as the applicant couldn't foresee the offense due to conflicting interpretations and translations of the relevant provision. [157] The diversity in the translation of the key term of the relevant provision and its inconsistent interpretation in the practice of domestic authorities resulted in the applicant, even with legal advice, not needing to foresee that using the vehicle in Croatia would constitute a customs offense at the time of entry into Croatia. This means he could not distinguish between permissible and prohibited behavior with the degree of certainty required by Article 7 of the Convention.[158]

Furthermore, the applicant's conviction in the customs misdemeanor proceedings violated the principle of legality.[159] The ECtHR advised reopening proceedings or a legality review. The government initiated measures to align interpretations with ECtHR rulings, including re-translating relevant provisions. Efforts were made to ensure transparency in court decisions and Convention compliance, forwarded for further examination to ensure compliance with ECtHR judgments.[160]

4. CONCLUSION

The Rule of Law, a concept evolving from ancient legal traditions to modern legal frameworks, underscores the principle that society should be governed by laws

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155 Art. 265(1) of the Decree on the implementation of the Customs Act.

156 „…the Customs Administration consistently held that the term "person resident" referred to in Annex C to the Istanbul Convention was to be interpreted as "persons having habitual residence". In none of these opinions did the Customs Administration refer to the definition of domicile provided in either the Domicile and Residence of Citizens Act or the General Tax Act. Rather, in one of the opinions (opinion of 31 May 2010) it cited the definition of habitual residence provided in the Domicile and Residence of Citizens Act (see paragraph 32 above), whereas in four of the opinions (opinions of 22 November 2012 and of 3, 7 and 10 January 2013) it referred to the definition of habitual residence provided in the General Tax Act (see paragraph 31 above). While in the first of the above-cited opinions (opinion of 19 December 2006) the Customs Administration held that persons having registered domicile in Croatia could not be considered to have habitual residence abroad, in another of the opinions it expressly stated that domicile was irrelevant for determining whether a person had habitual residence (opinion of 15 September 2011)..." ECtHR Judgment, *Žaja v. Croatia*, § 51.

157 For more see Stažnik, Š., *Nullum crimen sine lege* u carinskom prekršajnom postupku, *Informator*, No.. 6473 from 6 May 2017, pp 7, 8.

158 ECtHR Judgment, *Žaja v. Croatia*, § 106.

159 ECtHR Judgment, *Žaja v. Croatia*, § 106.

160 Bonačić; Tomašić, *op. cit.*, note 110, pp 395-398.

rather than arbitrary decisions by individuals. Historically developing through various legal systems and philosophical contributions, this principle culminates in contemporary legal protections such as those outlined in the European Convention on Human Rights. The enduring relevance of the Rule of Law lies in its foundational role in upholding justice, transparency, and equality in democratic societies.

The European Court of Human Rights (ECtHR) plays a vital role in safeguarding human rights and upholding democratic principles within the European Convention on Human Rights (ECHR) framework, especially the rule of law. Central to its mission is promoting the rule of law, incorporating the principle of legality, which includes rule-based governance, adherence to established laws, and ensuring high-quality legislation. While the term "legality" is not explicitly mentioned in the Convention, the ECtHR's jurisprudence emphasizes the importance of this principle and compliance of national laws to this principle and ECtHR-specific quality standards. ECtHR legality can be divided into 'legality' in the border sense (which is to be checked for all rights and freedoms of the ECHR) and legality *stricto sensu,* (in Art. 7, *nullum crimen sine lege)*. Both legalities demand law to be accessible and foreseeable (and, in addition, general, certain, and precise). Accessibility and foreseeability are crucial in the ECtHR's assessment of legality. Laws must be accessible and their consequences foreseeable, with national laws being precise, consistent, and clear. Judicial safeguards are essential, ensuring the application of accessibility and foreseeability, upholding fair trials, and effective remedies. Article 7 of the European Convention on Human Rights (ECHR) is a fundamental element of legality in criminal substantive law, prohibiting punishment without law. Through landmark cases like *Yüksel Yalçinkaya v. Turkey, Streletz, Kessler, and Krenz v. Germany, Vasiliauskas v. Lithuania,* and *Kononov v. Latvia*, the ECtHR has consistently upheld Article 7, ensuring protection against arbitrary prosecution, conviction, and punishment. These cases, along with *M. v. Germany* and *Žaja v. Croatia,* highlight the ECtHR's dedication to scrutinizing the legality of domestic laws, even in complex scenarios like preventive detention and misdemeanor proceedings. By ensuring member states adhere to the principle of legality, the ECtHR protects individual rights and reinforces democracy, justice, and the rule of law.

However, it must be mentioned that the ECtHR, by its interpretation and understanding, has relativized the principles of foreseeability and accessibility as elements of legality in the 'spirit' of the rule of law in some (older) cases. Although it seemed fair at that time to make things just and act as a remedy, it must be noted that such a practice could lead to 'malpractice' and negatively affect the rule of law principle in the future. However, it is commendable that the recent ECtHR case

law goes toward stricter interpretation and adherence to these principles, which is of enormous importance, especially in the legality *stricto sensu* (Art. 7). It can be noticed that the ECtHR case law is like a living being constantly evolving with a purpose to protect human rights and freedoms.

Finally, it can be concluded that the relationship between the ECtHR and the rule of law is symbiotic and unique. The ECtHR and the rule of law are inseparably interconnected. The effect and impact of the ECtHR on the rule of law, and *vice versa*, are amendable and significantly influence each other. When interpreting and applying the ECHR according to its principles, especially the principle of legality (in a broader sense and stricto sensu), the ECtHR acts in accordance with the rule of law principles and simultaneously creates a law that becomes part of the rule of law. It is a circular process of simultaneously applying and making law, and the rule of law.

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Original scientific paper

DEPRIVATION OF LIBERTY IN CROATIAN MISDEMEANOUR PROCEEDINGS - APPLICATION OF EUROPEAN DETENTION AND PENITENTIARY STANDARDS*,**

Marija Đuzel, PhD, Associate Professor
University of Split, Faculty of Law
Domovinskog rata 8, 2100 Split
marija.duzel@pravst.hr

ABSTRACT

The paper addresses the issue of deprivation of liberty in misdemeanour proceedings in the context of both pre-trial detention standards and penitentiary standards set out in the practice of the European Court of Human Rights and the documents of the European Union. The fundamental human right to liberty can be restricted in misdemeanour proceedings in accordance with the Misdemeanour Act of the Republic of Croatia, following a police arrest or based on a court decision on detention to ensure the defendant's presence. The paper aims to analyse material and procedural conditions for the arrest and detention, and the conditions for the execution of both the detention measure and the prison sentence imposed in misdemeanour proceedings within the Croatian prison system.

In addition to the rich jurisprudence of the European Court of Human Rights, which has been developing and strengthening detention standards and the rights of prisoners for decades, the past decade has been marked by intensive activities of the European Union in matters related to persons deprived of their liberty in criminal proceedings. Considering that the issue of deprivation of liberty in misdemeanour proceedings has not been systematically addressed in Croatian literature, the paper will particularly analyse how these standards established in binding and non-binding legal instruments apply to and affect issues related to deprivation of liberty in Croatian misdemeanour proceedings.

Keywords: *arrest, deprivation of liberty, detention, European standards, misdemeanour proceedings*

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1. INTRODUCTION

Misdemeanour proceedings are conducted on the occasion of committed misdemeanours which are under Croatian law considered a type of punishable acts[1] that do not pose a substantial threat to public order or violate fundamental constitutional values to the same extent as criminal offences and are usually sanctioned with more lenient penalties.[2] However, some misdemeanours are even punishable with a prison sentence of up to 90 days[3] or even 120 days in the event of concurrent misdemeanours. The possibility of imposing a prison sentence and the nature of certain misdemeanours led the European Court of Human Rights (ECtHR) to autonomously interpret that misdemeanours can be regarded as criminal offences regardless of their classification under national law and that this entails the applicability of criminal aspect of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).[4]

In addition, the severity of certain misdemeanours, the nature and level of the prescribed sanction and the risk of prejudice to the unimpeded conduct of the proceedings may justify the possibility of deprivation of liberty in the course of the misdemeanour proceedings. This fundamental human right may be restricted in accordance with the Misdemeanour Act of the Republic of Croatia following a police arrest or on the basis of a court decision on detention to ensure the presence of the defendant. Since the right to liberty is one of the fundamental human rights

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1 Croatian criminal law distinguishes three types of punishable acts: criminal offences, misdemeanours and disciplinary offences. Although the European Court of Human Rights (ECtHR) refers to misdemeanour proceedings as minor-offence proceedings in its judgments against the Republic of Croatia, the term "misdemeanour" shall be used in the following chapters for better understanding and distinction from criminal proceedings *stricto sensu* as this term is often used in Croatian law literature written in the English language. E.g. Munivrana Vajda, M.; Ivičević Karas, E., *International Encyclopaedia for Criminal Law: Croatia*, Wolters Kluwer, 2016, p. 23.

2 *Cf.* Article 1 of the Misdemeanour Act, Official Gazette No. 107/2007, 39/2013, 157/2013, 110/2015, 70/2017, 118/2018, 114/2022 (hereinafter: MA).

3 Misdemeanours related to domestic violence, other misdemeanours related to violence, grave environmental offences and grave misdemeanours related to the abuse of narcotics. Art 35 (2) of the MA.

4 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, signed at Rome on 4 November 1950 and entered into force on 3 September 1953. For elaboration of criminal law nature of Croatian misdemeanour proceedings in accordance with *Engel* criteria established in jurisprudence of ECtHR and its autonomous interpretation of term criminal proceedings, see Novosel, D.; Rašo, M.; Burić, Z., *Razgraničenje kaznenih djela i prekršaja u svjetlu presude Maresti protiv Hrvatske,* Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 17, No. 2, 2010, pp.790-792. After the *Engel* judgement, in its subsequent practice, in the case *Jussila v. Finland,* the Court took the position that not all criminal procedures are equal, and the criminal-head guarantees in cases that do not belong to the hard core of criminal law will not necessarily apply with their full stringency. *Jussila v. Finland*, § 43, app. No. 73053/01, 23.11.2006. For more detail, see Vojvoda, N., *"Jezgra" i "periferija" kaznenog prava u praksi Europskog suda za ljudska prava,* Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 30, No. 1, 2023, pp. 73 – 95.

guaranteed by the Constitution of the Republic of Croatia (Article 22),[5] ECHR (Article 5), EU Charter on Fundamental Rights (Article 6)[6], the question arises as to which guarantees and to what extent are applicable to the deprivation of liberty in misdemeanour proceedings.

After the introduction, the paper provides a detailed analysis of liberty deprivation measures in misdemeanour proceedings, arrest and detention and sets out the general legal framework for these coercive measures, then elaborates on the application of European detention standards, especially procedural guarantees from Article 5 of the ECHR. This is followed by an analysis of the national legislation on arrest and detention with special emphasis on disputed issues in theory and practice. The last chapter before the conclusion deals with the issue of compliance with penitentiary standards, i.e. detention conditions during the enforcement of the prison sentence and detention measures imposed in misdemeanour proceedings.

2. APPLICATION OF EUROPEAN DETENTION STANDARDS ON DEPRIVATION OF LIBERTY IN MISDEMEANOUR PROCEEDINGS

2.1. General remarks on arrest and detention

The Misdemeanour Act of the Republic of Croatia distinguishes two forms of deprivation of liberty in misdemeanour proceedings, arrest and detention defining them as any measure or action that includes deprivation of liberty of a person suspected of having committed a misdemeanour.[7] These coercive measures have the purpose of ensuring the presence of the defendant and the successful conduct of misdemeanour proceedings.[8] The measures to ensure the presence of the defendant in the Misdemeanour Act are nomotechnically arranged in Chapter 17 according to the intensity of encroachment on fundamental rights from the mildest (summons to the defendant) to the most severe ones (detention). The entire chapter and especially Art. 127(2) is a reflection of the constitutional principle of proportionality, which requires the application of more lenient measures whenever the purpose can be achieved with such measures.[9]

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5 Constitution of Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.

6 Charter of Fundamental Rights of the European Union [2012] OJ C 326, p. 391–407.

7 Article 86(2) of the MA.

8 Article 127 of the MA lists the measures to ensure the presence of the defendant: summons, apprehension, precautionary measures, bail, arrest and detention.

9 *Cf.* Pleić, M.; Budimlić, T., *Mjere opreza u kaznenom postupku – prijepori oko samostalne opstojnosti i trajanja te druga otvorena pitanja,* Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), Vol. 28, No. 2, 2021, pp. 272 – 273.

The police have the authority to deprive a person of their liberty in misdemeanour proceedings for a short time in the event of an arrest pursuant to Art. 134 of the Misdemeanour Act. In addition, special police measures of liberty restriction are foreseen to prevent offenders under the influence of intoxicants from continuing to commit a misdemeanour.[10]

However, continued detention in misdemeanour proceedings can be based solely on the court's decision when the conditions from Art. 135 are met. The legislator also provided for a special type of detention and bail, the purpose of which is to ensure the enforcement of the misdemeanour sanction imposed by the first-instance judgment against a foreign defendant.[11]

Before a thorough analysis of the potentially disputed issues of measures of arrest and detention, it is necessary to determine whether the established European standards and procedures for reviewing the legality of deprivation of liberty in criminal proceedings are applied to these measures in misdemeanour proceedings.

2.2. Application of Article 5 of the ECHR on deprivation of liberty in misdemeanour proceeding

Article 5 of the ECHR protects the right to liberty and security by setting out an exhaustive list of specific grounds for detention in Article 5(1)(a) – (f), and further in paragraphs 2 - 5, by specifying procedural guarantees for persons deprived of liberty. These provisions provide for the right to be informed of the reasons for arrest (§2), the right to challenge the legality of detention (§4), and the right to compensation in the case of unlawful deprivation of liberty (§5). While these provisions refer to all persons deprived of liberty based on Art. 5 (1), Art. 5(3) contains two specific safeguards which only apply to Art. 5(1)(c), arrest and detention of the person suspected of committing an offence: the right to be brought before a judge and the right to be released within reasonable time.[12]

Two of six enlisted grounds for detention, Art 5(1)(a) and Art 5(1)(c), refer to deprivation of liberty in the context of criminal proceedings. Art 5(1)(c) covers the period of deprivation of liberty from the arrest to the passing of the first-instance judgment, and together with the guarantees prescribed in Art. 5(3) form an organic whole.[13] Art 5(1)(a), however, refers to the deprivation of liberty after the

[10] Article 137 of the MA.

[11] Article 136 of the MA.

[12] Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 408.

[13] *Cf.* Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava, Strasbourški acquis*, Zagreb, 2013, pp. 1176 – 1177.

establishment of guilt and conviction, and the application of this provision commences immediately upon the first-instance judgment.[14]

The question of whether the measures of deprivation of liberty imposed in misdemeanour proceedings fall under Article 5(1)(c) depends on the fulfilment of three conditions: firstly, the existence of a criminal offence, secondly, the existence of a justified purpose and thirdly, the existence of justified suspicion.[15] The key issue in the application of Article 5(1)(c) to the deprivation of liberty in misdemeanour proceedings is the issue of defining the term "offence". This term is identical to the terms *offence* and *criminal charges* as set out in Art. 6(1) of the ECHR and the interpretation of those terms is also relevant for the interpretation of the scope of Arts. 5(1)(a) and (c).[16]

Thus Article 5 (1)(c) extends not only to criminal offences classified as such under national law, but it has a wider scope in accordance with the ECtHR's principle of autonomous interpretation.[17] In *Steel v. the UK*, ECtHR considered that an offence within the meaning of Article 5(1)(c) was an issue bearing in mind the nature of the proceedings in question and the penalty at stake.[18] The Court held that even though breach of the peace is not classified as a criminal offence under English law, the duty to keep the peace is within the scope of the public duty and the police have powers to arrest any person who has breached the peace.[19]

As for the second condition, the purpose of detention – under this provision detention is only permitted when it is effected in connection with criminal proceedings.[20] Following the criteria established in the practice of the ECtHR, misdemeanour proceedings with regard to the nature of the offence and the degree and severity of the possible sanction can be considered a criminal proceeding in the sense of this requirement from Article 5.

Since arrest and detention can only be ordered for serious misdemeanours (violent acts, acts against public order and peace) sanctioned by imprisonment or heavy fines according to the Misdemeanour Act, the existence of a criminal offence in

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14 *Cf.* Trechsel, S., *op. cit.*, note 12, p. 437.

15 According to Art 5(1)(c), the deprivation of liberty is justified in the case of the lawful arrest or detention of a person effected to bring him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so.

16 Omejec, *op. cit.,* note 13, p. 1177.

17 Harris, D.J. *et al.*, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 315.

18 Harris, O'Boyle & Warbrick, *op. cit.*, note 17, p. 315.

19 *Steel v UK*, §48, app. no. 24838/94, 23.9.1998.

20 Harris, O'Boyle & Warbrick, *op. cit.*, note 17, p. 315.

the context of Art. 5(1)(c) and the application of the guarantees from Art. 5(3) of the Convention on cases of arrest and detention in misdemeanour proceedings should not be disputable.

Thus, in *Osmanović v. Croatia*, ECtHR examined the applicant's allegations that there had not been sufficient reasoning for remanding him in custody and that the proceedings by which he sought to challenge his detention had not been in conformity with the guarantees provided under Article 5 of the ECHR. The Court held that there was no dispute between the parties and that depriving the applicant of liberty in connection with the proceedings for breach of public peace and order falls within the scope of Article 5(3).[21] Considering the fact that detention lasted for eight days, the Court stated that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.[22] The Court found that, since the applicant was charged with breach of the public peace and order by attacking two off-duty police officers, the national authorities provided relevant and sufficient reasons in justifying the short eight-day period of the applicant's detention and that there has been no violation of Article 5(3) of the ECHR.[23]

The applicant also contended that his right to effective judicial supervision under Article 5 (4) had been violated by the Constitutional Court when declaring his constitutional complaint inadmissible without examination of his complaints on merits. Having in mind that the Court has already found a violation of Article 5(4) in several cases against Croatia with similar allegations,[24] the Court stated that by declaring the applicant's constitutional complaint inadmissible simply because he had no longer been detained, the Constitutional Court deprived it of whatever further effect it might have, which did not satisfy the requirement of the effectiveness of the review as required under Article 5 (4) of the ECHR.[25]

2.3. Deprivation of liberty under the EU law

Having recognised the continuous problem of excessive use of pre-trial detention among the EU Member States and inadequate detention conditions in their

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21 *Osmanović v Croatia*, §35., app. no(s). 67604/10, 6.11.2012.

22 *Osmanović v Croatia*, §38, see *Belchev v. Bulgaria*, § 82, no. 39270/98, 8 .4.2004.

23 *Osmanović v Croatia,* § 41.

24 After ECtHR established the above-mentioned violation in several cases, the Constitutional Court of the Republic of Croatia decided to review the problematised practice assessed as contrary to the European Convention and amended it to conform to the Convention. See Graovac, G., *Izvršenje "istražnozatvorskih" presuda Europskog suda za ljudska prava u predmetima protiv Republike Hrvatske*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 24, no. 2, 2017, pp. 362 – 363.

25 *Osmanović v Croatia,* §§ 51. – 52.

respective prison systems that adversely affect the mutual trust and EU judicial cooperation in the area of criminal law, in the last decade the EU decided to take concrete actions in that area. Back in 2009 the European Parliament proposed adopting a directive setting common minimum rules for pretrial detention in the European Union Member States.[26] In 2011, the Commission presented the Green Paper on the application of EU criminal justice legislation in the field of detention within the procedural rights package.[27] Since 2009, the procedural rights of defendants in criminal proceedings have been the subject of six directives adopted by the European Parliament and Council of European Union with the aim of improving the mutual recognition of decisions in criminal matters.[28] The procedural rights Directives have a direct impact on some aspects of pre-trial detention by establishing rights for the defence or obligations for the Member State.[29] These Directives, depending on the content and scope of the procedural rights they regulate, can also be applicable in misdemeanour proceedings. However, when it comes to deprivation of liberty in misdemeanour proceedings, the application of the Directives is not questionable, given that the scope of application of the Directives in any case refers to suspects deprived of their liberty.

Although the adoption of the new pre-trial detention rules in a form of a directive, based on Art. 82(2)b TFEU, has been intensively discussed in recent years,[30] the European Union has not been inclined to adopt such a legislative act.[31] Deriving from the fact that, in addition to numerous binding and non-binding international and European legal instruments, notably rich ECtHR jurisprudence and established detention standards, it is not necessary to pass new legislative proposals, the EU has recently adopted the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material

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26 European Parliament, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/91.

27 Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, 14.6.2011, COM/2011/0327 final.

28 Directives related to rights to interpretation and translation, to information, to access to a lawyer, to legal aid the presumption of innocence and procedural safeguards for children suspected or accused in criminal proceedings have been adopted so far.

29 Martufi A.; Peristeridou C., *Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework*, European Papers, vol. 5, no. 3, 2020, p. 1482.

30 For a detailed analysis of the content of the proposed legislative activities, see Baker, E., *et al.*, *The Need for and Possible Content of EU Pre-trial Detention Rules*, Eucrim, 3/2020, pp. 225 – 226.

31 Some authors warn on the limits of Art. 82(2)b of the Treaty on the Functioning of the European Union as a legal basis for the harmonisation of detention rules and that it can be argued whether the EU has given itself the necessary legal basis for achieving this objective. Wieczorek, I., *EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?,* European Journal on Criminal Policy and Research, vol. 28, Issue 3, 2020, p. 477.

detention conditions.[32] Aiming to prevent the excessive use of pre-trial detention, the EU Recommendation on pre-trial detention pleads for the application of this measure only for the more serious crimes. The Recommendation encourages Member States to impose pre-trial detention only for the offences that carry a minimum custodial sentence of 1 year. Considering that detention in the Croatian misdemeanour proceedings is possible even for some misdemeanours for which only a fine can be imposed, it is obvious that Croatian misdemeanour law cannot adequately abide by the Recommendation in this aspect. Nevertheless, when reviewing the justification of the application of detention in misdemeanour proceedings in the light of the EU Recommendation, and in the light of the discussion on the excessive use of detention, apart from the gravity of the offence, *i.e.* the prescribed sanction, it is also necessary to take into account the totality of all the conditions for determining pre-trial detention, hence the well-founded assessment of the court on the existence of a specific risk for the conduct of proceedings is particularly significant. In addition, the length of time that is commensurate with the severity of the offence for which this measure can be applied should be taken into consideration. However, this Recommendation should be a strong incentive to order detention in misdemeanour proceedings only as a last resort when application of precautionary measures cannot achieve its purpose.

3. POLICE POWERS OF LIBERTY DEPRIVATION IN MISDEMEANOUR PROCEEDINGS

3.1. Arrest

Arrest is a measure of liberty deprivation that differs from detention by its brevity and the fact that it does not consists of confinement. It is a short, instantaneous act and, though it precedes the decision on detention, it does not necessarily entail detention.[33] Yet, arrest entails the possibility of detaining a person for up to 24 hours in police station before bringing said person before the competent court, which requires compliance with fundamental procedural guarantees for a person deprived of liberty. Given the intrusive nature of the arrest, the Constitution of the Republic of Croatia lays requirements for the application of this measure,[34] and the Misdemeanour Act elaborates it in detail.

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[32] Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2023] OJ L 86, p. 44–57.

[33] Krapac, D. i suradnici, *Kazneno procesno pravo, Prva knjiga: Institucije*, Zagreb, 2020, p. 364

[34] Art 24 of the Constitution of the Republic of Croatia. For a more detailed analysis see *infra 3.1.1.*

3.1.1. Grounds for arrest

The Misdemeanour Act distinguishes between arrest as a measure carried out by the police with a court order (Art. 129) and arrest without a court order (Art. 134). The possibility of arrest without a court order is envisaged only in a situation where a person is caught in the act of committing a misdemeanour if there are detention grounds in accordance with Article 135 of the MA.[35] For comparison, the Criminal Procedure Act distinguishes between three situations in which arrest without a court order is possible, while arrest in the event of being caught committing a criminal offence is linked to criminal offences prosecuted *ex officio*.[36] Furthermore, the CPA grants the police the authority to arrest a person if there are grounds for suspicion that they have committed a criminal offence and conditions for ordering pre-trial detention exist.

Accepting the limitation envisaged in Art. 135 of the MA related to the type of misdemeanour for which detention can be ordered,[37] three conditions have emerged in practice, which should cumulatively be fulfilled for a person to be arrested: firstly, being caught in the commission of a misdemeanour, secondly, a consideration of a specific type of misdemeanour and the type and level of prescribed sanction, and thirdly, the existence of specific grounds for detention (*causae arresti*).[38]

Misdemeanour legislation, unlike the CPA,[39] does not define the term "caught in the act of committing a misdemeanour" which raises the question of whether, for the existence of the grounds for arrest, it is sufficient for any person to catch the perpetrator in the commission of a misdemeanour or whether the perpetrator must be caught by the police. The extent of the police powers of arrest depends on the scope of the interpretation of this notion, and the restrictive interpretation significantly limits the police's ability to act promptly, especially in particularly sensitive cases of domestic violence.[40]

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35 See *infra 4.1.*

36 Article 107 of the Criminal Procedure Act, Official Gazette No. 152/08,76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24 (hereinafter: CPA).

37 For the review of the method of resolving legislative ambiguities with ministerial instructions see Bonačić, M.; Filipović, H., *Istraživanje o dvostrukim uhićenjima kod prekršaja nasilja u obitelji*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 29, No. 2, 2022, pp. 252 – 253.

38 *Cf.* Filipović, H.; Trivunović, V., *Uhićenje kao mjera osiguranja nazočnosti okrivljenika u prekršajnom postupku de lege lata – de lege ferend*a, Hrvatska pravna revija, no. 2, 2014, pp. 87-88.

39 Article 106 (2) of the CPA.

40 Bonačić, M.; Filipović, H., *op. cit.*, note 37, p. 252.

Based on the wording of Article 86 of the Misdemeanour Act which defines arrest and detention and on the secondary application of the provisions of the Criminal Procedure Act when relevant to misdemeanour proceedings,[41] this term should be interpreted to mean that it is sufficient for a police arrest if any person catches the offender committing a misdemeanour.

Although an extensive interpretation of the term "caught in the act of committing a misdemeanour" has been adopted in practice, some authors take a more restrictive stance stating that police have the right to arrest a person whom they (police) caught in the act of committing a misdemeanour.[42]

Considering the doubts arising in relation to the conditions for arrest thus set out and the interpretation of the question of who can catch a person in the act of committing a misdemeanour, it would be advisable to review the current legislative solution and consider *de lege ferenda* the introduction of a new legal basis for arrest that will be linked to the existence of a certain degree of suspicion that a misdemeanour has been committed and the existence of grounds for detention. In the literature, however, such proposals also diverge in regard to the question of whether the existence of grounds for suspicion (*osnove sumnje*) is sufficient for an arrest,[43] or whether the existence of reasonable suspicion (*osnovana sumnja*) is necessary.[44]

This issue is of particular importance from the Constitutional point of view since, according to the Article 24 of the Constitution of the Republic of Croatia, arrest without a court order is possible only in case of reasonable suspicion that a serious crime has been committed. The strict constitutional conditions on arrest in criminal proceedings were elaborated by the Criminal Procedure Act by setting out, instead of the abstract gravity of the crime, other circumstances as crucial conditions for the achievement of the purpose of the criminal procedure (existence of grounds of suspicion and *causae arresti*).[45] However, misdemeanours are by nature milder offences, and even when it comes to more serious types of misdemeanours that entail a stricter sanction, it is debatable whether it is constitutionally justified to set the same conditions for the arrest of misdemeanour and criminal offences.

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41 Article 82 (3) of the MA.

42 Josipović *et al.*, *Komentar Prekršajnog zakona*, Zagreb, 2014, p. 254.

43 Bonačić, M.; Filipović, H., *op. cit.*, note 37, p. 252.

44 Gržin, M., *Zatjecanje kao uvjet za uhićenje u prekršajnom pravu Republike Hrvatske u komparaciji s prekršajnim zakonodavstvom Sjedinjenih Američkih Država*, Policija i sigurnost. (Zagreb), vol 28 no. 2, 2019, pp. 226 – 227. Gržin proposes, in cases where the police have not found the perpetrator in the commission of a misdemeanour, to introduce an arrest warrant that would cover all types of misdemeanors and the issuance of which could be initiated by the police authorities at the Misdemeanour Court, modelled on the American system. *Ibidem*, p. 225.

45 Krapac, *op. cit.*, note 33, p. 366.

Therefore, *de lege ferenda* we still favour the position that the existence of reasonable suspicion that an offence has been committed would be necessary for an arrest although even such a legal solution is not without its shortcomings in practice but it is more acceptable from the constitutional point of view.

Although the constitutionality of arrest without a warrant in misdemeanour proceedings, given the nature of the misdemeanour, could be questioned regardless of the conditions set by law, we believe that the limitation related to the type and amount of the sanction and the type of misdemeanour, the obligation to bring the arrested person before the court in a short period of time and the existence of circumstances that affect the unimpeded conduct of the proceedings, in their totality could justify short-term deprivation of liberty without a court order. However, full reconciliation of the wording of constitutional provision on arrest and the legislative regulation of the arrest can be achieved either by abolishing any arrest without a court order, which would significantly reduce the effectiveness of misdemeanour procedures, or by constitutional amendments that would come closer to the reality of the criminal law *largo sensu.*[46]

3.1.2. Procedure upon arrest and rights of arrested and detained person

Provisions on the rights of an arrested person are fragmented and can be found in articles 86 and 134 of the MA. According to Article 86, a person arrested or detained under the suspicion of having committed a misdemeanour must be immediately informed of the reasons for the arrest or detention, and the competent authority is obligated to inform their family or another person designated by them about the arrest or detention. If they are questioned as a suspect or the accused, they will be warned that they are not obliged to testify and that they have the right to an attorney of their choice.

Unlike the CPA which requires the arrestee to be immediately informed of the right not to testify, as well as the right to a defence attorney, the Misdemeanour Act attaches these rights exclusively to the circumstance of interrogation of the arrestee as a suspect or defendant.[47] This should *de lege ferenda* be amended in accordance with the CPA, especially since the Directive on the right of access to a lawyer requires that suspects or accused persons have access to a lawyer without undue delay upon the deprivation of liberty. [48]

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[46] Back in 1998, Josipović pointed out the shortcomings of the constitutional provisions on arrest. Josipović, I., *Uhićenje i pritvor*, Zagreb, 1998, p. 271.

[47] *Cf.* Filipović, H.; Trivunović, V., *op. cit.*, note 38, p. 89.

[48] Article 3§2(c) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant

Article 134 elaborates on the rights from Art. 86 and envisages the procedure to be followed after the arrest until the arrested person is brought before the court. After the arrest, the police are obliged to immediately inform the arrested person about the reasons for their arrest, and upon the arrestee's request, inform their family about the arrest within 12 hours of the arrest. The parent or the guardian of an arrested minor will be notified of the arrest regardless of the arrestee's wishes, and the competent social welfare authority will be informed about the arrest if they need to undertake appropriate measures to take care of the children and other family members in the care of the arrested person. In the case of proceedings related to domestic violence, it is mandatory to immediately inform them of the possible care of family members affected by that violence.

The police will bring the arrested person before the judge with the indictment or release them as soon as the need for deprivation of liberty ceases, no later than within 12 hours of the arrest and in any case, retention cannot last longer than 24 hours. After the arrested person has been brought before the judge, the judge is obliged to immediately question the arrested person on the allegations of the indictment and, on the proposal of the police or *ex officio* decide on their detention or release.[49]

Considering that the EU Directive 2012/13/EU on the right to information in criminal proceedings[50] refers to suspects or accused persons deprived of liberty in the course of criminal proceedings within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights,[51] the applicability of the Directive and its procedural guarantees to arrest and detention in misdemeanour proceedings should not be disputed. However, an analysis of the provisions on the rights of arrested and detained persons indicates that the Directive has not been adequately transposed into the Croatian misdemeanour legislation.

The major deficiency in regulating the rights of the arrested person, from the aspect of procedural guarantees enshrined within the EU Directives, is the absence of the obligation of the competent authorities to provide a written letter of rights

proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294, pp. 1–12.

49 The method of the enforcement of the arrest is not prescribed by the Misdemeanour Act, but the provisions of the police legislation are applied. See Veić, P.; Gluščić, S., *Prekršajno pravo*, Opći dio, Zagreb, 2013, p. 144.

50 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012]OJ L 142, pp. 1–10.

51 Recital 21, Directive 2012/13/EU.

to the arrested person. Even more, the provision of Art. 109a(1) explicitly excluded the delivery of a written letter of rights to an arrested person. As *Novokmet* states, such reasoning would make sense if the method and content of the written letter od rights were specifically regulated for persons deprived of liberty in the corresponding provisions of the Misdemeanour Act. However, the harmonisation of the relevant provisions of the Misdemeanour Act with Directive 2012/13/EU failed in that sense.[52] Although the Misdemeanour Act refers to the subsidiary application of the Criminal Procedure Act which guarantees the rights from the Directive, the subsidiary application of the CPA in this case does not solve this shortcoming since the legislator expressly excluded the right of the arrested person to a written letter of rights from the Misdemeanour Act, which means that the legislator's intention was not to guarantee the right to information to the extent regulated by the provisions of the CPA.

The second controversial issue with regard to the procedural rights guaranteed by the EU Directives on the procedural rights of suspects and accused persons is the right of access to the case file. The arrested person does not receive a written letter of rights, so they are not informed of the right to access the case file, even though in accordance with the Directive, the authorities should ensure that documents, which are essential for effectively challenging the lawfulness of the arrest or detention, are made available to the arrested persons or their attorneys.[53] In addition, the written letter of rights for suspects or accused persons who are arrested or detained should, in accordance with the Directive on the right to information, contain information on the right to an attorney already from the moment of arrest and not from the moment of interrogation, as explained in the introduction of this chapter.

These shortcomings should be corrected by properly transposing the Directive into the misdemeanour legislation.

3.2. Special police measure to immediately prevent offenders under the influence of intoxicants from continuing to commit a misdemeanour

In addition to the arrest, the legislator grants the police the power of short-term deprivation of liberty in the form of a special police measure to immediately prevent offenders under the influence of intoxicants from continuing to commit a

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52 Novokmet, A., *Pravo na obavijest u prekršajnom postupku – teorijski i normativni aspekt***,** Zbornik radova Pravnog fakulteta u Splitu, 3/2024, pending publication.

53 *Ibid.*

misdemeanour.[54] The condition for the application of this measure is to catch a person committing a misdemeanour *in flagranti*, and the purpose is to prevent the continuation of the misdemeanour. The measure can be specifically imposed only against a person under the influence of intoxicants or a person who shows signs of the influence of intoxicants and refuses to subject themselves to the testing to verify the presence of intoxicants in the organism and can last for 12 hours. Placing a person in a special room against that person's will indisputably constitutes deprivation of liberty,[55] and, consequently, the time spent in the special room is incorporated in the imposed sentence in accordance with Art. 40 of the MA.

From the perspective of convention standards, a 12-hour detention is not a negligible period, moreover, the ECtHR provides for significantly shorter periods, such as two hours or less, for the deprivation of liberty in the sense of Art. 5 § 1 of the ECHR.[56] Consequently, the person deprived of liberty is entitled to all the procedural guarantees from Article 5.

However, the legislator does not elaborate on the rights of a person detained in accordance with Art 137 and it does not envisage the obligation to inform them about their rights during the deprivation of liberty, as it does in the case of arrest.

Although a person under the influence of intoxicants may have reduced abilities to understand the meaning of the letter of rights, the legislator should provide for the obligation to inform the person of the rights in accordance with the Directive on the right to information. If, given the circumstances, this is not possible on the spot, it should certainly be done by the end of the 12-hour period at the latest. Yet, the law provides that the detainee may seek damages for the unfounded or illegal application of this measure. In practice, this measure, after the 12-hour deadline expires, is followed by the arrest. However, an arrest after the application of this measure will not be possible if the measure is not ordered for misdemeanour with a prescribed sanction in accordance with Art. 135.[57]

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54 Article 137(1) of the MA.

55 *Cf.* Josipović et al., *op. cit.,* note 42, p. 260.

56 Where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of detention does not affect this conclusion. *Rantsev v. Cyprus and Russia*, 2010, § 317. More about the criteria for deprivation of liberty, see Guide on Article 5 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights, 2022, pp. 8 – 9, [https://www.echr.coe.int/documents/d/echr/guide_art_5_eng], accessed 27 April 2024.

57 *Cf.* Filipović, H.; Trivunović, V., *op. cit.*, note 38, p. 88.

4. DETENTION

4.1. Grounds for detention

When setting out the conditions for determining the detention measure, the legislator started from the material-procedural criterion, which takes into account the procedural phase of initiation of misdemeanour proceedings, type and nature of the misdemeanour charged to the defendant, as well as the type and level of the prescribed sanction, and requires the existence of the specific grounds for detention i.e. *causae arresti*.

Unlike the CPA, which sets out reasonable suspicion that a person has committed a criminal offence as a general condition for pre-trial detention, the Misdemeanour Act links the possibility of ordering detention to a specific moment in the course of the proceedings, i.e. the filing of an indictment. This condition for detention stems from the requirement set forth in Art. 134 MA, that the police must bring the arrested person to the judge with an indictment or release them as soon as the need for deprivation of liberty ceases. The obligation to submit an indictment at the time of bringing arrestee before the court encourages the swift action of the prosecutor and the quick completion of misdemeanour proceedings in cases where a person is deprived of liberty. However, the problem may arise due to the fact that the legislator did not link the submission of the indictment to the existence of reasonable suspicion. Thus, it is theoretically possible for detention to be determined despite the fact that no reasonable suspicion arises from the indictment. Therefore, *de lege ferenda* it would be more appropriate to set the existence of reasonable doubt as a condition.

The second condition, which is of substantive-legal nature, sets multiple restrictions regarding the type of misdemeanour and prescribed sanction for which detention can be ordered. First of all, it must be a misdemeanour prescribed by law and not by secondary legislation. The legislator further states that, alternatively, detention can only be determined in a case of a misdemeanour against public order and peace, a misdemeanour related to domestic violence, a misdemeanour related to the prevention of disorder at sports competitions, or a misdemeanour for which a prison sentence or a fine higher than EUR 1327.23 can be imposed. Considering that the legislator has already prescribed these specified sanctions for all misdemeanours related to domestic violence,[58] it becomes redundant to set out

[58] According to the Law on Protection from Domestic Violence, Official Gazette 70/2017, 126/2019, 84/2021, 114/2022, 36/2024.

the conditions in this way *i.e.* to mention explicitly this category of misdemeanours.[59]

Furthermore, the legislator requires the existence of one or more specific *causae arresti,* i.e. circumstances that point to the risk that the defendant may flee, that they may destroy, hide, alter or falsify evidence or traces important for the misdemeanour proceeding or that they may interfere with the misdemeanour proceeding by influencing witnesses or participants, or that special circumstances justify the risk that they will repeat the same offence.[60]

4.2. Formal prerequisites

In accordance with constitutional and conventional requirements,[61] court is the only authorised body for ordering detention in misdemeanour proceedings. The court may determine the detention *ex officio* or at the request of the prosecutor, after interrogating the defendant and determining that there are no grounds for dismissing the indictment.

Detention in misdemeanour proceedings can last as long as there are reasons for it, but not longer than fifteen days, including the time of arrest. Against minors, detention can last 24 hours, counting from the time when the detention was determined by the court.

After a non-final judgment has been passed, detention may be extended or ordered against the defendant only if prison sentence or juvenile prison has been imposed and special circumstances justify the risk that they may commit a similar misdemeanour. Detention on this ground may last fifteen days, but not longer than the imposed sentence. Furthermore, when the High Misdemeanour Court annuls the first instance judgment and returns the case for a retrial, it may extend detention up to a maximum of fifteen days if there is still the risk of reoffending. Therefore, detention in misdemeanour proceedings can last a maximum of 45 days until the judgement becomes final, except in the situation envisaged in Article 136 when the defendant does not have a permanent residence in the Republic of Croatia. Detention based on the decision of the High Misdemeanour Court in that case

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59 Furthermore, almost all misdemeanours prescribed by the Law on the Prevention of Disorders on Sports Competitions are punishable by fines over 1327.23 euros, except for the misdemeanours from Art. 38.a and Art. 39(2) for which a fine from 130 euro to 1320 euro can be imposed, which mean that for all but these two violations, detention could be determined even if the legislator did not explicitly mention this type of offense in Art. 135 MA. Act on the Prevention of Disorders on Sports Competitions, Official Gazette 117/03, 71/06, 43/09, 34/11, 114/22.

60 For details see Josipović *et. al, op. cit.,* note 42, p. 257.

61 Art 124 of the Constitution of the Republic of Croatia.

can last a total of 30 days beyond the deadline from paragraph 11 of Article 135, i.e. a total of 60 days.

The defendant has the right to appeal against the decision determining or extending detention within 48 hours. The appeal does not delay the enforcement of the decision.

In a case in which detention has been ordered, the court shall proceed with particular haste and in accordance with the constitutional principle of proportionality, considering *ex officio* whether the reasons and legal conditions for the further duration of detention have ceased and, in that case, it shall immediately terminate the detention.

Detention is determined or extended by a written and reasoned decision, which is handed over immediately to the detained defendant. Given that the Misdemeanour Act does not provide for a provision that would elaborate in more detail the content of the explanation of the decision on detention, in the way that the CPA does in Art. 124(3), and considering that in the practice of misdemeanour courts, these explanations are usually reduced to a few generic sentences, misdemeanour courts should, in accordance with Article 82(3) of the Misdemeanours Act, apply this provision of the CPA. In this sense, the grounds of the decision should set out specific and complete facts and evidence showing the reasons for detention, and the reasons why the court considers that the purpose of detention cannot be achieved by another more lenient measure and, in the case of the extension of the period of detention, the circumstances justifying its continued application should be further elaborated.

4.3. Rights of a detained person

Misdemeanour Act guarantees the rights of the arrested and detained person with the same provisions (Art 86 and Art 134(2) and (3)). Given that in its essence and nature, detention measure in misdemeanour proceedings is equal to the measure of pre-trial detention from the Criminal Procedure Act and it entails all the procedural guarantees prescribed in Art. 5 of the ECHR, detainees in misdemeanour proceedings should be provided with the same scope of procedural rights as the remand prisoners in criminal proceedings. The only difference between these two measures is the maximum duration of the measures. However, a person detained in misdemeanour proceedings is not guaranteed the rights of defence in the same way as a detainee in criminal proceedings. Misdemeanour legislation prescribes very restrictive conditions for mandatory defence, i.e. mandatory defence is an exception and deprivation of liberty is not a reason for appointing an *ex officio*

defence attorney. Unlike detainees in criminal proceedings who have the right to a mandatory defence from the moment of delivery of decision ordering detention or pre-trial detention, a detained person in misdemeanour proceedings can exercise the right to a defence attorney only if they appoint one themselves. Moreover, since 2013 the legislator has expanded the right to a mandatory defence in criminal proceedings in relation to persons deprived of liberty due to the established violation of convention rights before the ECtHR in the *Prežec v. Croatia* case.[62] Subsidiary application of the provisions of the CPA on mandatory defence or free legal aid has no effect since the legislators deliberately omitted these rights. In addition, the extension of this right to misdemeanour proceedings entails costs for the state budget that the legislator, apparently, did not foresee, because otherwise it would have prescribed this right.

4.4. Detention and bail in special cases

In addition to detention as a measure to ensure the presence of the defendant and ensure the unimpeded course of criminal proceedings, the misdemeanour legislation also provides for the measure of detention against a defendant who does not have a permanent residence or place of residence in the Republic of Croatia when conditions for ordering detention in accordance with Article 135 are not met. The purpose of this measure, envisaged in Article 136, is to ensure the execution of a non-final judgment against that person. Detention for this reason can only be ordered if the defendant had previously refused to post bail offered by the court. In that case, the court will determine or extend the detention notwithstanding the conditions for ordering or extending detention from Art. 135(3).

Given the purpose of deprivation of liberty in this specific case, the detention measure from Art. 136 does not fall within the scope of Article 5(1)(c) of the ECHR but under subparagraph *a* which refers to the lawful detention of a person after conviction by a competent court.[63]

Detention for this purpose is not limited by the deadlines from Art 135 of the MA and may last until the end of the imposed prison sentence, i.e. as long as imprisonment was imposed in lieu of an unpaid fine. The defendant may file an appeal against that decision within 48 hours, which does not delay the enforcement of the decision.

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62 *Prežec v Croatia,* app. no. 48185/07, 15.10.2009.

63 For a detailed elaboration of conventional grounds for detention see Harris, O'Boyle & Warbrick, *op. cit.*, note 17, pp. 306 – 310.

The introduction of this provision into the misdemeanour legislation was justified by the fact that, in this way, the execution of numerous decisions on misdemeanours against defendants who do not have residence or permanent residence in the Republic of Croatia, and which previously could never be executed due to the lack of an appropriate legislative mechanism for the execution of misdemeanour decisions, is ensured.[64] However, the justification of such a solution in relation to EU citizens and the existing mechanisms of judicial cooperation within the EU can be discussed. Thus Commission Recommendation on strengthening detention rights emphasises that pre-trial detention decisions must not be discriminatory and automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality.[65]

When it comes to ensuring the execution of a fine by ordering detention against EU citizens, justification of the provisions of Art 136 can be questioned whereas Council Framework Decision 2005/214/PUP of February 24, 2005 on the application of the principle of mutual recognition to fines, which was implemented in Chapter VI of the Act on judicial co-operation in criminal matters with Member States of the European Union[66] regulates the recognition and enforcement of decisions on fines in the manner that is applicable in misdemeanour proceedings.[67] Therefore, there is no need for special provisions on the execution of fines that would place EU citizens in a less favourable position compared to Croatian citizens.

However, when it comes to the execution of a prison sentence, there is no adequate mechanism within the EU that would enable the execution of short-term prison sentences imposed in misdemeanour proceedings. The European Arrest Warrant can be issued only where a sentence has been passed or a detention order has been made, for sentences of at least four months,[68] and according to the Framework Decision 2008/909, the recognition and execution of the sentence can be refused

64 See Josipović et al, *op. cit.*, note 42, pp. 259, 317.

65 Paragraph 23 Recommendation.

66 Act on judicial co-operation in criminal matters with Member States of the European Union, Official Gazette no. 91/2010, 81/2013, 124/2013, 26/2015, 102/2017, 68/2018, 70/2019, 141/2020, 18/2024.

67 With the exception that the execution of the fine can be refused if the financial penalty is below EUR 70 or the equivalent to that amount. Article 7 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005] OJ L 76, p. 16–30.

68 Article 2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190.

when there are less than six months left to serve the sentence.[69] Consequently, the obligation to post a bail as a mechanism for ensuring the execution of prison sentence, and in case of refusal to post a bail, the determination of detention after first instance judgements has been rendered, does not seem as unjustified way of ensuring the effective execution of a prison sentence under domestic law. This provision, considering its purpose and available EU mechanisms for efficient enforcement differs from some worrisome practices among EU member states aimed at ordering pre- trial detention in criminal proceedings based on the fact of non-existence of residence in that MS although the presence of such a defendant, *i.e.* the unimpeded conduct of the proceedings, can be ensured by adequate mechanisms of judicial cooperation.[70]

5. DETENTION CONDITIONS FOR PERSONS DEPRIVED OF LIBERTY IN MISDEMEANOUR PROCEEDINGS

In addition to the establishment of minimum standards of procedural guarantees for detainees, another important aspect in the analysis of the position of persons deprived of liberty refers to the conditions in which these persons carry out the measure of detention. Inadequate detention conditions, in addition to leading to inhuman and degrading treatment, can pose an obstacle to the successful exercise of procedural rights.[71]

Article 2 of the Prison Sentence Enforcement Act defines two categories of persons deprived of liberty in misdemeanour proceedings: a person against whom detention measure has been ordered by a court decision and is spending the misdemeanour detention in prison (detained misdemeanour defendant, *kažnjenik na prekršajnom zadržavanju*) and a person against whom a prison sentence in

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[69] Article 9 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008] OJ L 327, pp. 27–46.

[70] *Cf.* Fair Trials, *A measure of last resort? Practice of pre-trial detention decision making in EU*, 2016, p. 22, [https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf], accessed 12 June 2024. See also Jonckheere, A.; Maes, E., *Report Regional Research, Available statistical data and research on flight risk in pre-trial (detention) proceedings*, National Institute of Criminalistics and Criminology (NICC), Brussels, Belgium, 2024, pp. 12 -14, [https://www.fairtrials.org/app/uploads/2024/05/Report-NICC-on-available-statistical-data-and-research-on-flight-risk-04042024.pdf], accessed 12 June 2024.

[71] Pleić, M., *Procedural rights of suspects and accused persons during pretrial detention – impact of detention conditions on efficient exercise of defence rights*, EU and Comparative Law Issues and Challenges Series, Vol 4 (2020): EU 2020 – Lessons from the past and solutions for the future / Duić, D.; Petrašević, T. (eds), Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2020 p. 506.

misdemeanour proceedings has been imposed or a fine was replaced by a prison sentence (misdemeanour convict, *kažnjenik*).[72] The legislator uses the archaic term misdemeanour convict (*kažnjenik*) which does not adequately reflect the position of these persons, especially when it comes to a person against whom detention measure has been ordered, because it implies or prejudges that the person has already been convicted of a misdemeanour.

Enforcement of a prison sentence imposed in misdemeanour proceedings is regulated by chapter XXVI of the Prison Sentence Enforcement Act. However, this act does not prescribe the mode of enforcement of the procedural detention measure, so in accordance with Art. 82 of the Misdemeanour Act, the provisions of the Criminal Procedure Act related to the enforcement of pre-trial detention should be applied.

Pursuant to Art. 186 of the Prison Sentence Enforcement Act, misdemeanour convicts are housed separately from the remand prisoners and detained misdemeanour defendants. As a rule, misdemeanour convicts are housed separately from other convicted prisoners. However, there is no provision on the obligation to separate detainees in misdemeanour detention from other categories of persons deprived of liberty, although this would implicitly follow from the provisions of Art. 13. paragraph 9,[73] In the reality of the Croatian prison system, detainees on misdemeanour detention are held in the prison premises together with remand prisoners. Although both of these categories are persons who have not yet been convicted in criminal or misdemeanour proceedings and are still within the institute of presumption of innocence, considering the nature of the offence, the gravity of the offence charged against them, the fact that remand prisoners are often previously convicted, accused of serious crimes of organised crime, etc., placing them in the same premises together can negatively affect misdemeanour detainees.

Considering the tendencies to strengthen the rights of persons deprived of liberty, which is particularly visible in the revised international and European penitentiary documents, the Mandela Rules, and the European Prison Rules, these two categories of persons deprived of liberty should be placed separately. In the event that it is necessary to place them in the same premises, all the criminal characteristics, previous convictions, the gravity of the criminal offence and the misdemeanour charged against them should be taken into account.

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72 Prison Sentence Enforcement Act, Official Gazette No. 14/2021, 155/2023.

73 According to Art. 13 (9), different categories of persons deprived of liberty in penitentiaries or prisons may exceptionally be accommodated together and participate in daily activities in accordance with the house rules of said penitentiary or prison when such accommodation is necessary for health safety or provision of adequate medical care.

Detention measures determined in misdemeanour proceedings and prison sentences imposed in misdemeanour proceedings as well as fines replaced by prison sentences imposed in misdemeanour proceedings are usually carried out in prisons as organisational units of the administrative organisation of the closed prison system.[74] Statistical data and reports on the state of the prison system in the Republic of Croatia in recent decades indicate that inadequate prison conditions and overcrowding are generated to a greater extent in prisons as organisational units where the turnover of persons deprived of liberty is more frequent.

Thus, paradoxically, persons deprived of liberty in misdemeanour proceedings, convicted of minor offences or misdemeanours, are exposed to worse conditions than persons convicted of criminal offences who serve their prison sentences in semi-open or open facilities.

Although compared to the period ten years ago, when the ECtHR issued a number of judgments against the Republic of Croatia due to inadequate prison conditions,[75] in recent years the number of persons deprived of liberty in prisons and penitentiaries has continuously decreased, and accommodation capacities have increased. In the last two years (2021 and 2022), there has been an increasing trend in the number of prisoners, which is also reflected in the increase in the occupancy of existing capacities.[76] The number of persons deprived of liberty in misdemeanour proceedings has also been decreasing over the years. If we observe the 10-year period, from 2013 (4529) to 2022, that number has halved. A significant decrease in the number of prisoners was already visible in 2014,[77] and then a slight decrease continued every year since. This corresponds to data on the general decrease in the number of prisoners since 2010 when overcrowding reached its peak.

In 2022, persons in misdemeanour detention accounted for 11.03%, while prisoners accounted for 3.56% of the total population of persons deprived of liberty, i.e. a total of 13.6% of the total prison population.[78] If we observe the absolute numbers (1907), it is clear that this is not an insignificant number of persons de-

74 Article 24.

75 Prison occupancy on 31/12/2013 ranged between 110% and 208%, which implies the impossibility of ensuring minimum standards on detention conditions. Izvješće o uvjetima života u zatvoru, Constitutional Court of Republic of Croatia, U-X-5464/2012, 12/6/2014, Zagreb, p. 7.

76 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2022. godinu, Vlada Republike Hrvatske, Zagreb, 2024., p. 9, [https://www.sabor.hr/izvjesce-o-stanju-i-radu-kaznionica-zatvora-odgojnih-zavoda-i-centara-za-2022-godinu-podnositeljica?t=144170&tid=212570], Accessed 27 April 2024.

77 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2014. godinu, Vlada Republike Hrvatske, Zagreb, 2015, p. 45, [https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080848/IZVJESCE_STANJE_KAZNIONICE_ZATVORI_2014.pdf], Accessed 27 April 2024.

78 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2022. godinu, *op. cit.,* note 75, p. 11.

prived of liberty in misdemeanour proceedings, so almost two thousand persons deprived of liberty in misdemeanour proceedings pass through the prison system annually, and it is necessary to ensure the respect of fundamental rights in accordance with the established penitentiary standards.

Although deprivation of liberty in misdemeanour proceedings, either as a detention measure determined during the proceedings or as a misdemeanour sanction, lasts significantly shorter than the prison sentence imposed in criminal proceedings and the pre-trial detention measure, we should by no means relativise and underestimate the period that these categories of persons deprived of liberty spend in prison, especially because the prison sentence imposed in misdemeanour proceedings can last up to 120 days.

The European Court of Human Rights in the *Muršić v. Croatia* case determined the criteria for evaluating the compliance of the conditions of the stay in prison with the prohibition of humiliating treatment from Art. 3 of the ECHR.[79] Thus, the Court found that even shorter periods of deprivation of liberty can lead to a violation of Art. 3. A strong presumption of a violation of Article 3 occurs when the area of personal space available to a person deprived of liberty is less than three square meters. This presumption can only be rebutted if certain factors are cumulatively met, *inter alia*, if the reductions in the required minimum personal space of three square meters are short, occasional and minimal.[80] Accordingly, the Court found that in the period of 27 days in which the applicant disposed with less than 3 sq.m of personal space in the Bjelovar Prison, the conditions of the applicant's detention subjected him to hardship beyond the unavoidable level of suffering inherent in detention and thus amounting to degrading treatment prohibited by Article 3 of the ECHR.[81]

In the light of such conclusions, it is clear that the detention measure itself, which as a rule lasts 15 days, but can last up to 45 days after the pronouncement of the first-instance judgment, or in special cases 60 days, can result in violations of the fundamental human right to the prohibition of torture, inhuman and humiliating treatment.

6. CONCLUSION

Although misdemeanours are not formally classified as criminal offences under national (Croatian) law but are minor violations of fundamental social values,

[79] *Muršić v. Croatia,* app. No. 7334/13, 20/10/2016.

[80] *Ibid.*, §§137-138.

[81] *Ibid.,* §153.

deprivation of liberty in misdemeanour proceedings has essentially the same legal nature as in criminal proceedings and entails all procedural guarantees from Art. 5 of the ECHR. Despite the fact that national jurisprudence has not encountered any major problems in the application of the detention measure in misdemeanour proceedings, several potentially contentious issues should be pointed out.

The first is the question of ensuring mandatory defence when ordering detention, which is not recognised by the misdemeanour law. Though not all procedural mechanisms and guarantees from the Criminal Procedure Act can be implemented in misdemeanour proceedings, when it comes to deprivation of liberty measures, this issue should be taken with caution and efforts should be made to harmonise the procedural position of detainees in misdemeanour and criminal proceedings. Therefore, *de lege ferenda* we should consider the introduction of mandatory defence or at least the right to a defence attorney at the expense of budget funds in the event of a detention decision. In addition, it would be advisable to review the provision on conditions on detention according to which, in order to determine detention, it is required that an indictment has been filed, while at the same time, the existence of a reasonable suspicion that the defendant has committed a misdemeanour is not necessary for the indictment to be filed.

As for the rights of the arrested persons, the obligation to provide a written letter of rights should be *de lege ferenda* envisaged and thus enable the enforcement of procedural guarantees from the Directive on the right to information. In addition, every detainee, not only the ones arrested and under interrogation, should be informed upon the arrest of the right not to testify and the right to a defence attorney.

Furthermore, controversies regarding the interpretation of the question of whether the police are authorised to arrest only a person whom they have personally caught committing an offence or also the person whom other citizens have caught in the act should also be resolved and a new legal basis for the arrest should be introduced. However, this is part of a larger and more significant issue regarding the compliance of misdemeanour legislation on arrest without a court order with the constitutional provision on arrest, and it is necessary to establish conditions for arrest that will correspond to the wording of the Constitution or else bring the constitutional requirements closer to the reality of criminal law *largo sensu*.

Also, provisions on special measures of deprivation of liberty prescribed in Art. 136 and 137 of the MA should be thoroughly reviewed.

In addition to the protection of the procedural rights of persons deprived of liberty in misdemeanour proceedings, the position of the detainee during the en-

forcement of the detention measure should also be taken into account. The major problem with overcrowding in the last two decades is visible in closed conditions, i.e., in closed-type penitentiaries and in prisons where misdemeanour detainees are placed. Clearly, inadequate prison conditions adversely affect the categories of prisoners who have committed or are under suspicion of having committed minor offences, which are significantly different from criminal offences in terms of the severity of the consequences and the nature of the crime. Therefore, it is necessary to separate this category of persons who have been detained in misdemeanour proceedings from the remand prisoners.

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THE DANGER OF ORGANIZED CRIME IN THE AREA OF FALSIFICATION OF MEDICINES AND MEDICAL PRODUCTS (PROFIT VS. RIGHT TO HEALTH)

Nina Mladinić, PhD, Associate Professor
University of Split, University Department of Forensic Sciences,
Put Skalica 35, 21 000 Split, Croatia
nina.mladinic@forenzika.unist.hr

Šime Jozipović, PhD, Assistant Professor
University of Split, Faculty of Economy
Cvite Fiskovića 5, 21 000 Split, Croatia
sjozipov@efst.hr

Marko Perkušić, PhD, Assistant Professor
University of Split, University Department of Forensic Sciences
Ruđera Boškovića 33, 21 000 Split, Croatia
marko.perkusic@forenzika.unist.hr

ABSTRACT

Falsification of medicines and medical products as major risk to human life and health is new global threats facing the international community. By its nature, counterfeiting medicines and medical products as a very lucrative "business" falls under the term of organized crime. Precisely because of the large profits it is considered to be a new danger and one of the priorities for all countries in the fight against organized crime, especially because of its role in financing of terrorism. In the phenomenology of organized crime, represented by criminal associations, of the so-called adaptable or flexible type, the participation of counterfeiting and falsification of medicines and medical equipment is taking on an increasing share. In these organized activities legal entities are increasingly involved, which are companies that, due to profit, have no regard for what most the important goods for the individual or society are. Fake pharmaceutical products endanger not only public and individual health, but also the economy, because they "feed a parallel economy". A global problem is the illegal sale of counter-

feit or fake medicines and medical products through websites that are difficult to detect or are the result of fraud by manipulating corporate websites. Although this trade has previously been recognized as a growing danger to human health, the pandemic of the disease COVID-19 has brought "to the light of day" countless glaring cases of organized trade in counterfeit medicines and, moreover, various fake low-quality medical equipment as new opportunities for profit. Enormous quantities of such equipment (protective masks, vaccines, disinfectants, home tests, antimalarial drugs, etc.) have appeared in different modus operandi of criminal trade, from fraud in large shipments, online sales of equipment with fake labels to direct package delivery. The expansion of the online trade in counterfeit pharmaceutical products through the Internet space of the Dark Web has significantly developed organized crime as the so-called "mafia super business". Moreover, illegal and legal markets are often intertwined in many ways. Although international legal frameworks have been established with bodies to combat very dangerous forms of transnational organized crime, such as Interpol, Europol, OLAF, etc., there are a number of difficulties in detecting and prosecuting illegal trade in counterfeit and fake medicines and medical products, especially in developing countries. Given that legal companies are also engaged in this trade, as direct traders or intermediaries, and that the connections between criminal networks facilitate the infiltration of such medical equipment into the legal supply and sales chain, in detection operations it is necessary, in addition to the police, to include the participation of customs, tax, inspection and health authorities. From the perspective of legislation and jurisprudence, this is a demanding challenge for the rule of law and a great risk for fundamental human rights, because the scale of trade, the development of the illegal market and the cross-border cooperation of organized criminal networks with counterfeit medicines and medical equipment represent a significant public health problem. From the perspective of public health danger and global security the problem is so worrying that it has led to the idea of declaring this crime an international crime. This paper will include a presentation of legal frameworks for combating counterfeiting medicines and medical products, as well as the operations of various bodies undertaken with the aim of prosecuting perpetrators. The goal of the treatment of criminal liability in this paper is the investigation of the problems of detection and suppression of an organized network of production and distribution medical counterfeits.

Keywords: *counterfeit medicines and medical equipment, Dark Web, fake medicines, organized crime, legal entities*

1. INTRODUCTION

Globally, around two billion people do not have access to necessary medicines, vaccines medical and other equipment, which opens up a huge and very profitable area of trading in falsified medical products.[1] The World Health Organization (WHO) has estimated it involves a market of 75 billion dollars and that falsified medicines make up more than 10% of the global pharmaceutical market while Interpol estimates that the profit from such crime amounts to 4.4 billion US

[1] See *Substandard and Falsified Medical Products,* World Health Organization (WHO), available at: [https://www.who.int/news-room/fact-sheets/detail/substandard-and-falsified-medical-products], Accessed 15 February 2024.

dollars yearly.[2] A significant share of fake products (estimated at almost 30%) is present in developing countries and in under developed countries such as Asia, Africa, and Latin America[3] where citizens, due to the inaccessibility of medicines and medical equipment and lower costs, are exposed to dangerous falsifications (mostly medicines for malaria, HIV/AIDS tuberculosis and those for treating life threatening conditions).[4] At the same time, in developed countries the use of fake medicines such as painkillers, hormones, steroids, antibiotics etc. as lifestyle medicines has increased. These include Viagra or weight loss concoctions.[5] The use of those products is dangerous for public health because not only are they ineffective in curing sickness, but they are harmful due to the poisonous substances in them because of which numerous cases have resulted in death.[6] Fake medicines directly and indirectly globally affect public health, leading to an increase in sickness, resistance to medicines, unsuccessful treatment, death and ultimately in an increase in health care costs and in a loss of trust in the healthcare system. From the public healthcare danger perspective, the problem is of such huge concern that it has even led to the idea that this crime be declared an international crime that is, a crime against humanity.[7] Also, the falsification of medicines belongs to white collar crime and can be called the "perfect crime", because by the time a fake medicine is even suspected, the fraudsters have disappeared and covered their tracks.[8] It is a generally accepted opinion that the falsification and illegal sale of medicines

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2 The Organization for European cooperation and development (OECD) and the European Union Office for property rights (EUIPO) in 2020 estimate that the total value of falsified pharmaceutical products sold worldwide is almost 4.03 billion EUR. According to Kurtović Mišić, A.; Sokanović, L.; Mišić Radanović, N., *Kažnjiva ponašanja fizičkih i pravnih osoba za vrijeme pandemije COVID-a 19: između kaznenog, prekršajnog i upravnog prava*, Zbornik radova Pravnog fakulteta u Splitu, 2, 2021, p. 425.

3 Cooper, J. M., *Intellectual property piracy in the time of the metaverse.* IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property, Vol. 63, No. 3, 2023, pp. 479-517.

4 Islam, I.; Islam, M. N., *A blockchain based medicine production and distribution framework to prevent medicine counterfeit,* Journal of King Saud University - Computer and Information Sciences, 36, 1, 2024.

5 Glass, B., *Counterfeit drugs and medical devices in developing countries*, Dovepress, Research and Reports in Tropical Medicine 2014, 5, pp. 11–22.

6 In Nigeria in 2009 a cough medicine syrup containing antifreeze for motorcars killed 84 children. In those countries falsified medicines can be found for example in markets, and in Guinea 60% medicines sold are fake. See Przyswa E., *COUNTERFEIT MEDICINES AND CRIMINAL ORGANIZATIONS*, Report IRACM, Paris, 2013, p. 17.

7 See Attaran, A.; Bate, R.; Kendall, M., *Why and how to make an international crime of medicine counterfeiting,* Journal of International Criminal Justice, 2011, Vol. 9, No. 2, pp. 325-354.

8 The physician and legitimate pharmaceutical company (or both) must prove that the diagnosis or legitimate medicine did not cause the patient's ensuing damage or disease. Nelson, M.; Chang, D., *Counterfeit Pharmaceuticals: A Worldwide Problem,* The Trademark Reporter 96, no. 5 (September-October 2006), p. 1070.

are an „ideal“ transnational crime and that a mafia type of organizations views the fake medicine market as an inexhaustible source of income without greater criminal risk.[9]

The fake medical products trade underwent a renaissance during the outbreak of the COVID-19 pandemic. The thesis is correct that the fraud related to the production and trade of nonstandard and counterfeited medical products has followed the spread of the coronavirus.[10] The pandemic has led to the transformation of organized crime, because up till then, narcotic merchants in the search for high profits, and with considerably lower risk of prosecution, very quickly „turned to“ counterfeiting pharmaceuticals.[11] Furthermore, the significantly lower punishments for selling counterfeit pharmaceuticals than for the sale of narcotics make this type of crime more profitable and less risky. The pandemic brought „to the light of day“ innumerous blatant cases of organized trade in not only counterfeit medicines but in even more varied, poor quality medical equipment and products. Huge poor quality and falsified protective masks, vaccines, disinfectants, house tests, antimalaria and antivirus medicines etc. have emerged worldwide using various *modus operandi* of criminal trade. „Vaccine “against corona virus could be found in that illegal trade even before the emergence of the first real vaccines.[12] The expansion of online trade via Dark Web („a web of crimes“) even further

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9 Delval, P., *Counterfeit Medicines, Défis: Le Intelligence Stratégique au Service de la Compétitivité*, 2015, no 5, p. 15. i 21, According to Hall, A.; Koenraadt, R.; Antonopoulos, G., *Illicit pharmaceutical networks in Europe: organising the illicit medicine market in the United Kingdom and the Netherlands,* Trends in Organized Crime; New York, 2017, Vol. 20, 3-4, p. 297.

10 Sokanović, L.; Roksandić, S.; Stošić, I., *Pravo na zdravlje vs. krivotvorenje medicinskih proizvoda u vrijeme pandemije COVID-19*, International Congress Journal “3. KONGRES KOKOZA I 5. HRVATSKI KONGRES MEDICINSKOG PRAVA S MEĐUNARODNIM SUDJELOVANJEM”, Rovinj, 2022, p. 78. i Roksandić, S.; Grđan, K., *COVID-19 i razumijevanje pravnih propisa vezanih uz suzbijanje zaraznih bolesti u Republici Hrvatskoj – osvrt na bitna pravna pitanja od početka pandemije do listopada 2020*., Pravni vjesnik, Vol. 36, No. 3-4, pp. 327-343.

11 Bate, R., *Making a killing: the deadly implications of the counterfeit drug trade*. AEI Press, Washington, D.C., 2008. Profit gained by counterfeiting medicines often totals 3000% and it is estimated that investing 1000 USD in counterfeit script medicines can result in a profit of 30 000 USD, which is 10 times more than the profit from trafficking heroin. According to Blackstone, A. E.; Fuhr, P. J. Jr.; Pociask, S., *The Health and Economic Effects of Counterfeit Drugs,* American Health & Drug Benefits, 2014, 4, p. 220. A comparison of the difference in the profitability of the production of heroin and Viagra shows that the production of 1 kg of heroin has higher costs and a lower street value than the corresponding costs and profits of 1 kg of Viagra. In a case investigated by the Medicines and Healthcare Products Regulatory Agency in the UK, 100,000 counterfeit pills imported at around 25p each were sold for up to £20 each. See Clark, E., *Counterfeit Medicines: The Pills That Kill,* in Telegraph, 5 April 2008, [http://www.telegraph.co.uk/health/3354135/Counterfeit-medicines-the-pills-that kill.htm], Accessed 15 February 2024.

12 Bracci, A.; Nadini, M.; Aliapoulios, M. et al., *Dark Web Marketplaces and COVID-19: before the vaccine*, *EPJ Data Sci.* 10, 6, 2021, p. 3.

developed organized crime in the form of so called. „Mafia super business". Pandemics change the structure of opportunity of organized crime[13] but the danger to health will impact generations. By its nature, counterfeit medicines belong to the concept of organized crime.

In the phenomenology of organized crime, represented in criminal associations of the so called adaptable or flexible type, counterfeit medicines and medical products are taking up a greater share. Increasingly, legal entities are included in those organized criminal activities, that is, trading and other commercial companies and it is becoming a serious worldwide problem which include production networks and distribution which are key components of so called „industrialized organized crime".[14] A globalized virtual space and health crises have transformed organized criminal activity because of a wider circle of consumers. As reason for the huge increase in counterfeit medical products is, among other things, the increasing sophistication of counterfeiting methods.[15] This paper will present the most important operations undertaken within the international legal framework and the national criminal law possibility of fighting against counterfeiting of medical products. Changes in the way criminal networks operate during the pandemic will be presented, as well as the difficulties of detecting organized networks of production and distribution of medical counterfeits. In conclusion, the aim of this paper is to point out the far reaching social, economic and political consequences of profit acquired by counterfeiting medical products on the part of criminal associations and the global danger to the right to health as a fundamental human right and the great threat to world security.

2. CONCEPTS OF FALSIFIED AND COUNTERFEIT MEDICINES AND MEDICAL EQUIPMENT

For the purposes of further developing this topic, it is useful to firstly clarify definitions of concepts because official definitions differentiate fake and counterfeit medicines. Fake medicines contain poor quality or wrongly dosed ingredients or are intentionally or fraudulently marked in regard to their identity or source or are falsely packaged, contain wrong ingredients or low levels of active ingredients.[16]

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[13] Muggah, R., *The COVID-19 Pandemic and the Shifting Opportunity Structure of Organized Crime,* in *A Multidisciplinary Approach to Pandemics: COVID-19 and Beyond*, Bourbeau, P., (ed.), 2022.

[14] Dégardin, K.; Roggo, Y.; Margot, P., *Understanding and fighting the medicine counterfeit market,* Journal of Pharmaceutical and Biomedical Analysis, 87, 2014, pp. 167-175.

[15] Casabona, C. M. R.; Mora, A. U.; Jimenez, P. N.; Alarcon-Jimenez, O., *International strategies in fighting against medicaments fraud and other similar offences. The MEDICRIME Convention,* Crime, Law and Social Change, 2017, Vol. 68, No. 1-2, pp. 95-122.

[16] European Medicines Agency (EMA) and *Substandard and Falsified Medical Products, op. cit.,* note 1.

Fake medicines are designed to imitate real medicines while counterfeit medicines are those not in keeping with intellectual property rights or breach the law on copyright logos.[17] Therefore, falsified medicines (generic and brand products) intentionally falsely labelling their source or identity and are manufactured and sold, containing misleading information about the manufacturer, authenticity and effectiveness.[18] The concept of falsifying medical equipment includes every medical product falsely presented.[19] From the criminal law aspect, what is key in counterfeiting is precisely malicious behavior, that is, intentional fraud. Besides these concepts, in use are the concepts of poor quality medicines (substandard medicines) which signify "real medicines which do not satisfy the specifications of quality set for them"[20] and the concept of unlicensed pharmaceutical medicines.[21] According to Interpol, "pharmaceutical crime" includes production, sales and distribution of fake, stolen or inadmissible medicines and medical equipment and includes counterfeiting and falsifying medical products and their packaging and accompanying documentation, as well as theft, fraud, unallowed redirection, smuggling, illegal sale of medical products and related money laundering.[22]

3. CHANGES IN ACTIVITY OF ORGANIZED CRIME DURING COVID-19 PANDEMIC

Criminologically, the COVID-19 pandemic is a significant factor in the phenomenology of organized crime and its transformation. At the beginning of the crisis and measures of social distancing and quarantine in 2020, there was a fall in certain types of violent and non-violent crimes.[23] However, anti- pandemic

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17 Altavilla, A., *Safe, Innovative and Accessible Medicines in Europe: A Renewed Strategy for Patients and the Pharmaceutical Sector*, European Journal of Health Law 25, No. 2, 2018, p. 137.

18 Kopp, S., *WHO survey on terminology on "counterfeit" medicines or equivalent*, 2019. According to Islam, I.; Nazrul Islam, M., *op. cit.,* note 4.

19 *Counterfeit Medicines and Organised Crime*, United Nations Interregional Crime and Justice Research Institute, Turin, 2012, p. 14, and Xuereb, S.; Valenzia, A., *The Difference between Falsified and Counterfeit Medicines*, February 14, 2018.

20 *Counterfeit products. Trends in Organized Crime,* 2013, Vol. 16, No. 1, pp. 114-124.

21 This can be generic products legally produced abroad but are sold in the country via contracts on licensing so they can circumvent the existing laws on intellectual property. Hall, A.; Koenraadt, R.; Antonopoulos, G., *op. cit.,* note 9*,* p. 298.

22 Negri, S., *The Medicrime Convention: Combating Pharmaceutical Crimes through European Criminal Law and beyond,* New Journal of European Criminal Law, 2016, Vol. 7, No. 3, p. 356.

23 The pandemic reduced so called „street crime", but widened to scope of other crimes trafficking in protective equipment for combatting coronavirus. Streltsov, Y.*, Coronavirus and Criminal law: Paradox or Expediency of the Joint Analysis?!* In the greater part of North America and Western Europe the number of murders and violent attacks went down, in Chicago, Los Angeles and New York the number of burlaries and rapes went down. Muggah, R., *The Pandemic Has Triggered Dramatic Shifts in the Global Criminal Underworld,* 2020.

measures did not stop narco-cartels and gangs so on an international level the effects of the pandemic were precisely expansion of organized pharmaceutical crime through the illegal distribution chains of vaccines and medicines against corona.[24] Criminal associations usually quickly reacted to ways of making profit and the pandemic opened up new opportunities due to the dramatic increase in the demand for certain medical products,[25] causing "dramatic changes in the global criminal underworld".[26] A health crisis emerged which did not only demand adaptation only from many legal companies but also from criminal associations.[27] By introducing restrictive measures narco-cartels were faced with stopped supply chains, reduced profits and market changes. With lockdown, mandatory quarantine, limited travel and border closure, the Mexican narco-cartels drug production was reduced due to reduced imports of necessary chemical substances from China while supply chains for sale of cocaine to the USA and Europe were cut.[28] Mexican cartel Jalisco New Generation quickly became one of the leading manufacturers of stolen and pirated pharmaceutical products, as a part of a successful global black market in counterfeit or stolen medicines and personal protective equipment.[29] At the same time, Columbian and Mexican narco-cartels at the beginning of the pandemic, changed their *modus operandi* gaining social control in local communities with a tradition of the use of violence by demonstrating solidarity and care for people.[30] Branches of Cosa Nostra and Camorra used to deliver basic essentials to populations of the Italian towns of Palermo and Naples. Cartels in Mexico (in the states of Jalisco, Veracruz etc.) used to deliver food and aid packages.[31] In Japan,

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24 Pawluczuk-Bucko, P., *The impact of the pandemic on economic crime,* Bialostockie Studia Prawnicze, 2021, Vol. 26, No. 6, p. 81.

25 Dellasega, M.; Vorrath, J. *A., Gangster's Paradise? Transnational Organised Crime in the Covid-19 Pandemic*, SWP Comment 66, December 2020, p. 1.

26 Muggah, R., *op. cit.,* note 23.

27 Cosa Nostra, N'drangheta, Camorra, Sacra Corona Unita, Yacuza, Chinese Triads, Russian Mafia, Sun Yee On.

28 Dellasega, M.; Vorrath, J. *A., op. cit.,* note 25, p. 2.

29 Muggah, R., *op. cit.,* note 23. The Jalisco New Generation Cartel forced pharmacies to buy counterfeit drugs. It is believed that they earn at least 666.5 million dollars a year from the sale of counterfeit drugs. Torres, A., *Mexican cartel, whose leader is the DEA's no. 1 target, 'forces pharmacies to purchase bootleg medicine' - with six out of every ten pharmaceutical drugs sold in the country now counterfeit*, Dailymail.com, 19 March 2020.,
[https://www.dailymail.co.uk/news/article-8131247/Deadly-Mexican-cartel-forces], Accessed 13 March 2024.

30 Gomez T. C., *Organised Crime Governance in Times of Pandemic: The Impact of COVID-19 on Gangs and Drug Cartels in Colombia and Mexico*, Bulletin of Latin American Research, Vol. 39, Iss. S1, 2020, p. 12.

31 Keyser, Z., Reuters, April 21, 2020, The Jerusalem Post. In the first months of the pandemic members of rival gangs in Cape Town joined for example to distribute food and essentials packets. According to Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, M., *COVID-19 and Organized Crime: Strategies em-*

newer criminal groups known as "hangura" fought with older "yakuza" groups for profits from the sale of medical supplies[32] while criminal group Yamaguchi-Gumi in Yokohama supplied the population with disinfectants, food and economic aid.[33]

Organized crime had very quickly recognized the significance and use of the Internet as the main means of distribution of counterfeit medicines offering a wide base of consumers and limited risk of detection. Dark web enabled anonymous transactions among manufacturers, distributors and consumers, offering flexible and decentralized network with liberal access to the online market which strongly supported illegal trade.[34] Advanced digitalization increased potential for cybercrime e.g. online fraud, and higher profits.[35] Moreover, in developed countries the Internet was the only way counterfeit medicines could enter the market. Internet sales in counterfeit medicines since the end of the last century is linked to online pharmacies, that is, retail pharmacies which partially or entirely do business via the Internet (mostly on social media platforms and applications for exchanging messages) and which deliver to buyers' door. There are three main types of e-pharmacies: legal online pharmacy, fake online pharmacy and illegal e-pharmacy. Legal e-pharmacies respect the country's legal framework in which established, fake e-pharmacies on the surface just sell medicines but in reality, they are fraudulent and steal identity and clone credit cards while illegal online pharmacies are the main system whereby counterfeit medicines can be sold to western markets.[36] Thus company Pharmacom International Corporation which manages an Internet pharmacy www.buymeds.com (now hidden) and 18 other related websites asked buyers purchasing script only medicines to register with one of the websites, to make up a short questionnaire about their state of health and give their credit card

ployed by criminal groups to increase their profits and power in the first months of the pandemic, in Trends in Organized Crime, 2023, 26, p. 124.

32 Cerantola, A., *Japanese Gangs Vie for Power Amid Pandemic*, 2020.

33 Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, M., *op. cit.,* note 31, p. 127.

34 Khan, D.; Rafiqi, F. A., *E-Pharmacies & Fake Medicines: Threat to Public Health*, Indian Journal of Law and Legal Research, 2022-2023, 4, p. 2. According to WHO 50% of medicines are purchased on websites showing their physical address according to the studies carried out by European Federation for Accessing safe medicines 62% of medicines bought over the Internet are counterfeit (50% according to WHO-u). Przyswa E., *op. cit.,* note 6, p. 19.

35 Dellasega, M.; Vorrath, J. *A., op. cit.,* note 25, p. 2.

36 According to Lavorgna, A., *The online trade in counterfeit pharmaceuticals: new criminal opportunities, trends and challenges*, European Journal of Criminology, 2015, Vol. 12, No. 2, p. 233. Fake and illegal e-pharmacies are promoted by spam messages, very powerful instruments which have become one of the favorite tools of organized groups for advertising their illegal products, which reach a large number of addresses worldwide and is even adapted to the needs of certain geographical regions. Negri, S., *op. cit.,* note 22, p. 358.

details without any medical documentation being necessary.[37] In the virtual illegal trade of counterfeit medicines, there is trade taking place on superficial websites accessible via standard search engines (e.g. Google), and the sale on deep web (a hidden part of the Internet not accessible by conventional web browsers, which can be reached, for example, by special software like Tor browse engine).[38] This complexity and internationality of Internet sales is an indicator that virtual crime is operated precisely by organized criminal networks with a significant degree of sophistication.[39] Internet is a new powerful instrument which organized crime uses as an important channel to offer counterfeit medicines at both wholesale and retail level, creating independent distribution processes which directly aim at distributers and finally consumers.[40]

4. *MODUS OPERANDI* OF CRIMINAL NETWORKS FOR COUNTERFEITING MEDICAL PRODUCTS

The methods of infiltration of organized crime into the market of pharmaceutical products are varied, because they depend on the complexity of global supply chains. In the counterfeiting of medicines and medical equipment process there are three phases: production, transport, and distribution. Counterfeit products are most often produced in one, transported in the second and distributed to consumers in a third country. In all phases, counterfeiters „maximize fragmentation "in order to escape being uncovered, for example, they separate production from packaging (counterfeit goods are produced in one and packaged in another country)[41]. The so called *broken load technique* is used (counterfeit products are directed to the final destination transiting through one or more countries not considered to be countries which produce counterfeits in that area, by which the counterfeiters hope that customs will focus on which country the product has come from and not from which country it originated).[42] Criminal organizations

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37 According to Lavorgna, A., *op. cit.,* note 36, p. 233.

38 *Ibid.,* p. 233. The part of the Deep Web where the illegal sale of goods takes place, also weapons, child pornography, etc. is called the Darknet.

39 *Ibid.,* p. 228.

40 Khan, D.; Rafiqi, F. A., *op. cit.,* note 34, p. 7.

41 Packing counterfeit medicines is identical to the packaging of authentic ones due to the easy access of high quality and cheap printing systems mass production. Przyswa E., *op. cit.,* note 6, p. 16. In Croatian pharmacies fake home antigen tests appeared for speedy detection of the coronavirus so that some distributers of pharmaceutical products actually delivered to pharmacies professional tests, repackaging original packaging several professional tests in individually and declaring them as so-called self-tests, even though there was a difference in collection of swabs. See Uzinić, S., *U prodaji su lažni brzi kućni testovi*, Slobodna Dalmacija, 25 May 2021.

42 Przyswa E., *op. cit.,* note 6, p. 26.

use all available forms of transport, even travelers themselves can carry counterfeit medicines as a so-called "mule" in the narcotics trade. Traces are covered, especially in container transport, by storing in free trade zones and warehouses totally unrelated to country-of-origin, reloading products on different means of transport so that only the declared country of origin remains on the goods.[43] The distribution strategy depends on the regional surroundings, implementation of control and success in combating counterfeit pharmaceuticals. Products are often distributed through various fake companies, and also directly in the main chain of distribution within legal economic networks via well-known companies or in certain countries, in street markets or via the Internet.[44] In this „labyrinth" of the channels transnational criminal networks, apart from founding new companies in various countries which are just „facades" for their criminal organization, they also bring in legal companies into their „business". Although counterfeiters often use blackmail and intimidation of retailers, criminal groups try to penetrate the legal distribution system as true distributers. By ordering counterfeit medicines and equipment legal wholesalers and retailers provide organized crime groups the power and capacity to penetrate into a legal supply chain.[45] With the outbreak of the COVID-19 pandemic it is precisely wholesale distribution of pharmaceutical products that showed how it is „most sensitive to criminal infiltration".[46] Then all criminal associations were able to extract profit with a range of activities, from illegal ones, such as production of counterfeit products, to legal ones, for example founding completely legal companies.[47] Counterfeit networks have the capacity for producing false certificates on the quality (e.g. fake CE labels) and/or other fake official documents enabled them to infiltrate into legal wholesale or distribution networks. There is a range of examples illustrating the infiltration of organized criminal networks into legal markets and economies and fraudulently entering legal entities in this area.

An earlier case involved an English accountant and pharmaceutical distributer who managed a company with headquarters in Luxembourg and from December 2006 to May 2007 imported 72.000 packets of counterfeit medicines, that is, over two million doses (of which a third were medicines for serious illnesses such as prostate cancer, heart problems and schizophrenia). His company imported medicines to the value of 1.4 million GBP, while their retail value was 4.7 million GBP,

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43 *Ibid.,* p. 16.

44 *Ibid.,* p. 16.

45 *Counterfeit Medicines and Organised Crime*, *op. cit.,* note 20, p. 93.

46 Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, M., *op. cit.,* note 31, p. 129.

47 Smith, D. C., *Paragons, pariahs, and pirates: A spectrum-based theory of enterprise*, Crime Delinq, 1980, Vol. 26, No. 3, pp. 358–386, According to *Ibid.*, p. 126.

so they gained a profit of 3 million GBP. Counterfeit medicines were transported by sea from China through Hong Kong, Singapore and Belgium, after which they were packed into French medicines which were sold in Great Britain. It was the first bigger case in which counterfeiters used the technique so called parallel distribution, and which fraudulently sold to pharmacies or hospitals 25,000 packets of counterfeit „medicines "containing only 50 to 80% of active ingredients plus impurities of an unknown nature. The perpetrator with partners used the defense that French medicines had been imported from Brussels and that „parallel trading" had been legally practiced, but Chinese was written on the boxes, and they had bought machines to make the labels in French to show that the medicines were from France.[48] Seizure of the packets with counterfeit medicines which were sent from the Netherlands to the United Kingdom uncovered an illegal wholesale business of Dutch suspects who had received medicines from wholesalers from Pakistan and sold them to consumers, suppliers, re-sellers and middlemen and sent to addresses in Holland, Belgium, Germany Denmark and the USA. Packets were sent and received via various mailboxes in various parts of town, and buyers had to make payment to a certain bank account while cash could be sent to various mailboxes.[49] A more recent case of fraud, with money laundering, is in the procurement of 10 million protective face masks valued at 15 million Euros. German Healthcare was tricked when they contracted with two companies in Switzerland and Germany via cloned websites of a legal company in Spain.[50] Furthermore, the company with headquarters in Faenza dealing with sale of paramedic equipment, imported from China in 2020 surgical masks, FFP2 masks[51] protective clothing and glasses, face guards and footwear for tens of millions of Euros free of import fees and VAT, the exemption of which depended on direct delivery exempt from fees to public health institutions in order to combat the pandemic. However, the company placed the goods with another private company which was its mother company, for a higher price and with the falsified documents.[52] A particular way of defrauding exists in e-shopping so in Italy falsified prescription medicines were

48 See Przyswa E., *op. cit.,* note 6, p. 37.

49 Hall, A.; Koenraadt, R.; Antonopoulos, G., *op. cit.,* note 9, p. 304.

50 According to Interpol, frauds in 2020 were organized by criminal groups who orchestrated a complex delivery chains among suppliers in Spain, Ireland and Holland. Also, the well-known case of embezzlement of Italian funds where packets of economic aid for COVID-19 to the value of 45.000 euros was given to a member of 'Ndranghete via a complex scheme of tax fraud, fake invoices and names within the sale of steel sector. See Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, M., *op. cit.,* note 31, p. 126 and Sokanović, L.; Roksandić, S.; Stošić, I., *op. cit.,* note 10, p. 78.

51 Medical masks FFP2 sold to the Emiliji-Romagni hospital were not certificated nor prsuant to penetration parametres of materials for filtriration. V. Sokanović, L., *Krivotvorenje medicinskih proizvoda u vrijeme pandemije: nova tržišta kriminalnih skupina,* Liječničke novine, No.. 208, April 2022, p. 45.

52 Sokanović, L.; Roksandić, S.; Stošić, I., *op. cit.,* note 10, p. 81.

sold by an Internet pharmacy which pretended to have its physical address in the United Kingdom. The criminal network, led by a citizen of India, was located in Switzerland, while the servers were in Canada and the USA. Managing the supply chain functioned by drop-shippers, i.e., people storing articles ready for sending, and who were located in various European countries in order to escape customs inspection, so that for example packages were sent to Italy from Germany while Internet financial operations were carried out in Eastern Europe.[53] Also, an online pharmacy had a Swiss number as a call center for offering medical advice, but calls were answered by six men (four Italians and two French) who carried out criminal activities from a warehouse in Northern Italy.[54] Therefore, cybercriminals pretended they were surgical companies, even medical institutions and the real pandemic, due to digital transformations in healthcare, created the expression „cyber pandemic".[55] The Internet enables complex criminal activities without time and spatial limitations even for smaller groups which otherwise do not have the organizational or financial capacity. Apart from producing fake medicines, organized criminal groups also steal authentic medicines by repackaging them and changing the expiry date thereby selling them again.[56] During the pandemic the number of various thefts of all goods related to the outbreak increased.[57]

The *modus operandi* of organized crime is also an abuse of public funds by taking advantage of national and international aid in big health crises access to public funds which were increased during the pandemic and more speedily paid out, enabled them to infiltrate into the legal economy and increase profits[58] Market globalization has influenced traditionally local or regional criminal groups to expand

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53 Lavorgna, A., *op. cit.,* note 36, p. 233.

54 Medicines in the warehouse worth 3 million euros were confiscated. *Ibid.,* p. 236.

55 Pawluczuk-Bucko, P., *op. cit.,* note 24, p. 77. Illegal online pharmacies are linked to organized crime networks that use unwanted e-mail, spam, viruses/malware/spyware and other cyber security threats that include financial fraud and data theft. Mackey, K. T., Nayyar, G., *Digital danger: a review of the global public health, patient safety and cybersecurity threats posed by illicit online pharmacies*, British Medical Bulletin, 2016, 118, p. 123.

56 See more Riccardi, M.; Dugato M.; Polizzotti, M.; Pecile, V., *The theft of medicines from Italian hospitals,* Transcrime Research in Brief - N.2/2015, Trento. About the theft of the medicine Herceptin from a delivery truck to Italian hospitals and Operation Volcano see more in Kohli, V. P., *Combatting Falsification and Counterfeiting of Medicinal Products in the European Union – A Legal Analysis,* Copenhagen, 2018, pp. 109-118.

57 So were millions of protective masks from airport storage in Kenya protective gloves to the total value of a million dollars from a container in Florida stolen and 200 respirators directed to Columbia while in England during the shortages 150.000 rolls of toilet paper were stolen. See Bešker, I., *Organizirani kriminal okreće se najtraženijoj robi: 'Ovo je sigurnosni izazov generacije'*, Jutarnji list, 4 March 2021., [https://www.jutarnji.hr/vijesti/svijet/organizirani-kriminal], Accessed 25 February 2024.

58 For example, European aid such as Recovery Fund. According to Dellasega, M.; Vorrath, J. *A., op. cit.,* note 25, p. 6.

their operations by creating links with other criminal groups in other regions. Research showed that the production centers are mainly located in South Asia (India and Pakistan), China, Hong Kong, Russia and Latin America, and distribution is in parts of the Middle East, Africa and Central Europe. Transit countries between producers and consumers are Spain, Hungary, Great Britain and the Netherlands where packages are diverted with a higher degree of "legitimacy" for markets in the US and Western Europe.[59]

5. INTERNATIONAL AND NATIONAL LEGAL FRAMEWORKS FOR COMBATTING COUNTERFEIT MEDICINES AND MEDICAL PRODUCTS

Besides the lack of universally acceptable definitions as well as the conflict between the right to public health and intellectual property rights, the increase in the number of fake medicines in both legal and illegal supply chains has led to the establishment of legal frameworks for punishing. Given that the sale of falsified medical products is considered to be in an alarming category of transnational crime for all countries of the most importance of the UN Convention against Transnational Organized Crime (PALERMO convention)[60] which is also applicable to organized criminal groups active in this area.[61] From the criminal law perspective, an important instrument is the Convention of the Council of Europe on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME convention).[62] This criminal law convention forms the foundation for international and national cooperation of judicial and health powers with the aim of protecting all people, particularly the most vulnerable, patients,[63] because it contains incrimination descriptions in art. 5-9 on manufac-

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59 Hall, A.; Koenraadt, R., Antonopoulos, G., *op. cit.,* note 9, p. 303.

60 Official Gazette, International treaties, No. 14/2002.

61 Art. 2a A *»Organized criminal group«* is a structured group of three or more persons, which exists for a certain amount of time and acts in agreement with the aim of committing one or more criminal acts or criminal acts determined on the basis of this Convention, in the aim of directly or indirectly acquiring financial or some other material benefit; art. 2c A *» Structured group«* is a group which is gathered not by chance to directly commit a criminal offense, and which does not need to have to have formally established roles, durability of membership or developed structure.

62 Official Gazette, International treaties, No. 7/2019. Also art. 13 of the Directive 2011/62/EU on counterfeit medical products by the European Parliament and Council of 8 June 2011 on amendments to Directive 2001/83/EZ on the Community Code applicable to medicines for human consumption, in the aim of preventing the entry of falsified medicines in legal supply chain, SL L 174, 1 September 2011. See more Valverde, J. L., *Illegal medicines as threats to public health,* Pharmaceuticals Policy and Law 19, 2017, p. 5.

63 Alarcon-Jimenez, O., *The Medicrime Convention-fighting against counterfeit medicine,* Eurohealth International, Vol. 21, No. 4, 2015, p. 26.

turing, supply and sale of counterfeit medical products as well as punishing abetting, aiding and attempting these criminal activities.[64] An important provision in combating organized crime in this area is regulating aggravating circumstances if the act is committed within a criminal organization (art. 13e). MEDICRIME convention also contains a very important provision on corporate liability (art. 11) the aim of which is to make legal entities liable for counterfeiting products done in their name and for their benefit by anyone in a managerial position within their powers, as well as for misdemeanors committed by any employee or subject agent whenever anyone in a leading position committed omissions in inspection (did not undertake appropriate and reasonable steps to prevent employees and agents from participating in criminal activity in the subject's name).[65] A regional instrument enabling the fight against counterfeiting is also the Council of Europe Cybercrime Convention.[66]

On the basis of the above-mentioned conventions numerous organizations and agencies have been effective in combating medicinal counterfeiting: World Intellectual Property Organization, World Trade Organization, Interpol, Europol, Olaf, EUIPO, etc.[67] A number of actions by international bodies have been undertaken in order to uncover and combat counterfeiting,[68] but, globally most significant are those undertaken by Interpol under the name of Pangea, implemented since 2008. At the very beginning of the COVID-19 pandemic due to the danger of infectiousness, Interpol in March 2020 carried out *Pharmaceutical crime operations* under the name of Pangea XIII in which the police, customs and health bodies of 91 countries participated with the aim of reducing illegal Internet sales of counterfeit medicines and medical equipment.[69] Operation Pangea XIV in May 2021 showed that criminals continued to profit on the demand for personal protection and hygiene products, brought about by the COVID-19 pandemic. Fake COVID-19 tests made up more than half of all seized medical products, resulting

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64 The expression "counterfeit" is really a synonym for a "falsified". The Convention is applicable to medical products regardless of their status pursuant to intellectual property regulations which means it covers generic medicines and that the protection of intellectual property rights is not within that scope. Negri, S., *op. cit.,* note 22, p. 360.

65 *Ibid.,* p. 362.

66 Official Gazette, International treaties, No. 9/2002.

67 In the fight against counterfeit private non-profit organizations are also included such as Global Anti-Counterfeiting Network and Commercial Crime Services-Counterfeiting Intelligence Bureau. Nelson, M.; Chang, D., *op. cit.,* note 8, p. 1099.

68 See more Sokanović, L.; Roksandić, S.; Stošić, I., *op. cit.,* note 10, pp. 77-82.

69 This joint action led to the arrest of 121 people, seizure of disinfectants, surgical masks, sets for COVID-19 testing, various vaccines and antimalaria and antivirus medicines in the total value of 14 million USD and the removal of more than 2500 websites (Internet links, social networks and advertisers). See Kurtović Mišić, A.; Sokanović, L.; Mišić Radanović, N., *op. cit.,* note 2, p. 427.

in 277 arrests around the world, seizure of potentially dangerous medicines to the value of more than 23 million USD and the removal of over 113 thousand Internet websites. In Italy more than 500.000 fake surgical masks were found as well as 35 industrial machines used for the production and packaging of counterfeits.[70] In the operation called Pangea XV in which 94 countries were included, Interpol in 2022 seized more than 3 million units of doping substances and narcotics, including more than 7800 illegal and counterfeit medicines and medical products. Counterfeit medicines are mostly produced in Asian countries and counterfeit stimulants for erectile dysfunction originate from India. More than 4000 websites have been removed containing advertising for illicit products. Almost 3000 packets have been checked as well as 280 postal hubs in airports at borders and postal or cargo mail distribution centers and more than 600 investigations initiated and more than 200 searches. The most significant action of Pangea XV was to stop the activities of at least 36 organized criminal groups. The last operation of Pangea XVI carried out in 89 countries in October 2023 resulted in 72 arrests and 325 investigations for seizing medical products valued at up to 7 million USD and the removal of 1300 websites.[71] Europol's latest undertaking called SHIELD IV (2023) implemented in 30 countries including Croatia resulted in 296 arrests, 1284 persons being charged, investigations into 52 organized criminal groups, removal of 92 websites and seizure of hundreds of thousands of packages of counterfeit medicines with over 12 million tablets and pills, ampoules, raw and doping substances, overall value of 64 million Euros.[72] In breaking criminal groups infiltrated in the legal market, the European Office for combating fraud (OLAF) has an important role and up till May 2020 has already identified more than 340 companies mediating or sellers with falsified or poor quality products linked to the COVID-19 pandemic.[73]

Ratification of the MEDICRIME convention resulted in the implementation of rules on criminal liability for counterfeiting medical products in Croatian criminal legislation. Croatian Criminal Code[74] (hereinafter: CCC) proscribes in art. 185 the act of counterfeiting medicines or medical products which maybe committed by various producers and suppliers. The fundamental form of the act is producing the fake medicine, active substance, auxiliary substance, medical prod-

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70 Available on:
[https://www.interpol.int/Crime], Accessed 15 March 2024.

71 *Ibid.*

72 Available on:
[https://europol.europa.eu], Accessed 15 March 2024.

73 OLAF, Press Release No 16/2020.

74 Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

uct, its constitutive parts or utensils, or the real medicine is changed, its active substance, auxiliary substance or medical product, its constituent parts or utensils. The prescribed punishment is from six months or up to 5 years in prison. The same punishment is for persons procuring or offering to procure, store, import or export, offer for sale whether as if original, falsified or changed medicine, active substance, auxiliary substance, medical product, its constitutive parts or accessories (sec. 2). The most serious act for which a prison sentence from one to eight years is prescribed is for the person who betrays the trust they have as an expert, producer or supplier or who commits the act via means suitable for mass distribution such as informational systems including the Internet (sec. 5).[75] The act is blanket in nature and represents a formal criminal act because finishing the act does not demand creation of consequences in the form of destroying health or the death of one or more persons.[76] An important element of the act is the perpetrator's intention (*dolus*) about the production of the falsified medicine or changing the real medicine.[77] The definition of a falsified medicine is regulated in Medicines Act[78] while the concept of a medical product is determined Medical Products Act.[79] The MEDICRIME convention in article 11 requires governments to regulate the liability of legal entities in case that an individual commits the act for the benefit of the legal entity being in a superior position acting independently or as a part of the body of a legal entity on the base of: a) authority to represent that legal entity; b) authority to make decisions on behalf of that legal entity; c) authority to monitor and supervise within the legal entity.[80] Croatian criminal legislation

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75 Making fake or changing original internal or external packaging of a medicine or medical product, the summary of contents, description of medicine, directions for usage, documentation on active or auxiliary substances is punishable by prison sentence of up to 3 years (art. 185 sec. 3). Attempting a criminal act is punishable and the products and means of manufacture will be mandatorily seized.

76 The act will be commensurate with acts against life and body or with the criminal act of unconscientious treatment (art. 181 CCC) or with the criminal act of spreading and transmitting infectious diseas (art. 180 CCC). Sokanović, L.; Roksandić, S.; Stošić, I., *op. cit.,* note 10, p. 76.

77 Pavlović, Š., *Kazneni zakon*, Rijeka, 2015, p. 863. According to some authors, the possibility of negligence is not completely excluded for the criminal acts contained in the MEDICRIME Convention. See Novaković, F., *Substantive Criminal Law of the Medicrime Convention and the Criminal Legislature of Bosnia and Herzegovina, The Ratio of Harmony and Disharmony*, Journal of the Bar Association of Vojvodina, 3, 2023, p. 1045.

78 Art. 3. section 1. t. 49., Official Gazette, No. 76/13, 90/14, 100/18.

79 Art. 3. t. 1.

80 This relates to cases in which the legal entity can be responsible when the lack of supervision or control on the part of stated physical persons enabled commission of the criminal act established pursuant to the convention on benefit of the legal entity. See more Mišić Radanović, N., *The liability of legal entities for criminal acts in Croatian court practice*, 36th International Scientific Conference on Economic and Social Development – "Building Resilient Society", 2018. pp. 225.-235. and Sabia, R., *Prosecuting corporations for international crimes: in search of new perspectives?* RIDP, Vol. 93, No. 1, 2022, pp. 209-229.

regulates that the perpetrators of the criminal act of counterfeiting medicines or medical products can also be legal entities such as manufacturers and suppliers of medicines and medical products[81] and that participants in Internet sales (distance) of medicines issued without a recipe.[82] Special rules for criminal liability of legal companies in the Republic of Croatia are regulated by Law on Liability of Legal Persons for Criminal Offenses[83] while the PALERMO convention is implemented in the provisions of CCC on the liability of criminal organizations. Provisions art. 328 and 329 CCC provide for liability for organizing leading or committing a criminal act within such a criminal association. A criminal association is made up of a minimum of three persons colluding with the common aim of one or more criminal acts, for which they can be sentenced to prison for 3 or more years which does not include the association of persons by chance linked to directly committing a criminal act.[84] Art. 329. sec. 1. CCC prescribes a more serious punishment for persons who aware of the criminal aim of the association or its criminal activity commit a criminal act within such an association or incite another to commit a criminal act within such an association.[85] Therefore, the Republic of Croatia has the legal instruments to combat organized criminal networks active in the area of counterfeiting medical products and which enable prosecution of legal entities which are just a cover for organized crime and only at first glance function pursuant to regulations, but in the background commit crimes.[86]

6. DIFFICULTIES IN DETECTING AND PROSECUTING COUNTERFEITERS' CRIMINAL NETWORKS

Counterfeiting is very profitable, but a very low risk criminal activity, because uncovering is difficult for a number of reasons. Criminal organizations are difficult to identify, especially if linked to „white collar "crime and are infiltrated into the legal environment. Counterfeiting any kind of good is organized as a complex and coordinated network of several criminals who undertake constant and long-lasting illegal activities. A counterfeiter whose *modus operandi* is that

81 Art. 135. sec. 1. of the Medicines Act., Official Gazette, No. 76/13, 90/14, 100/18.

82 Art. 136 sec. 1. of the Medicines Act. In the aim of protecting consumers from counterfeit medicines a common logo has been introduced for Internet pharmacies in the European Union. Bilić Paulić, M., *op. cit.,* note 2.

83 Official Gazette No. 151/03, 110/07, 45/11, 143/12, 114/22, 114/23.

84 Art. 328. sec. 4. Croatian Criminal Code.

85 According to sec. 2. of this article, aider and abetter can be punished more lightly.

86 On possibilities of widening the application of the theoretical concept and legal figure of the organized power apparatus see Vuletić, I., *Dometi koncepta "organiziranog aparata moći",* Hrvatski ljetopis za kazneno pravo i praksu, vol. 21, 1, 2014, pp. 23-38, and Novoselec, P.; Martinović, I.*, Komentar Kaznenog zakona, I. knjiga: Opći dio,* Zagreb, 2019, p. 277.

a large number of little packages are sent from one EU member state to another EU member state is very difficult to uncover and stop.[87] Investigations are made more difficult in all systems of decentralized factories such as for example Chinese, as it involves a complex labyrinth with innumerous middlemen and suppliers.[88] The use of the Internet modifies the organizational level of the criminal network so that newcomers are enabling to join the chain of counterfeits as local or even international retailers, which facilitates relations among perpetrators and their contact with clients.[89] The illegal sale of medical products via Internet sites is difficult to detect because it is often the result of fraud by manipulating websites. Difficulties in revealing counterfeit medicines lie in finding out where and when sub networks can be incorporated with each other or even mutate so that various groups are included, from Chinese manufacturers, smugglers, wholesalers from the pharmaceutical sector, corrupted customs officers, Chinese or Russian soldiers, cyber criminals, „white collar" criminals, mafias and so on.[90] Internationalization of illegal networks together with the decentralization of operative cells has led to the widening of criminal activity.[91] Due to so-called delocalization, it is difficult to identify criminal organizations while their close connections make them transnational networks. However, empirical data in some research show that the networks and participants involved in trade are very flexible and complex structures existing in both permissible and non-permissible categories, online and offline, both global and local. The operation of the supply of non-allowable medicines mostly differentiates in the sense of size, scope, organization and legality.[92] Organization of counterfeiting can be described as "individual's puzzle", members of closely connected groups, family and friends working as teams located in various geographical locations. This smuggling network includes various individuals or teams in close contact who play various roles from managing warehouse and packaging units, redirecting posted packets, transport, right up to maintaining informational services used for online advertising and sales and managing companies used as fronts for something else.[93]

Organized criminal groups also use different usual violent methods of extortion, intimidation, blackmail, and violence against public officials in charge of detection.[94]

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87 Sokanović, L., *op. cit.,* note 51, p. 46.

88 Przyswa E., *op. cit.,* note 6, p. 51.

89 Lavorgna, A., *op. cit.,* note 36, p. 228.

90 Przyswa E., *op. cit.,* note 6, p. 77.

91 *Counterfeit Medicines and Organised Crime*, *op. cit.* note 20, p. 89.

92 Hall, A.; Koenraadt, R.; Antonopoulos, G., *op. cit.,* note 9, p. 296.

93 *Ibid,* p. 309.

94 Example, attacks on director of Nigerian National Agency for Food and Drugs Administration and Control. Cit. *Counterfeit Medicines and Organised Crime*, *op. cit.* note 20,

Victims of counterfeiting probably will not suspect that they are using fake medicines. Packaging is quickly thrown away, and medicines cannot be detected in the bloodstream after a few days and "the evidence is destroyed as soon as it is swallowed or injected." Not even the very victims who, for the most part, are not even aware of the risks of on-line shopping do not want to reveal that they bought medicines without a prescription via the Internet.[95] Moreover, there is a lack of public awareness about counterfeit medical products[96] and it is believed that illegal medicines are crimes without victims.[97] One of the reasons is payment by cash to avoid banking systems by virtual currencies such as Bitcoin. Thereby, following money traces is made more difficult, particularly if cyber money laundering of huge amounts of money atomizes, that is, change into so called. *micro dust* so that money is quickly transferred through thousands electronic transactions.[98] Also, organized crime has a lot of capital for corruption of state and local entities, eg. for bribing customs officers at border controls. Finally, listed as factors impeding the fight against counterfeiting medical products are a lack of or deficiency in normative national regulation on the production of medicines and distribution, mechanisms for implementing regulations, insufficient international cooperation and mild penalties for counterfeiting.[99]

7. SOCIAL, ECONOMIC, AND POLITICAL CONSEQUENCES OF PROFIT ACQUIRED BY COUNTERFEITING MEDICAL PRODUCTS

The danger of organized crime in the area of counterfeit medical products emerges from its far reaching social, political, and economic consequences. Harmful consequences are reflected in the violation of Fundamental Human Rights - right to life, right to health, quality and trust in the health system and in the grave danger to global and national security. Counterfeiting medicines, vaccines and other medical products also lead to fatal consequences, because some fake medicines contain lead, arsenic, rat poison or cement.[100] Organized crime immanently widens the scope of its influence and power precisely in times of social crisis whereby it gains the political support of local communities and widens its influence to central powers. This was evident during the COVID-19 pandemic in organized criminal groups offering to

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95 Blackstone, A. E.; Fuhr, P. J. Jr.; Pociask, S., *op. cit.,* note 11, p. 220.

96 Slak, B.; Frangež. D., *Detection and Investigation of Counterfeit Medical Products in Slovenia,* Kriminologijos studijos, 2022, Vol. 10, pp. 8-29.

97 See more Valverde, J. L., *op. cit.,* note 62, p. 8.

98 See Pavlović Š., *Komentar Zakona o sprječavanju pranja novca i financiranja terorizma*, Rijeka, 2018, p. 553.

99 More about profitability, low risk of detection and light penalties in *OECD/EUIPO Trade in Counterfeit Pharmaceutical Products, Illicit Trade,* 2020, pp. 52-56.

100 Pawluczuk-Bucko, P., *op. cit.,* note 24.

help those at risk and in need.[101] Thus in Japan after declaring a state of emergency Yakuze immediately sent help, and in their attempt that the Japanese government saw them as a legitimate speaker offered to disinfect the Diamond Princess cruiser, blocked in the Yokohama.[102] At the same time, Mexican drug traffickers published pictures of packets being distributed of food with their logo or sticker while other narco-cartels posted online videotapes in which their members were handing out food parcels.[103] Thus, the pandemic certainly strengthened the social influence of organized crime in the public sphere.[104] This well-known "Robin Hood myth" increases the power and social acceptance of gangs and narco-cartels, assisting them to include civil society and government in supporting their criminal operations.[105]

Times of economic crisis and disorders in economic functioning are significant criminogenic factors, so the economic consequences are linked to the so called parallel economy (gray and black zones) in which organized crime invests criminal money in legal economic entities, for example, buying companies, restaurants and hotels whose owners are at risk of bankruptcy or financial difficulties.[106] Such infiltrations of accumulated profits violate market rules and since counterfeiters do not pay taxes or import/export duties, states have less income, all of which slows down economic growth.[107] The black market of counterfeiting is an underground economy characterized by tax evasion. The consequences of counterfeiting are the violation of intellectual property rights, non-compliance with basic standards of health safety and product quality,[108] and the victims of counterfeiting, in addition to patients and consumers, are also the pharmaceutical industry.

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101 In Southern Italy, the shaken economy in battling the coronavirus was a vacuum for organized crime. D'Ignoti, S., *Mafia, Poverty, and the Pandemic,* 2020.

102 Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, *op. cit.,* note 31, p. 128.

103 Example, Cártel del Golfo printed the 'CDG' logo on aid packets or sealed them with stickers on which was written: "Gulf Cartel, in support of Ciudad Victoria, Mr. 46, Vaquero" and Mr. 46 is pseudonym of the leader of the Cártel del Golfo group. *Ibid.,* p. 125.

104 In the same way the Italian mafia and Japanese yakuze strengthen after the First World War. Muggah, R., *op. cit.,* note 23.

105 Gomez, T. C., *op. cit.,* note 30, p. 13.

106 Pawluczuk-Bucko, P., *op. cit.,* note 24, p.78. Economic areas which are vulnerable due to financial difficulty are tourism, hospitality, transport, esthetic services, art and entertainment and recreation. According to Aziani, A.; Bertoni, A. G.; Jofre, M.; Riccardi, M., *op. cit.,* note 31, p. 129.

107 Nelson, M.; Chang, D., *op. cit.,* note 8, p. 1072. Al Capone, who was convicted of tax evasion in 1931, discovered that the statement "They can't collect legal taxes from illegal money" was wrong. Available on [https://www.forbes.com/sites/kellyphillipserb/2018/10/17].

108 Nelson, M.; Chang, D., *op. cit.,* note 8, p. 1072. and Verfaillie, K.; Beken, T. V., *Proactive policing and the assessment of organized crime,* Policing: An International Journal of Police Strategies & Management, 31(4), 2008, pp. 534-552.

The illegal market for counterfeit pharmaceuticals offers an additional way for criminal groups to launder money and finance other illegal activities.[109] Given the centrality of money laundering in the operations of criminal organizations, it is a task that must be equally central in the fight against organized crime.[110] Organized crime gains political support and power through corruption and deals between the political and criminal spheres, i.e. aboveground and underground. For example, political decision makers protect certain criminal groups in exchange for financial support in election campaigns.[111] Profit gained from organized crime serves to bribe all three branches of government with the aim of enabling criminal activities of organized groups and protection from being uncovered and prosecuted. Furthermore, it is not necessary to specifically prove the close connection between the counterfeiting of all types of goods and the weapon trafficking and terrorism. In addition to financing from legal sources, the activity of terrorist associations[112] is financed by the assets gained by the commission of predicate criminal acts.[113] Acquired profit is reinvested in buying weapons which then are sold at higher prices to terrorist organizations, whereby profit increases even more and at the same time finances terrorism. Counterfeiting of medical products is also engaged in by terrorist organizations, for example the Lebanese Hezbollah, which released over 10 tons of dangerous pills for the treatment of sexual disorders on the market and earned hundreds of millions of dollars.[114]

8. INSTEAD OF A CONCLUSION: SUGGESTIONS *DE LEGE FERENDA*

Given that organized crime is constantly finding and changing the best methods and ways to acquire profit and power, the widespread and fatality of counterfeit medical products on the part of organized criminal association has to worry all of humanity. Regardless of whether it concerns intellectual property crime, cy-

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109 *Counterfeit Medicines and Organised Crime*, *op. cit.* note 20, p. 90. According to the Europol report (EMPACT 2022 – 2025), almost 70% of criminal groups in EU use money laundering.

110 Keatinge, T., *Money Laundering: The Beating Heart of Organised Crime*, 27 November 2023, [https://rusi.org/explore-our-research/publications/commentary/money-laundering-beating-heart-organised-crime], Accessed 7 March 2024.

111 Dellasega, M.; Vorrath, J. *A., op. cit.,* note 25, p. 6.

112 The terms terrorist and terrorist group or organization are defined in art. 3. of Act on Prevention of Money Laundering and Financing of Terrorism, Official Gazette No. 108/17, 39/19, 151/22.

113 Pavlović Š., *op. cit.,* note 98, p. 19. Interpol believes that profits from counterfeit medicines goes to terrorist organizations, including Al Qaida. See Attaran, A.; Bate, R.; Kendall, M., *op. cit.,* note 7, p. 4.

114 The terrorist organization Real IRA is also involved in the counterfeiting of medicines. According to Cannon, T. D., *War Through Pharmaceuticals: How Terrorist Organizations Are Turning to Counterfeit Medicine to Fund Their Illicit Activity*, 47 Case W. Res. J. Int'l L. 343, 2015, p. 357.

bercrime, white collar crime, it is about organized crime which is transnational. Due to the connection of criminal networks over various continents, cross-border organized crime can also be called transcontinental. Counterfeiting of medical products is a threat to lives, health and security and economic and social development. Due to its close connection to economic crime, corruption, money laundering, and especially direct and indirect links to terrorism with the proliferation of weapons of mass destruction it is a great risk and threat to global security and world peace. Corruption, money laundering and terrorism destroy every political system. All of the stated crimes really deserve the name of international crime, that is, crimes against the whole international community. Not one state has enough resources and the capacity to defend itself from the problem of complex cross-border operations with many middlepersons organized in well structured, flexible, and operative networks of counterfeiters, especially in the in the virtual world. The efficiency of the prosecution terrorism, corruption and money laundering also depends on the uncovering the falsified medical product as a predicate offense. Therefore, several additional measures could be taken which would intensify the fight against this type of organized crime. In the area of conventions instruments, it would be necessary in the PALERMO convention to establish criminalization of falsifying medical products. Such additional responsibility would ensure extradition or criminal prosecution according to the principle of *aut dedere aut punire* and the principle of universal jurisdiction. At the national level, it is necessary to improve criminal law mechanisms, for example in art. 185 of the CCC, following the French solution, to prescribe more severe punishment if the falsification of medical products is perpetrated by criminal groups. Following the example of the Austrian solution, it would be desirable to introduce stricter punishment into art. 192. CCC as a grievous criminal offense against human health in cases where the counterfeit medicine led to health impairment, serious bodily injury, pregnancy termination or the death of one or more persons. In the fight against illegal profits gained by counterfeiting which then finances terrorism, it would be good if in Art. 265 of the CCC prescribes as a qualified form of money laundering if the perpetrator acts knowing that the money is from a terrorist or a terrorist organization. Also, it is extremely important to intensify the application of the instrument extended confiscation of proceeds of crime from individuals and legal entities participating in an organized chain of counterfeiting medical products.

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Review article

THE PRINCIPLE OF MUTUAL TRUST IN JUDICIAL COOPERATION: A REALITY OR AN UNATTAINABLE IDEAL IN CRIMINAL MATTERS BETWEEN EU MEMBER STATES?

Ena Gotovuša, PhD Candidate, Senior Teaching and Research Assistant
University of Sarajevo, Faculty of Law
Obala Kulina bana 7, 71000 Sarajevo, Bosnia and Herzegovina
e.gotovusa@pfsa.unsa.ba

ABSTRACT

The principle of mutual recognition of judicial decisions among Member States was proclaimed as the cornerstone of judicial cooperation in criminal matters at the Tampere meeting in 1999. The implementation of this substantial and legally binding principle of EU primary law, since the entry of the Lisbon Treaty, is unattainable without a high level of mutual trust among Member States. The concept of mutual trust, crucial for enacting the principle of mutual recognition in criminal matters between Member States, lacks precision, yet the jurisprudence of the CJEU to some extent clarifies its boundaries. Starting with the logical presumption that all Member States, as outlined in the TEU, share common values of the European Union, including the rule of law and respect for human rights, a high level of mutual trust between Member States should be unquestionable. Consequently, judicial cooperation in criminal matters should operate seamlessly. However, CJEU decisions regarding the implementation of legal instruments of secondary EU law, based on principle of mutual recognition, such as the European Arrest Warrant (EAW) and the European Investigation Order (EIO), challenge this presumption. In the paper, the author scrutinizes CJEU jurisprudence, investigating shifts in stance on whether the principle of mutual trust constitutes an irrebuttable or rebuttable presumption in EU law. Special consideration is given to questions that arise in both cases. The author examines into pro and contra arguments of mutual trust as irrebuttable or rebuttable presumption in EU law, and its effects. Firstly, from the aspect that mutual trust between Member States, as irrebuttable presumption, reaffirms supremacy of secondary EU law and consequently primacy of EU law over national laws of Member States. Secondly, if the mutual trust between Member States in criminal matters is a rebuttable presumption, the decisions of CJEU show weak points of EU law in this area and they should be used as corrective measure to achieve overall aim of European Union: shared common values. In the paper, author emphasizes that all actions undertaken by EU are not strictly legal nature, but rather they are influenced by political decisions.

Keywords*: CJEU, EAW, EIO, judicial cooperation in criminal matters in EU, principle of mutual trust*

1. MUTUAL TRUST: ESSENTIAL FOR IMPLEMENTING THE PRINCIPLE OF MUTUAL RECOGNITION IN EU CRIMINAL MATTERS

October 2024 will mark 25 years since the Tampere meeting in 1999, where mutual recognition was declared the cornerstone of EU criminal justice cooperation.[1] Over the course of years, this principle has been fortified through strategic political documents issued by the European Council, with a focus on further developing the area of freedom, security, and justice within the European Union (AFSJ). With this objective in mind and building upon the Tampere Conclusions, the European Council adopted multiannual agendas: the Hague[2] and Stockholm[3] Programme. Both programmes emphasize the need for strengthening the implementation of the principle of mutual recognition of judgments and judicial decisions among Member States throughout all stages of criminal proceedings or in areas pertinent to such proceedings, as an appropriate strategy to address cross-border crimes within the EU. While the Tampere Conclusions do not address mutual trust, the Hague and Stockholm Programs explicitly highlight mutual trust among Member States as prerequisite for efficient judicial cooperation in criminal matters based on principle of mutual recognition.[4] Since the entry into force of the Lisbon Treaty in December 2009, the principle of mutual recognition of judgments and judicial decisions has become a legally binding principle of judicial cooperation in criminal matters (Article 82(1) of the TFEU) and one of the fundamental principles through which the EU ensures AFSJ (Article 67(3) of the TFEU).[5]

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1 Tampere European Council 15 and 16 october 1999, Presidency conclusions. It is important to emphasize that the principle of mutual recognition is not new to EU law, originating in the CJEU's internal market jurisprudence, specifically in the landmark *Cassis de Dijon* case. In this case, the CJEU established that goods lawfully produced and marketed in one Member State should be allowed to enter the market of any other Member State, and that such products may not be subjected to legal prohibitions based on national rules, such as those concerning alcohol content in beverages. This foundational judgment has profoundly influenced the evolution of mutual recognition within EU law, extending its application to judicial cooperation in criminal matters. For more on mutual recognition in the internal market, see C120/78 *Rewe-Zentrale v Bundesverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECLI:EU:C:1979:42, par. 14; Auke, W., *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing, Oxford, 2021, pp. 42-43; Xanthopoulou, E., *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, 1st ed., Hart Publishing, Oxford, 2020, pp. 12-15.

2 The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C53 (The Hague Programme).

3 The Stockholm Programme — An open and secure Europe serving and protecting citizens [2010] OJ C115 (The Stockholm Programme).

4 The Hague Programme, *op. cit.,* note 2, pp. 11-12; The Stockholm Programme, *op. cit.,* note 3, pp. 11-12.

5 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

The definition of the principle of mutual recognition, as leading principle of judicial cooperation in criminal matters within the EU, predates Lisbon Treaty. In its Communication on mutual recognition of final decisions in criminal matters, Commission defines mutual recognition "as a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state."[6] Mutal trust among Member States is crucial element of cited definition and has two aspects: 1) trust in the adequacy of each other's rules and 2) trust that they will be correctly applied.[7] Nevertheless, the concept of mutual trust, crucial for enacting the principle of mutual recognition in criminal matters between Member States, lacks precision. How can mutual trust be defined? Does mutual trust imply blind faith, where one believes in the actions of others without any reservations and expects the same in return, or mutual trust can be subject to questioning? If so, what serves as a reference point for such questioning? In the realm of judicial cooperation in criminal matters, primary EU law, notably the shared values enshrined in Article 2 TEU and the Charter of Fundamental Rights of the European Union (the Charter), can act as a reference point for evaluating mutual trust between Member States. It is reasonable to presume that upon joining the EU, all Member States are committed to embracing, respecting, and promoting a shared set of common values outlined in Article 2 of the Treaty on European Union (TEU), upon which the EU is founded. This presumption equally applies to the Charter, which, since the entry into force of the Lisbon Treaty, holds the same legal status as the Founding Treaties (Article 6(1) TEU). Consequently, there should be no dispute among Member States when implementing secondary EU law (e.g. directives or regulations), as it must be adopted and aligned with primary EU law. Put simply, if all Member States fully comply with primary EU law, any doubts about mutual trust issues would vanish. Naturally, this compliance also extends to the application of secondary EU law based on mutual recognition. In the criminal justice area of the EU, this is a challenging endeavor, as Member States have not embraced the unification of law.[8] Hence, the presumption of mutual trust among Member States exists to create a legal fiction that all Member States act in accordance with primary EU law. By doing so, this legal fiction supports the implementation of secondary EU law, which

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6 Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM/2000/0495 final, p. 4.

7 *Ibid*.

8 Mitsilegas, V., *EU Criminal Law after Lisbon*: *Rights, Trust and the Transformation of Justice in Europe*, 1st ed., Hart Publishing, Oxford, 2016, pp. 125-126; Mitsilegas, V., *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness Based on Earned Trust*, Revista Brasileira de Direito Processual Penal, Vol. 5, No. 2, 2019, p. 568; Armada, I.;Weyembergh, A., *The mutual recognition principle and EU criminal law*, in: Fletcher, M.; Herlin-Karnell, E.; Matera, C. (eds.), The European Union as an Area of Freedom, Security and Justice, Abingdon, Routledge, 2017, 116-117.

is based on the principle of mutual recognition, ensuring its uniform application and reaffirming its supremacy over the national legislation of Member States. The key question in this legal construct is whether presumed mutual trust is an irrebuttable or a rebuttable presumption. The answer can be found via review of jurisprudence of the CJEU in cases involving the implementation of secondary EU law instruments based on the principle of mutual recognition, such as the European Arrest Warrant (EAW) and the European Investigation Order (EIO).

Before examining the CJEU's judgments in relevant cases concerning the implementation of the EAW and the EIO, this paper provides a brief review of the CJEU's initial approach to mutual trust in a *ne bis in idem* cases, demonstrating the importance of mutual trust principle for judicial cooperation in criminal matters among Member States in the EU.

2. BLIND MUTUAL TRUST AMONG MEMBER STATES IN CRIMINAL MATTERS AS THE GUARDIAN OF EU LAW SUPREMACY

The CJEU established itself as a strong proponent of the principle of mutual trust, a fundamental element for mutual recognition of judgments, even before it was formally codified in the Lisbon Treaty. Despite its limited jurisdiction under the Amsterdam Treaty, as well as during the five-year transitional period after the Lisbon Treaty came into force, the CJEU effectively promoted the principle of mutual trust as a crucial one for cooperation in this field. In its landmark ruling in the joined cases *Hüseyin Gözütok and Klaus Brügge*[9], the CJEU justified broad interpretation of the Article 54 of the CISA[10] (*ne bis in idem* principle) particularly on the mutual trust among Member States. The main question in these joined cases revolved around identifying whether the *ne bis in idem* principle applies when the prosecuting authority opts to terminate criminal proceedings after the accused fulfills specific obligations, such as the payment of a predetermined sum by the prosecuting authority, without any court involvement in the process. Following, in a detailed explanation of why the lack of court involvement and consequently absence of a judicial decision is not contrary to the Article 54 of the CISA, the CJEU underlines the necessity of Member States to have "mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own

[9] C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECLI:EU:C:2003:87.

[10] Under Protocol 2 of the Amsterdam Treaty, the Schengen *acquis* was integrated into the legal framework of the European Union. See Protocol 2 integrating the Schengen acquis into the framework of the European Union, Treaty of Amsterdam, OJ C 340/1/, pp. 93-96.

national law were applied."[11] Therefore, the CJEU ruled that the *ne bis in idem* principle, as outlined in Article 54 of the CISA, also applies in the aforementioned situation. It seemed that the CJEU left this position in *Spasic*[12] case, in which it confirmed the compatibility of Article 50 Charter with Article 54 of the CISA, without making a reference to the mutual trust principle among Member States. Nevertheless, subsequent rulings indicate an expansion of the mutual trust principle. In the judgment in the *M.* case[13], delivered just a few days after the *Spasic* judgment, the CJEU reaffirmed its position from the *Hüseyin Gözütok and Klaus Brügge* cases and concluded that mutual trust extends not only to final judgments disposing of a case against a person but also to decisions made by authorities not to proceed with a case to trial, known as 'non-lieu' decisions. The CJEU reiterated its settled case law in recent judgments, but it also provided further guidelines for interpretation of the Article 54 of the CISA read in in the light of Article 50 of the Charter regarding the assessment of the "*idem*" requirement of the principle *ne bis in idem* (C-726/21)[14], as well as conditions under which this principle can be triggered due to the lack of sufficient evidence (C-147/22)[15].

The CJEU extended the presumption of mutual trust established in *Gözütok and Brügge* cases to the context of the new legal instrument - Framework Decision 2002/584/JHA (FD EAW)[16]. FD EAW adopted in 2002, entered into force in 2004, established the EAW as the first legal instrument to operationalize the principle of mutual recognition in EU's criminal matters.[17] The EAW was established with the purpose to replace the traditional extradition system reliant on the principle of mu-

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11 C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECLI:EU:C:2003:87, par. 33.

12 Article 50 of the Charter guarantees that individuals who have been finally acquitted or convicted cannot be tried or punished again for the same offense. However, under Article 54 of the CISA, this right is conditional upon the penalty having been enforced, being in the process of enforcement, or no longer being enforceable under the laws of the sentencing Contracting Party. In the Spasic case, the European Court of Justice was asked to determine whether this enforcement condition is compatible with the Charter. See C-129/14 PPU *Spasic* [2014] ECLI:EU:C:2014:586.

13 Case C-398/12 *M.* [2003] ECLI:EU:C:2014:1057.

14 C-726/21 *Inter Consulting* [2023] ECLI:EU:C:2023:764. See Wahl, T., *ECJ Clarifies Assessment of "idem" Requirement, 2023,* [https://eucrim.eu/news/ecj-clarifies-assessment-of-idem-requirement/], Accessed 2 April 2024.

15 C-147/22 *Terhelt5 v Központi Nyomozó Főügyészség* [2023] ECLI:EU:C:2023:790. See Wahl, T., *ECJ: Public Prosecutor's Order to Discontinue Proceedings due to Lack of Evidence Triggers ne bis in idem Rule, 2024,* [https://eucrim.eu/news/ecj-public-prosecutors-order-to-discontinue-proceedings-due-to-lack-of-evidence-triggers-ne-bis-in-idem-rule/], Accessed 2 April 2024.

16 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190 (FD EAW).

17 Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, Cham, 2017, pp. 61-63; Auke, W., *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing, Oxford, 2021, pp. 53, 57.

tual legal assistance and based on numerous multilateral conventions, by introducing a new simplified extradition system at EU level. By creating a new mechanism, which functions directly between judicial authorities of Member States, the EAW simplifies and facilitates the process of surrender of criminals within EU. The intention of the EU's legislator is evident from Recital 5 of the Preamble of FD EAW: it aims to replace all cumbersome and outdated traditional extradition cooperation instruments with a system that enables the free movement of both pre-trial and final judicial decisions in criminal matters within the AFSJ. This is aligned with the broader objective for establishing an the AFSJ within the EU. Unlike the Hague and Stockholm Programs, which view ensuring mutual trust as an ongoing process requiring further strengthening, the FD EAW asserts it as an already existing, established, fact: "The mechanism of the European arrest warrant is based on a high level of confidence between Member States."[18] While it should be self-evident that a high level of confidence among Member States originates from their adherence to primary EU law, the FD EAW emphasizes this as one of the obligations. Specifically, Recitals 10 and 12 of the Preamble and Article 1(3) of the FD EAW stress the requirement for Member States to respect fundamental rights and legal principles enshrined in Article 6 TEU. The focus on human rights protection within the FD EAW suggests that the EU legislator may have anticipated that potential challenges in its implementation would revolve around the extent and scope of safeguarding human rights and fundamental freedoms. This assertion is supported by rulings from the CJEU in cases such as *Advocaten voor de Wereld*[19], *Radu*[20], *Melloni*[21], and *Aranyosi and Căldăraru*[22]. However, it's worth noting that the CJEU ruling in the latter case (*Aranyosi and Căldăraru*) significantly differs from those in the three preceding cases. In all four rulings in the aforementioned cases, the CJEU made a reference to the mutual trust among Member States, affirming it as the underlying concept for the implementation of the principle of mutual recognition. In its judgment in the case *Advocaten voor de Wereld*, which addressed the exclusion of the verification of double criminality for 32 categories of offenses, the CJEU stated that the selection of the categories of offenses listed in Article 2(2) of the FD EAW was made "on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States" considering nature of the criminal offences.[23] Hence, the CJEU ruled that Article 2(2) does not contravene Article 6(2) TEU, or,

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18 Recital 5 of the Preamble of FD EAW. On this topic see: Auke, W., *op. cit.,* note 17, p. 119.

19 C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.

20 C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39.

21 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107.

22 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

23 C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261, par. 57.

more specifically, the principle of legality of criminal offenses and penalties or the principle of equality and non-discrimination. The importance of mutual confidence[24] among Member States as a prerequisite for implementing the principle of mutual recognition, and consequently, upholding the supremacy of EU law, was once again underscored in the *Radu* case. Notably, this case marked the first instance where the CJEU, after the Charter became primary EU law, considered whether EAW could be refused on fundamental rights grounds. In particular, referring court referred the question to the CJEU: whether FD EAW, interpreted in light of relevant articles of the Charter (Articles 47 and 48) and the ECHR (Article 6), must be interpreted as allowing the executing judicial authorities to refuse the execution of an EAW issued for the purpose of conducting a criminal prosecution if the requested person was not heard by the issuing judicial authorities before its issuance. The CJEU answered negatively and in its ruling took a firm stance that the execution of the EAW can only be refused on the grounds specified in Article 3 (mandatory grounds for non-execution of the EAW) and Articles 4 and 4a of the FD EAW (optional grounds for non-execution of the EAW).[25] The right of the requested person to be heard prior to arrest is neither listed as one of the mandatory nor optional grounds upon which executing judicial authorities can refuse to execute an issued EAW. Moreover, contrary to Mr. Radu's arguments that this right is guaranteed under provisions Articles 47 and 48 of the Charter (primary EU law), the CJEU argues that enforcing such an obligation "would inevitably lead to the failure of the very system of surrender provided for by" the FD EAW and, "consequently, prevent the achievement" of the AFSJ.[26] Therefore, the EAW must maintain an element of surprise to effectively prevent the requested person from fleeing.[27] The CJEU's prioritization of effectiveness of judicial cooperation, based on mutual trust and recognition, in the *Radu* case drew disappointment from scholars, who saw it as overshadowing the protection of fundamental rights.[28] The mutual trust as an irrebuttable presumption was reaffirmed in the subsequent judgment in the *Melloni* case. The CJEU held that Article 53 of the Charter does not allow Member States to prioritize their national constitutions over EU law regarding fundamental rights.[29] This applies even in cases where the national constitution

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[24] It's worth noting the difference in wording between the FD EAW and the CJEU's judgment in the *Radu* case. Whereas recital 10 of the FD EAW declares a high level of confidence between Member States as an established fact, paragraph 34 of the CJEU's judgment in the *Radu* case emphasizes that a high degree of confidence "should exist between the Member States."

[25] C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39, par. 36.

[26] C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39, par. 40.

[27] *Ibid.*

[28] See: Auke, W., *op. cit.,* note 17, pp. 91-92 ; Peers, S., *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law*, 4th ed., Oxford University Press, Oxford, 2016, pp. 100-101; Satzger, H., *International and European Criminal Law*, 2nd ed., C.H. Beck/Hart/Nomos, Munchen, 2018, p. 56.

[29] C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 56.

provides a higher standard of protection regarding guarantees for EAWs issued after trials conducted *in absentia*. Otherwise, interpreting Article 53 of the Charter differently would undermine the supremacy of EU law.[30] This is because it would allow Member States to disregard secondary EU law (FD EAW), which is fully in line with the primary EU law (the Charter), in instances where its provisions conflict with the constitutional guarantees of Member States. As a result, this would prompt scrutiny into the uniformity of the standard of fundamental rights protection as defined in the FD EAW, undermining the principles of mutual trust and recognition that the FD EAW aims to reinforce, and consequently, diminishing its effectiveness.[31]

The CJEU remained a strong defender of mutual trust as an irrebuttable presumption. In its *Opinion 2/13*[32] regarding the Draft agreement on the accession of the European Union to the European Convention of Human Rights, the CJEU once again reiterated that the mutual trust is of fundamental importance in EU law for creating and maintaining the AFSJ.

In line with its prior rulings, including the ruling in the *Melloni* case, the CJEU reaffirmed that the principle of mutual trust requires from each Member State, save in exceptional circumstances, to uphold EU law, particularly regarding fundamental rights enshrined within it. This obligation to adhere to EU law presupposes a reciprocal presumption among Member States that they all comply with EU law.[33] Therefore, when implementing EU law, each Member State must generally assume that all other Member States respect fundamental rights according to EU law. Consequently, it cannot request a higher national protection standard from others than what EU law sets forth. Additionally, save in exceptional circumstances, Member States cannot verify whether the other Member State has indeed respected the fundamental rights guaranteed by the EU law in a specific case.[34] From Opinion 2/13, it follows that the concept of mutual trust stems from the premise that all Member States share and recognize a set of common values delineated in Article 2 TEU. Taking this premise as true, the mutual trust is justified and unquestionable, as well as primacy of EU law envisaged for its implementation.[35] Therefore, the CJEU concluded that Draft agreement on the accession of the EU to the ECHR, *inter alia*, is incompatible with Article 6(2) TEU or with Protocol No 8 EU because it could negatively affect on "the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article

30 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 58.

31 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 60.

32 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454.

33 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 191.

34 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 192.

35 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 166-168.

53 of the Charter".[36] More importantly, the Draft "does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined". [37]

From the perspective of the CJEU, as evidenced by its case law and *Opinion 2/13*, mutual trust among Member States is regarded as an irrebuttable presumption.[38] This presumption comes from the voluntary decision of each Member State to join the EU and acknowledge and uphold the common values upon which it is founded (Article 2 TEU). For this reason, a high level of mutual trust among Member States is inherent, as well as a consistent application of primary and secondary EU law. However, the challenge with this standpoint of the CJEU lies in its failure to accurately observe the actual situation concerning the extent and effectiveness of the protection of fundamental rights within Member States under EU law. The CJEU's efforts to uphold the supremacy of primary EU law and system of judicial cooperation in criminal matter developed through secondary EU law, such as EAW, appears missing this issue. Additionally, it is important to note that while Member States can establish higher national standards of fundamental rights, this is only permissible in areas not fully regulated by EU law, such as the FD EAW, where Member States have limited ability to establish higher national standards. The CJEU's approach, while prioritizing the unity and effectiveness of EU law, risks undermining the equitable application of fundamental rights across the Union. Simply put, in areas where the EU legislator has imposed a uniform level of fundamental rights protection in line with the Charter, the *Melloni* case makes it clear that Member States are precluded from applying higher standards under their national laws. In any case, the fundamental rights protection cannot be lower than provided by the Charter. [39]

It took a great deal of time before the CJEU finally allowed Member States to challenge blind mutual trust due to concerns about the serious risk of fundamental rights violations. However, the landmark judgment in the joint cases of *Aranyosi*

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36 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 258.

37 *Ibid.*

38 Since Opinion 2/13, the CJEU has aligned its standards with those of the ECtHR in some cases, particularly those related to non-derogable rights enshrined in Article 3 ECHR and Article 4 of the Charter. In cases concerning other rights, "mutual trust remains a quasi-automatic requirement". See Di Franco, E.; Correia de Carvalho, M., *Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?*, European Papers, Vol. 8, No 3, 2023, pp. 1221-1233.

39 See: Lenaerts, K., *Making the EU Charter of Fundamental Rights a Reality for All: 10th Anniversary of the Charter Becoming Legally Binding* (keynote speech), 2019, pp. 11-15, [https://commission.europa.eu/system/files/2019-11/charter_lenaerts12.11.19.pdf] Accessed 30 March 2024; Franssen, V., *Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection*, 2014, [https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/] Accessed 30 March 2024; Materljan, G.; Materljan, I. *Predmet Taricco II i pitanja na vagi: ustavno načelo zakonitosti u kaznenom pravu i djelotvornost prava Europske unije*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 26, No. 2, 2019, pp. 521-522.

and Căldăraru marked this shift, transitioning the presumption of mutual trust from an irrebuttable to a rebuttable. The subsequent sections of this paper examine this change in perspective. The focus will not only be on the *Aranyosi and Căldăraru* case, but also on the rulings that followed concerning the implementation of the FD EAW. Additionally, particular attention will be given to the cases of *Ivan Gavanozov I*[40] and *Ivan Gavanozov II*[41], which were among the first cases to invite the CJEU to interpret relevant provisions of the EIO Directive.

3. FROM BLIND MUTUAL TRUST TO DOUBTFUL MUTUAL TRUST

In the landmark judgment in joint cases of *Aranyosi and Căldăraru*, the CJEU took a stance that the presumption of mutual trust among Member States can be called into question when there is a serious risk of violating fundamental rights, such as those protected under Article 4 of the Charter (prohibition of torture, inhuman or degrading treatment, or punishment). The background of the joined cases can be outlined as follows: Germany received two requests for surrender – one concerning the prosecution of Mr. Aranyosi (a Hungarian national residing in Germany), and the other request for the enforcement of a prison sentence for Mr. Căldăraru (a Romanian national). Both Mr. Aranyosi and Mr. Căldăraru refused the simplified surrender procedure under the FD EAW. The Higher Regional Court of Bremen (Germany) confronted with a crucial question: would their surrender to Hungary and Romania be in compliance with Article 1(3) of the FD EAW? This question was prompted by both countries' documented history of repeated violations of Article 3 of the ECHR due to their failure to uphold the minimum standards of detention conditions as guaranteed by international law. Therefore, the Higher Regional Court of Bremen (Germany) decided to stay the proceedings and seek clarifications from the CJEU, by way of preliminary ruling request, whether the execution of an EAW may or must be refused when there is compelling evidence that detention conditions in the issuing Member State violate fundamental rights of requested person. Alternatively, under such circumstances, is the executing Member State's decision to surrender requested person conditional upon receiving assurances that detention conditions in the issuing state will be sufficiently safeguarded.[42]

Contrary to its previous legal stance, which required the automatic execution of EAW unless none of the mandatory or optional grounds for non-execution ap-

[40] C-324/17 *Gavanozov* [2019] ECLI:EU:C:2019:892.

[41] C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902.

[42] C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 46, 63.

plied, the CJEU attempted to strike a balance in the *Aranyosi and Căldăraru* ruling. This balancing act involved navigating between the strict application of the principle of mutual recognition, based on mutual trust among Member States, and the concrete realization of guaranteed minimum fundamental rights of requested person as enshrined in EU law across every Member State. To this end, the CJEU established a two-step test that the executing Member State must conduct before making a final decision to refuse the execution of the EAW.[43] First step entails the obligation of the executing Member State to ascertain a real risk of infringement of the right guaranteed under Article 4 of the Charter.

This determination should be based on "objective, reliable, specific, and properly updated" information that reveals any systemic or widespread deficiencies affecting certain groups of individuals or specific detention facilities.[44] However, a determination that there are indeed general or widespread deficiencies in the detention conditions of the issuing Member State cannot automatically result in the refusal of the EAW. The executing Member State is required to proceed to the second step, correlating the findings from the first step with specific and precise circumstances of the individual facing surrender under the EAW. Conducting the second step requires the executing Member State to urgently request all additional information from the issuing Member State regarding the conditions under which the requested person will be detained.[45] Only after conducting a comprehensive assessment of the real risk through two-step test and if the risk cannot be ruled out within a reasonable period by the issuing Member State, the executing Member State can decide to bring the surrender process to an end.

Nevertheless, the CJEU ruling in judgment *Aranyosi and Căldăraru* raises doubts about the potential outcomes of conducting a two-step test given the circumstances of the case. It is unrealistic to expect that the Member States, Hungary and Romania, can promptly address, or more precisely, rectify the systemic deficiencies identified in judgments of the ECtHR and reports of the CPT concerning the conditions of deprivation of liberty within their territories.[46] Therefore, the guidelines of the CJEU, which require requesting additional information from the

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43 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 92-94.

44 Such information may be sourced from international court rulings, including those of the European Court of Human Rights (ECtHR), domestic court decisions, as well as resolutions, reports, and documents generated by Council of Europe entities or under the oversight of the United Nations. See:C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par.89.

45 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 95-97.

46 Auke, W., *op. cit.,* note 17, p. 101.

issuing Member State of the EAW in order to conduct thorough assessment of the serious risk of the requested person's rights being violated in the event of execution of the EAW, may be perceived as redundant or as a means of prolonging the procedure or delaying a final decision. Nonetheless, these guidelines must be viewed in the context of mutual trust among Member States. Given that mutual trust, particularly between Germany and Hungary and between Germany and Romania, as EU Member States, appears to be compromised, the guidelines advocate a collaborative process between the judicial authorities of the issuing state (Hungary and Romania) and the executing state (Germany) to enhance or reestablish it. Only if this proves unfeasible, the issuing Member State of the EAW will be refused execution, irrespective of the fact that unsatisfactory conditions of deprivation of liberty are not explicitly cited as grounds for non-recognition.

In the *LM*[47] case, the CJEU reaffirmed its departure from the presumption of mutual trust as irrebuttable one, once again prioritizing the protection of fundamental rights over the supremacy of EU law. By applying the two-part test established in the *Aranyosi and Căldăraru* case, the CJEU ruled that the executing Member State may refrain from executing the EAW if, upon receiving additional information from the issuing Member State, it is likely that the requested person's right to a fair trial before an independent court will be violated. A notable contrast to the CJEU's decision in the *Aranyosi and Căldăraru* case lies in the very nature of the right in question. Unlike the absolute prohibition of torture and inhuman or degrading treatment or punishment, the right to an effective remedy and to a fair trial can be subject to derogation in certain circumstances.[48] In its judgment, the CJEU emphasized that judicial independence is integral to the fundamental right to a fair trial, a right essential for safeguarding all the rights derived from EU law and upholding the common values of Member States outlined in Article 2 TEU, particularly the value of the rule of law. Furthermore, the CJEU reiterated that it falls upon national courts and tribunals, as well as the CJEU itself, to ensure the comprehensive application of EU law in all Member States and to protect individuals' rights under EU law, thus preserving the rule of law. Effective judicial review, aimed at guaranteeing compliance with EU law, is the core of the rule of law itself.[49] It is crucial to highlight specific aspects of the *LM* case: the High Court (Ireland) sought a preliminary ruling from the CJEU, referenced, *inter alia*, the European Commission's reasoned proposal to initiate proceedings against Poland (the issuing Member State of three EAWs), under the provisions of the TEU, to evaluate the evident risk of significant breaches of the rule of law resulting from implemented

47 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586.

48 Šarin, D. *Pravo na pristup sudu u praksi Europskog suda za ljudska prava*, Pravni vjesnik, Vol. 31, No. 3-4, p. 283.

49 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 50-51.

judicial reforms.[50] Given the circumstances, the referring court was in a quandary regarding the necessity to proceed to the second step of the test established in the *Aranyosi and Căldăraru* judgment, as deficiencies in the Polish justice system were apparent from its perspective. The nature of these deficiencies, according to the High Court (Ireland), made it impractical to conduct the second step of the test, as it would be unrealistic to expect from the person whose surrender is requested by EAW to demonstrate the impact of those deficiencies on the proceedings to which he is subject.[51] The CJEU rejected this argument and stated that the suspension of implementation of the FD EAW, and consequently of mutual trust, rests with the European Council as outlined in Article 7(2), along with consequences set out in Article 7(3) TEU.[52] Therefore, while the European Commission invoked Article 7(1) TEU in order to address the clear risk of a serious breach of the rule of law in Poland as Member State, it does not exempt the executing Member State of the EAW from the obligation to carry out the second step of the test established in the *Aranyosi and Căldăraru* judgment. In judgments that followed in joined cases *Openbaar Ministerie I*[53] (concerning the right to fair trial) and joined cases *Openbaar Ministerie II*[54] (pertaining to the right to a tribunal previously established by law), the CJEU upheld its ruling in the *LM* case. This encompassed reaffirming the obligation of the executing Member State to conduct a two-step test and to request supplementary information from the issuing Member State, as stipulated in Article 15(2) of the FD EAW, before refraining from execution of the EAW. Despite the well-documented deterioration of the rule of law in Poland, particularly concerning the independence of the judiciary, this did not sway the CJEU to abandon the second step of the established test in the *Aranyosi and Căldăraru* judgment. In conclusion, executing Member States cannot solely rely on first-step findings of general deficiencies, as mentioned above, in the issuing Member State to refuse the execution of an EAW, particularly when such deficiencies are known to be increasing.

Nonetheless, it could be argued that the CJEU shifted the burden of proof onto the individual requested by the EAW to demonstrate that, if surrendered, he would indeed face a real risk of his right to a fair trial before an independent and impartial tribunal being violated. In its ruling on the *Openbaar Ministerie II* case, the CJEU outlined specific requirements: "It is for the person in respect of whom a European arrest warrant has been issued to adduce specific evidence to suggest, in the case of a surrender procedure for the purposes of executing a custodial sentence or detention order, that systemic or generalised deficiencies in the judicial system of the issuing Member State had a tangible influence on the handling of his or her criminal case

50 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 21.

51 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 21-22.

52 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 70-73.

53 C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033.

54 C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie II* [2022] ECLI:EU:C:2022:100.

and, in the case of a surrender procedure for the purposes of conducting a criminal prosecution, that such deficiencies are liable to have such an influence. The production of such specific evidence relating to the influence, in his or her particular case, of the abovementioned systemic or generalised deficiencies is without prejudice to the possibility for that person to rely on any *ad hoc* factor specific to the case in question capable of establishing that the proceedings for the purposes of which his or her surrender is requested by the issuing judicial authority will tangibly undermine his or her fundamental right to a fair trial."[55] In this context, the CJEU established specific criteria regarding the information required, which vary depending on the purpose of the EAW - whether it pertains to the execution of a custodial sentence or detention order, or the conducting a criminal prosecution. However, the scholars did not welcome the persistence of CJEU on applying the second step of the established two-step test (an individual assessment of the impact resulting from findings from the first step), especially considering that despite its rulings in previous cases, the rule of law in the issuing Member State of the EAW is progressively deteriorating.[56] Scholars view the current the two-step test, particularly the evidence requirements for the second step, as setting an unreasonably high standard, making it practically impossible for the executing Member State to refuse an EAW on the grounds of fundamental rights infringement in the issuing Member State.

By alluding to the proverbial "elephant in the room" Inghelbrecht succinctly summarized the entire issue.[57] While the CJEU was focused on setting criteria for conducting the second step of the test, which are nearly impossible to meet, the elephant — the "unprecedented lack of respect for the rule of law" in the Member State (Poland) — remains unaddressed. Additionally, Holmøyvik's statement that "It would only be consistent, in surrender cases, to find that the general risk for a breach of fair trial is so high that few if any specific grounds should be required to refuse surrender." resonates with this perspective.[58]

The recent ruling in the case of *Luis Puig Gordi and Others*[59], involving Catalan separatists, unequivocally confirms that the CJEU remains resolute in upholding the two-step test, regardless of objections regarding potential infringements of fundamental rights by issuing Member States. This case involved a request for preliminary ruling from Spanish Supreme Court, which issued EAWs that were refused by Bel-

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55 C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie II* [2022] ECLI:EU:C:2022:100, par. 83.

56 See: Wahl, T., *CJEU: No Carte Blanche to Refuse EAWs from Poland*, eurcim, No. 1, 2022, pp. 33-34; Inghelbrecht, F., *Avoiding the Elephant in the Room Once Again*, 2022, [https://verfassungsblog.de/avoiding-the-elephant-in-the-room-once-again/] Accessed 2 April 2024.

57 Inghelbrecht, *op. cit.*, note 56.

58 Holmøyvik, E., *No Surrender to Poland*, [https://verfassungsblog.de/no-surrender-to-poland/] Accessed 2 April 2024.

59 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57.

gian courts. The Belgian courts based the refusal of the EAWs on the grounds that the requested persons would be tried by a court lacking jurisdiction for that purpose (Spanish Supreme Court). The CJEU ruled out this argument as valid, since the legal system of Spain, as issuing Member State of EAWs, provides for legal remedies enabling a review of the jurisdiction of the court called upon to try a person surrendered under FD EAW.[60] Furthermore, the CJEU reiterated that opinions from the Working Group on Arbitrary Detention and relevant judgments from the European Court of Human Rights (ECtHR) can be regarded as the first step of the examination in the two-step test. This step is focused on identifying systemic or generalized deficiencies within the judicial system of the issuing Member State. However, these external sources alone cannot serve as sufficient reason for an executing Member State to refuse the execution of an EAW. They must be directly relevant to the specific personal circumstances of the individual requested under the EAW and evaluated in the second step.[61] Finally, the CJEU addressed a question from the Spanish Supreme Court regarding the possibility of issuing multiple successive EAWs against an individual after the refusal of a prior EAW. The CJEU confirmed that successive EAWs can be issued, provided that their execution does not violate the fundamental rights of the requested individual in accordance with Article 1(3) of the FD EAW, and that the issuance of each new EAW is proportionate to the circumstances.[62]

In summary, an analysis of CJEU case law regarding the implementation of the FD EAW reveals that there is a tremendous challenge in contesting the presumption of mutual trust among Member States. While the presumption of mutual trust may be challenged contested if fundamental rights are at risk of being violated, the CJEU's established guidelines make successful contests highly improbable, bordering impossible.

3.1. The EIO: A New Legal Instrument, Yet Old Issues with Mutual Trust

In May 2017, Directive 2014/41/EU regarding the European Investigation Order in criminal matters came into force.[63] This directive established a comprehensive and unique legal instrument known as the EIO for obtaining evidence in cross-border criminal cases among Member States. Like the EAW, the EIO operates on the principle of mutual recognition, with mutual trust among Member States serving as a crucial prerequisite for its implementation. Both legal instruments include

60 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 112-114.

61 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 123-125.

62 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 146.

63 Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters [2014] OJ L130 (EIO Directive).

the same provision stipulating that their implementation will not adversely affect the obligation of Member State to respect fundamental rights and legal principles as enshrined in Article 6 of the TEU.[64]Considering this, along with established case law from EAW cases, it was reasonable to anticipate a swift ruling from the CJEU in the first EIO case, where CJEU was called to interpret the right to legal remedies outlined in Article 14 of Directive 2014/41 in conjunction with Article 47 of the Charter. Unfortunately, despite the CJEU delivering its first ruling in the case of *Ivan Gavanozov I*, the question prompted in the request for preliminary ruling from the referring court (Specialised Criminal Court, Bulgaria) remained unanswered. The Specialised Criminal Court, among all other questions, explicitly sought the answer on whether Bulgaria could be precluded from issuing an EIO due to the lack of any legal remedies in its national legislation against the issuance of an EIO for the purpose of conducting searches and seizures, as well as hearing a witness via videoconference. Instead of addressing this specific question, the CJEU, reformulated all questions and reduce them to a mere formal question: How to fill the Section J of the form set out in Annex A to Directive 2014/41?.[65] The CJEU ruled that the issuing Member State is not required to include in Section J a description of any legal remedies, if available, provided by its national law against the issuance of an EIO. This CJEU judgment was criticized by scholars as disappointing and inadequate for two reasons. Firstly, it upholds Bulgarian legislation, which lacks any legal remedy against the issuance of the EIO, to the detriment of the rights of the accused person.[66] Secondly, by doing so, it supports the *non-inquiry principle* of mutual trust among Member States.[67] Fortunately, the Specialised Criminal Court persisted in its quest for more comprehensive answers regarding the interpretation of provisions of Directive 2014/41 on the conditions for issuing an EIO (Article 6) and the legal remedies that should be ensured against its issuance (Article 14). Only few weeks after the first CJEU ruling (*Ivan Gavanozov I*), the Specialised Criminal Court submitted a new request for preliminary ruling in the same criminal case. In new request, now referred as the case of *Ivan Gavanozov II*, it restricted itself to the following two questions:

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64 See: Article 1(3) FD EAW and Article 1(4) EIO.

65 C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902, par. 23 -24. Section J of the EIO in point 1 requests information whether a legal remedy has already been sought against the issuing of an EIO, followed by further details (description of the legal remedy, including necessary steps to take and deadlines).

66 Wahl, T., *First CJEU Judgment on European Investigation Order, 2020,* [https://eucrim.eu/news/first-cjeu-judgment-european-investigation-order/], Accessed 2 April 2024.

67 Materljan, G.; Materljan, I., *Europski istražni nalog i nacionalni sustavi pravnih lijekova: pitanje primjerene razine zaštite temeljnih prava u državi izdavanja naloga*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 27, No. 2, 764-767.

1. Is a national legislation, which does not provide for any legal remedy against the issuing of an EIO for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41 and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?
2. Can an EIO be issued under those circumstances?[68]

It is surprising for the court of the Member State issuing an EIO to question whether its state can continue to be part of the EIO mechanism. This is especially true considering that Bulgaria, as a Member State, has repeatedly been held liable for breaching Article 13 of the ECHR due to the lack of legal remedies against search and seizure orders. Additionally, this fact was brought to attention by the court of the issuing Member State, the Specialised Criminal Court, which submitted the request for a preliminary ruling to the CJEU. In the judgment *Ivan Gavanozov II*, the CJEU ruled that the provisions of Article 6 and Article 14 of Directive 2014/41, read in conjunction with Article 47 of the Charter, must be interpreted as precluding the issuing of a EIO for the purpose of conducting investigative actions such as searches, temporary confiscation of items, and witness hearings via videoconference by a Member State that lacks any legal remedy against its issuance. As a result, Bulgaria, as a Member State, was precluded from the issuing EIOs due to the lack of legal remedies.[69]The CJEU adhered to the opinion of Advocate General Bobek presented in this case[70]. In his opinion, an EIO issued by Member State that is aware it does not adhere to the prescribed minimum guarantees of fundamental rights, fundamentally contradicts the principle of mutual trust and undermines the entire system built upon this principle. According to Bobek, if a Member State were permitted to issue an EIO while knowingly violating the prescribed rules, it would transform the safeguarding of fundamental human rights into a game of Russian roulette. In this scenario, the issuing state is aware that the issued EIO violates fundamental rights, yet it entrusts the executing state with recognizing this violation. If the executing state fails to identify or prevent the violation, there is a risk of it becoming complicit in those infringements and bearing international responsibility.[71] It is noteworthy that in the case of *Ivan Gavanozov II*, the CJEU did not apply of the two-step test. This is because the EIO Directive, unlike the FD EAW, specifically outlines in Article 11(f) substantial reasons when conducting the investigative measure specified in

68 C-852/19 Gavanozov II [2021] ECLI:EU:C:2021:902, par. 23.

69 C-852/19 Gavanozov II [2021] ECLI:EU:C:2021:902, par. 63.2.

70 C-852/19 Opinion of Advocate General Bobek [2021] ECLI:EU:C:2021:346.

71 C-852/19 Opinion of Advocate General Bobek [2021] ECLI:EU:C:2021:346, par. 85-86.

the EIO would violate the executing State's obligations under Article 6 of the TEU and the Charter, thereby allowing for non-execution of an EIO.[72]

4. FINAL REMARKS

The CJEU has had and continues to have a crucial role in both shaping and upholding the concept of mutual trust among Member States through its case law, as well as through the Opinion 2/13. This role is inherently complex and delicate, as it requires navigating the intricate legal framework of EU. On one hand, the CJEU aims to uphold the supremacy of EU law and enhance judicial cooperation in criminal matters based on the principle of mutual recognition. On the other hand, it must balance this objective with the imperative of protecting fundamental rights, especially in cases where there are indications that Member States do not fully adhere to primary EU law (Article 2 TEU and the Charter). Before its ruling in the case of *Aranyosi and Căldăraru,* the CJEU strongly favored the effective functioning of cooperation in criminal matters over protection of fundamental rights. This was achieved by establishing the presumption of mutual trust as *irrebuttable*, to the extent that the executing Member State was not allowed, save in exceptional circumstances, to verify whether the other Member State had indeed respected the fundamental rights guaranteed by the EU law in a particular case (Melloni case). By taking this position, the CJEU ensured both uniformed application of the EU law and its supremacy over national legislations of Member States. This is particularly clear in the CJEU's ruling in the *Melloni* case, where the CJEU interpreted Article 53 of the Charter to mean that Member States cannot provide higher standards of fundamental rights protection through their national laws when implementing secondary EU law provisions (such as the FD EAW). This is due to the fact that secondary EU law, such as FD EAW, is fully in compliance with the Charter. Allowing a different interpretation of Article 53 would undermine the effectiveness of EU law. However, the ruling in the case of *Aranyosi and Căldăraru* marked a significant shift, as the CJEU devised the two-step test for assessing the possibility of non-execution of EAW requests based on a real risk of fundamental rights violations. This move opened the door to contesting the presumption of mutual trust among Member States. The CJEU decided that established two step test is appropriate not only for non-derogable rights, such as prohibition of torture, inhuman or degrading treatment, or punishment (Article 4 of the Charter), but also for right to fair trial or to the right to a tribunal previously established by law (Article 47 (2) of the Charter), which can be subject to derogation in certain circumstances. However, despite its initial positive response, the two-step test eventually lost its intended purpose – enabling the refusal of EAW execution due to a real risk of fundamental rights

[72] Hernandez Weiss, A., *Effective protection of rights as a precondition to mutual recognition: Some thoughts on the CJEU's Gavanozov II decision*, New Journal of European Criminal Law, Vol.13, No. 2, pp. 190-191.

violations in the issuing Member State. The rationale behind this deviation stems from the fact that several Member States (such as Poland, Hungary, Romania, and Spain) have well-documented systemic or generalised deficiencies in their judicial systems. The requirement in the second step of the two-step test to demonstrate how these deficiencies affect the personal situation of the individual requested under the EAW, appears excessively demanding or potentially redundant, resulting in limited success. However, it's important to note that the suspension of the implementation of the FD EAW due to a serious and persistent breach of the principles set out in Article 2 of the TEU by a Member States, and consequently of mutual trust, rests with the European Council as outlined in Article 7(2), along with the consequences set out in Article 7(3) TEU. Therefore, it could be argued that it would be unreasonable to expect the CJEU to jeopardize the entire EAW mechanism, based on mutual trust, by abolishing the second step of the two-step test and allowing the non-execution of the EAW solely based on findings from the first step. The solution to existing problems should be sought through decisive and synergistic action by all relevant EU institutions. Although it took the CJEU more than four years to address the question from the request for a preliminary ruling, the ruling in the case of *Gavanozov II* demonstrates both the pathways for protecting fundamental rights and contesting mutual trust. At this point it is necessary to point out that EIO Directive explicitly contains a provision by which executing Member State may refuse the execution of EIO if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter. The introduction of this provision in the EIO Directive represents an improvement in EU legal instruments with regard to protecting fundamental rights, while simultaneously preserving the supremacy of EU law. Overall, while challenges continue to persist in relation to contesting the presumption of mutual trust among Member States, the CJEU's jurisprudence reflects a nuanced approach aimed at balancing the interests of cooperation in criminal matters with the protection of fundamental rights. These two tendencies, one for efficient criminal cooperation and another for protection of fundamental rights will always be in conflict.

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7. C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902
8. C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586
9. C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033
10. C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie II* [2022] ECLI:EU:C:2022:100
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Chapter 2

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Review article

THE DAYTON CONCEPT OF PERFORMING LEGISLATIVE AND OTHER FUNCTIONS OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA: COLLAPSE OF THE RULE OF LAW AND EFFECTIVE POLITICAL DEMOCRACY

Zlatan Begić, PhD, Associate Professor
University of Tuzla, Faculty of Law
Muhameda Hevaija Uskufija 7, 75000 Tuzla, Bosnia and Herzegovina
zlatan.begic@gmail.com, zlatan.begic@untz.ba

ABSTRACT

Bosnia and Herzegovina is a State whose current constitutional solutions are not the result of an effort to ensure basic democratic principles regarding the way of election and functioning of the institutions of the system, but are the result of an effort to establish and ensure peace through the Peace Agreements. However, today - almost thirty years after the entry into force of the General Framework Agreement for Peace in Bosnia and Herzegovina, such constitutional solutions have proven to be an insurmountable obstacle to, in the first place, the realization of the rule of law and development of effective political democracy, that is, to the fulfillment of the necessary conditions on the path to European integration. The constitutional system of Bosnia and Herzegovina, as it is well known, is interwoven with norms of a discriminatory nature that are not in accordance with the European Convention and its protocols, which has resulted in several judgments of the European Court of Human Rights in Strasbourg. It is a matter of severe discrimination on an ethnic basis in domain of the electoral rights of citizens, which is visible at first glance. Maintaining such a state of affairs and not implementing the judgments of the European Court of Human Rights, despite the fact that Bosnia and Herzegovina has ratified the European Convention - and especially its Protocol 12 - along with other ratified protocols, as well as the fact that according to the Constitution of Bosnia and Herzegovina, the above mentioned instruments are the part of the legal system of Bosnia and Herzegovina Herzegovina, represents an insurmountable obstacle for the serious approach to fulfilling other conditions from the European integration process. In this place, it comes to the unequal value of the votes and discrimination within the decision-making process in the Parliamentary Assembly of Bosnia and Herzegovina (which is not visible at first glance) and - in the first place, through the so-called entity voting in both Houses of this representative body (House of Representatives and House of Peoples). Thanks to the Dayton constitutional solutions that produce a

multiple inequality of the value of votes of MPs of the House of Representatives and delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, along with other deviations, any serious approach to fulfilling the conditions of the European integration process is impossible, the violation of the rule of law has become a constant phenomenon, and all this it has a very harmful effect on the principle of effective political democracy to the point of its complete cancellation. This paper contains considerations regarding the procedures of execution the functions of the Parliamentary Assembly of Bosnia and Herzegovina, along with an analysis of the key causes of delays in fulfilling the conditions of the European integration process based on valid norms that produce an unequal value of the votes in the decision-making process of the Parliamentary Assembly of Bosnia and Herzegovina, but also in terms of violations generally accepted democratic standards of a legal nature that refer to the election of the Houses of this representative body, their mutual relationship and overall position. Due to the multiple inequality of vote and discrimination in the decision-making process of the House of Representatives of the Parliamentary Assembly of BH - as a directly elected House, and in relation to the delegates of the indirectly elected House of Peoples, proceeding has been initiated before the European Court of Human Rights in 2021 (case no. 34891/21), and a decision is expected in this case.

Keywords: *Assembly of Bosnia and Herzegovina, Constitution of Bosnia and Herzegovina, Parliamentary entity voting, Peace Agreements, principle of effective political democracy, Rule of law*

1. INTRODUCTION

This paper mainly contains considerations concerning the procedures of passing acts of law and other decisions of the state representative body of Bosnia and Herzegovina (hereinafter: BH) - the Parliamentary Assembly of BH. As will be seen from the text that follows, the procedure of election as well as the procedure for passing laws and other decisions of the Parliamentary Assembly of BH abound with solutions completely unknown in democratic countries of comparative law and that is completely disputed from the point of view of the principle of equal vote and other generally accepted codified democratic standards of a legal nature (prohibition of discrimination, general and equal voting rights, equal access to public affairs, rule of law, effective political democracy, equality of vote etc.). These procedures produce a marked inequality of votes of the members of both Houses of the Parliamentary Assembly of BH, primarily due to the use of the so-called mechanism. entity voting - as a regular way of decision-making of this representative body.

This paper also provides a brief analysis of the structure, method of election and mutual relations between the House of Representatives and the House of Peoples of the Parliamentary Assembly of BH, which is also one of the causes of the violation of the principles of effective political democracy and the rule of law in BH, which precedes the inadequate decision-making procedures of this representative

body from the point of view generally accepted codified democratic standards of a legal nature.

Regarding the structure and method of elections, the European Court of Human Rights in Strasbourg issued several judgments in which it established a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) and its protocols. This paper also contains a brief overview of the impact of the structure, election methods and decision-making procedures of the Parliamentary Assembly of BH on the impossibility of realizing the principles of effective political democracy and the rule of law, as key principles for the development of a democratic society, which the European Convention refers to in its Preamble.

2. PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA: STRUCTURE AND ELECTION PROCEDURE

The Parliamentary Assembly of Bosnia and Herzegovina, according to the provisions of Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina – well known as Dayton Peace Agreement (hereinafter: DPA)[1],

[1] For the different views regarding the Washington and Dayton Peace Agreements, see: Bajtal, E., *Zločini i laži Miloševićeve kriptopolitike*, Univerzitet u Sarajevu, Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava, Sarajevo, 2014, pp. 234-236; Barnes Samuel, H., *The Contribution of Democracy to Rebuilding Postconflict Societies*, The American Journal of International Law, Vol. 95, No. 1, 2001, pp. 86-101 (see: pp. 86-94); Begić, Z., *One More Attempt by the US Administration in Bosnia and Herzegovina: Constitutional Reform of the Federation of Bosnia and Herzegovina—Mission Impossible or Back to the Future?*, Journal of Balkan and Near Eastern Studies, Vol. 19, No. 4, 2017, pp. 419-445, (see: pp. 423-427); Bieber, F., *Post-war Bosnia: Ethnicity, Inequality and Public Sector Governance*, Palgrave Macmillan, New York, 2006, pp. 40-86; Caspersen Nina, *Good Fences Make Good Neighbours? A Comparison of Conflict-Regulation Strategies in Postwar Bosnia*, Journal of Peace Research, Vol. 41, No. 5., 2004, pp. 569-588 (see: pp. 572-583); Chandler, D., Bosnia: *Faking Democracy After Dayton*, Pluto Press, London-Sterling, 2000, pp. 66-89; Chollet, D., *The Road to the Dayton Accords: A Study of American Statecraft*, Palgrave Macmillan, New York, 2005., pp. 133-181; Conces Rory, J., *A Sisyphean Tale: The Pathology of Ethnic Nationalism and the Pedagogy of Forging Humane Democracies in the Balkans*, Studies in East European Thought, Vol. 57, No. 2, 2005, pp. 139-184 (pp. 162-174); Cox, M., *The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina*, 47 The International and Comparative Law Quarterly 3, Vol. 47, No. 3, 1998, p. 599-631, (see: pp. 603-616); Friedman, F., *Bosnia and Herzegovina: A Polity on the Brink*, Routledge, London-New York, 2005, pp. 60-76; Graham John, *Black Past, Grey Future? A Post-Dayton View of Bosnia and Herzegovina*, 53 International Journal, Vol. 53, No. 2, 1998, pp. 204-220, (see: pp. 217-220); Horowitz Shale, *War after Communism: Effects on Political and Economic Reform in the Former Soviet Union and Yugoslavia,* 40 Journal of Peace Research 1, Vol. 40, No. 1, 2003, pp. 25-48 (see: pp. 42-43); Ibrahimagić, O., *Državno uređenje Bosne i Hercegovine*, Autor, Sarajevo, 2005, pp. 79-84; Ibrahimagić, O., *Državnopravni i politički razvitak Bosne i Hercegovine*, Autor, Sarajevo, 2009, pp. 403-409; Karnavas Michael, G., *Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region*

has extremely complicated and unfamiliar decision-making procedures, even for democratic states. In the comparative law of modern democratic states, there are no examples of such procedures for passing laws and other decisions of a representative body, for the simple reason that such procedures penetrate the very core of democracy, violating fundamental democratic standards of a legal nature. As will be seen from the following, such type of prescribed decision-making procedures imposes the question of character and classification of the Dayton constitutional construction. Thus, while on the one hand Annex 4 of the General Framework Agreement for Bosnia and Herzegovina is abundant with norms hat refer to the highest democratic values and principles of a legal nature which, as such, are standardized at the general and international level, on the other hand the procedure for passing laws and other decisions of the state of the representative body violate the generally accepted democratic standards of a legal nature to the extent that it can be reasonably stated that the constitutional order of Dayton Bosnia and Herzegovina has no democratic character at all.

This, in the first place, arises from the way this representative body is elected. Namely, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina is directly elected by the citizens. Two-thirds of the representatives of the House of Representatives (out of a total of 42) are elected from the territory of the Federation of BH entity - 28 of them, while one third is elected from the territory of the Republika Srpska entity - 14 of them.[2] Of that number, 21 representatives are directly elected in narrower constituencies in the Federation of BH entity - which for this purpose is divided into five narrower electoral

and Other Postconflict Countries, The American Journal of International Law, Vol. 97, No. 1, 2003, pp. 111-131, (see: 111-112); Kurtćehajić, S.; Ibrahimagić, O., *Politički sistem Bosne i Hercegovine*, Autor, Sarajevo, 2007, pp. 176-217; Kurtčehajić, S., Ibrahimagić, O., *Politički sistem Bosne i Hercegovin*, Autor, Sarajevo, 2007, pp. 246-261; Manning, C., *The Making of Democrats: Elections and Party Development*, Palgrave Macmillan, New York, 2008., pp. 73-85; Miraščić, Dž., *Bosanski model demokratske vlasti*, Of-set, Tuzla, 2009, pp. 109-111; Nystuen, G., *Achieving Peace or Protecting Human Rights?*, Martinus Nijhoff Publishers, Leiden-Boston, 2005, pp. 66-90; Papayoanou Paul, A., *Intra-Alliance Bargaining and U.S. Bosnia Policy*, The Journal of Conflict Resolution, Vol. 41, No. 1, 1997, pp. 91-116 (see: pp. 101-109); Pugh Michael, Cobble Margaret, *Non-Nationalist Voting in Bosnian Municipal Elections: Implications for Democracy and Peacebuilding*, Journal of Peace Research, Vol. 38, No. 1, 2001, pp. 27-47 (see: p. 27, pp. 29-32); Reilly, B., *Democracy in Divided Societies: Electoral Engineering for Conflict Management*, Cambridge University Press, Cambridge, 2001, pp. 143-144; Schneckener U., *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, Journal of Peace Research, Vol. 39, No. 2, 2002, pp. 203-228, (see: pp. 209-210); Singer Peter, W., *Bosnia 2000: Phoenix or Flames?*, World Policy Journal, Vol. 17, No. 1, 2000, pp. 31-37 (see: pp. 31-35); Steiner M., *Seven Principles for Building Peace*, World Policy Journal, Vol. 20, No. 2, 2003, pp. 87-93 (see: pp. 88-92); Talbott, S., *Self-Determination in an Interdependent World*, Foreign Policy, No. 118, 2000, pp. 152-163 (see: pp. 154-156); Trnka, K., *Ustavno pravo*, Fakultet za upravu, Sarajevo, 2006, str. 103-106., etc.

[2] See: Constitution of Bosnia and Herzegovina, Article IV/2.

units, while 9 representatives are elected directly in three narrower electoral units from the territory of the Republika Srpska entity. The remaining seven mandates in the entity Federation of BH and five mandates in the entity Republika Srpska are the so-called compensatory mandates that are awarded at the level of both entities with the so-called compensatory lists, according to the Saint-League election system. Although at first glance the method of election of the House of Representatives can be seen as democratic, the distribution of mandates by narrow electoral units in the entities does not follow the principle of equality of votes, which represents a very present problem in terms of the level of legitimacy of the elected representatives, equal representation and the value of votes of citizens with regard to the distribution mandates by electoral units. This problem is particularly pronounced in the Republika Srpska entity.

Thus, in the last elections in Electoral Unit 1 in this entity there were 568,773 registered voters, in Electoral Unit 2 – 395,395, and in Electoral Unit 3 – 295,154 registered voters.[3] In all three constituencies, however, according to the BH Election Law, three representatives are directly elected, that is, an equal number of representatives regardless of the large differences in the number of registered voters. At first glance, it is clear that – there is a huge disproportion between constituencies in terms of the number of registered voters. Despite this, citizens directly elect the same number of representatives in all three constituencies - thus, for example, the value of the vote of any citizen from Electoral Unit 3 is almost twice as high as the value of the vote of any other citizen from Electoral Unit 1. In this regard, the Final Report of the Election Observation Mission of ODIHR on the occasion of the general elections held on October 2, 2022 states the following: "The Electoral Law prescribes that competent state and entity parliaments review mandates according to the VIJ every four years. However, the borders of VIJ have not been changed since 2001, with the exception of constituencies for the elections for the National Assembly of the RS, which were last revised in 2012. There is an extremely unequal distribution of registered voters in constituencies for state and entity parliamentary elections, with a deviation of up to 68 percent, which is contrary to the obligations and commitments of the OSCE and the principle of equality of votes."[4]

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[3] [https://www.izbori.ba/Rezultati_izbora/?resId=32&langId=1#/2/2/0/0/0/0], Accessed 11 March 2024.

[4] See paragraph 7.3 of the OSCE Copenhagen Document of 1990, which stipulates that participating states must "guarantee universal and equal suffrage to all adult citizens". Paragraph I.2.2.iv of the Code of Good Practice in Electoral Matters was adopted by the Venice Commission in 2002 (Code of Good Practice), where it recommends that "the permitted deviation from the norms should not amount to more than 10 percent, and certainly should not exceed 15 percent except in special circumstances." (taken from: ODIHR Election Observation Mission, Final Report, Warsaw, 02 February 2023).

When it comes to this imbalance, it is partially compensated precisely through compensatory mandates. However, the problem with compensatory mandates is that they are assigned from compensatory lists where a large and decisive influence is held by narrow party leaderships - the presidents of political parties, and the order on the compensatory lists is crucial because these mandates are assigned according to the order of candidates. Compensatory lists are reserved for those candidates who did not enter the representative body by direct election, i.e. by the will of the citizens. Thus, these persons acquire the status of the representative in the highest constitutional and legislative representative body of the state, not based on the will of the citizens, but on the basis of the will of the narrow party leaderships that compile compensatory lists for candidates who were not elected by the citizens. Out of 42 representatives of the House of Representatives of the Parliamentary Assembly of BH, as many as 12 representatives are elected in this way, which in the conditions of complex political relations that prevail in BH ensures that the will of the narrow party leaderships prevail over the will of the citizens regarding key decisions. This is one of the reasons why democracy in BH has been reduced to a mere partitocracy.

The second and significantly more pronounced reason for a kind of desecration of democracy in BH is contained in the position, method of appointment and competencies of the so-called House of Peoples. The situation regarding the democratic capacity and democratic legitimacy of the House of Peoples, which is the second House of the Parliamentary Assembly of BH, is even worse. As BH Constitution stipulates, for the adoption of any law or other decision of the Parliamentary Assembly of BH, it is necessary that the act be adopted in the same text in both Houses - in the House of Representatives and the House of Peoples, which will be discussed more in the following chapters, even though the House of Peoples does not have direct democratic legitimacy that is acquired in the elections, but is appointed indirectly, where the decisive role in the process of candidacy for the position of delegate in the House of Peoples is again played by the narrow party leaderships - i.e. presidents of political parties dominantly. Thus, in accordance with Article IV/1 the Constitution of BH, the House of Peoples consists of 15 delegates, of which two thirds are from the Federation (including five Croats and five Bosniacs) and one third from the Republika Srpska (five Serbs). Nominated Croatian and Bosniac delegates from the Federation are appointed by Croat and Bosniac delegates in the House of Peoples of the Federation, while nominated delegates from the Republika Srpska entity are appointed by the National Assembly of the Republika Srpska. Nine members of the House of Peoples constitute a quorum, provided that at least three Bosniac, Serb and Croat delegates are present.

At first glance, it is clear that the House of Peoples, which, among other things, has the function of a constitutional and legislative body, is elected and appointed on the basis of constitutional norms that cause a state of severe and multiple discrimination on ethnic grounds. Thus, BH citizens who do not belong to the constituent peoples do not have the right to be candidates for this position. These are the citizens who belong to national minorities, and citizens who do not belong to national minorities, nor to constituent peoples, but link their national affiliation to the state affiliation of Bosnia and Herzegovina (Bosnians and Herzegovinians). The European Court of Human Rights in Strasbourg has issued several judgments dealing with severe discrimination on ethnic grounds. Some of them refer to the House of Peoples of the BH Parliamentary Assembly, where severe discrimination on ethnic grounds and violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols have been established (*Sejdić-Finci v BH, Zornić v BH, Šlaku v BH, Kovačević v BH*)[5]. The stipulated method of appointment and structure of the House of People also violates the rights of the constituent nations, since Serbs from the Federation of Bosnia and Herzegovina entity, and Croats and Bosniaks from the Republika Srpska entity do not have the right to run for these positions due to their entity affiliation. However, although the European Convention and its protocols[6] are binding legal acts of a constitutional nature on a double basis - by the force of the Constitution, and by the act of ratification, the judgments of the European Court of Human Rights have never been implemented thanks to the prescribed decision-making procedures of the BH Parliamentary Assembly, which are full of undemocratic blocking mechanisms completely inappropriate for a democratic system, and which are against the generally accepted democratic standards of a legal nature - without the respect and implementation of which one cannot talk about the existence of democracy as such.

Regarding the structure and method of election the Parliamentary Assembly of BH, as the highest state constitutional and legislative body, the questions arise - can a representative body that is elected in an undemocratic way rule - make laws and other decisions in a democratic way? Can a constitutional system centered on a representative body that is elected in an undemocratic manner be considered democratic at all?

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5 *Sejdić and Finci v BH* (2009) Application Nos. 27996/06 and 34836/06; *Zornić v BH* (2014) Application No. 3681/06; *Šlaku v BH* (2016) Application no. 56666/12; *Kovačević v BH* (2023) Application No. 43651/22.

6 For the legal position of ECHR in the constitutional order of BH see: Begić, Z., *O ustavu legalitetu i legitimitetu: Bosna i Hercegovina – od ZAVNOBiH-a do Dejtona i poslije*, Fakultet za upravu Univerziteta, Sarajevo, 2021, pp. 157-170.

As will be seen from the text that follows, the problem does not end with severe discrimination in terms of the election of this representative body, but continues and deepens through its decision-making procedures.

3. DECISION-MAKING PROCEDURES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

The Parliamentary Assembly of BH, as stated above, consists of two chambers, the House of Representatives and the House of Peoples. Article IV 3 c) of the Constitution of BH stipulates that "all legislative decisions shall require the approval of both chambers". This way of decision-making and the position of the chambers would not be disputed if both chambers had at least an approximately equal level of democratic legitimacy.

Namely, the House of Peoples is actually appointed by the ruling political parties autonomously, by their own discretion and without clear criteria, apart from the criteria of party affiliation and loyalty, unlike the House of Representatives, which - despite the shortcomings mentioned above, is still elected by citizens directly in elections, whereby, in addition to the existing very complicated decision-making procedures in the House of Representatives, in the House of Peoples any decision of the House of Representatives can be stopped - especially by using the mechanism of the so-called entity voting, according to which decisions are made in both chambers.

Thus, Article IV/3 of the Constitution of BH stipulates that the decisions of the Parliamentary Assembly of BH are made by a majority vote of MPs in House of Representatives and delegates in House of Peoples who are present and vote, but that majority in both chambers must include at least one third of the MPs in the House of Representatives, i.e. one third of the delegates in the House of Peoples from both entities who are present and vote. Bearing in mind that the House of Representatives of the Parliamentary Assembly of BH consists of 42 deputies, of which 14 are elected directly from the territory of the RS and 28 from the territory of the Federation of BH, this specifically means that in majority there must be at least 5 votes of deputies elected in the entity of the RS , and at least 10 votes of deputies from the entities of the Federation of Bosnia and Herzegovina, with the majority of all elected to the House of Representatives constituting a quorum. If there is not the required number of votes from each entity, no decision can be made in the House of Representatives, regardless of whether there is a majority of votes. For example, in a hypothetical case, all MPs elected from the territory of the Federation of Bosnia and Herzegovina and 4 elected from the territory of the

entity of the RS can vote in favour of a particular decision, which makes a total of 32 votes – out of a total of 42 MPs, but the decision cannot be made in the House of Representatives. The situation is even more dramatic in the House of Peoples, which consists of a total of 15 delegates, of which 10 delegates (5 Bosniacs and 5 Croats) are delegated from the Federation of BH entity, and 5 Serb delegates are delegated from the RS entity. Without the votes of at least 2 delegates from the entity of the RS and at least 1/3 of the delegates from the entity of the Federation of BH (four of them), the decision/law cannot be passed even if it is unanimously adopted in the House of Representatives. Moreover, it should be borne in mind that the House of Representatives is directly elected, unlike the House of Peoples, which is elected indirectly, whose members do not possess any democratic legitimacy - except for party affiliation or eligibility, as explained above. Nevertheless, even if any act of law was adopted unanimously in the House of Representatives, without the stipulated majority in the House of Peoples, which must include at least one-third of the votes of delegates from both entities, that act of law cannot be adopted. Simply put, this means that the vote of two indirectly elected delegates from the entity of the Republika Srpska (as well as one third of the delegates of the House of Peoples from the Federation of Bosnia and Herzegovina) is worth more than the votes of all directly elected MPs of the House of Representatives and all other delegates of the House of Peoples. This ultimately calls into question the equality of citizens represented by elected MPs, and seriously calls into question the democratic capacity and legitimacy of this institution. Discrimination based on ethnicity in the election of the delegates for the House of Peoples, confirmed by the judgments of the European Court of Human Rights, should be added to the list.

If the majority does not include one-third of the votes of the MPs and delegates from the territory of each entity (in both chambers), the chair of House and his deputies (in both chambers separately), working as a committee, will try to reach an agreement within three days from the day of the vote. If these efforts fail, decisions will be made by a majority of those present and voting, provided that the votes against do not include two-thirds, or more, of the delegates in the House of Peoples or MPs in the House of Representatives elected from each entity. However, this kind of unblocking mechanism gives almost no result in terms of removing the entity blockade if there is no entity support of 1/3 MPs in House of Representative and 1/3 delegates in House of Peoples from the territory of each entity.

A very illustrative example that can vividly describe this situation is the attempted legislative-institutional response of the BH Parliamentary Assembly to the pandemic caused by the Covid-19 virus. For the urgent procurement of vaccines for the population of Bosnia and Herzegovina, it was necessary to pass two laws - the

Law on Amendments to the Law on Public Procurement and the Law on Amendments to the Law on Medicines and Medical Devices. At the seventeenth session of the House of Representatives of the Parliamentary Assembly of BH on February 25, 2021, these acts of law were adopted unanimously, with the prescribed 1/3 of the votes of MPs from the territory of both entities. The adoption of these acts of law, however, was stopped in the House of Peoples (seventh emergency session of the House of Peoples from March 2, 2021). The House of Peoples, in the first place, adopted the request for urgent procedure, and then rejected the adoption of these acts of law, with the following voting results: 9 IN FAVOUR - all from the territory of Federation of BH; 4 AGAINST – all from the territory of Republika Srpska entity; 1 ABSTAINED. These acts law were not adopted despite the fact that they were unanimously adopted in the House of Representatives with 30 votes in favour, and despite the fact that in the House of Peoples there was a majority of 9 votes in favour – and 4 votes against, for the reason that according to the provisions of the BH Constitution it is stipulated that in the House of Representatives and the House of Peoples, there must be at least 1/3 of the votes of all MPs in the House of Representatives and 1/3 votes of delegates in the House of Peoples from the territory of both entities – as explained above. Since in the convincing majority of 9 votes in the House of Peoples there were not at least 2 votes of delegates from the territory of Republika Srpska, these very important acts of law were not adopted. Then, at the sixteenth session of the House of Peoples from April 8, 2021, in the second round of voting, these acts of law were finally rejected, with the voting results: (9 IN FAVOUR - all from the Federation of BH); (4 AGAINST – all from the Republika Srpska); (1 ABSTAINED). In the second round of voting, as stated above, in order for the law to be adopted, a general majority is required, and that at least 2/3 of the House of People's delegates from each entity are not against the adoption of the proposal. Although these acts of law were adopted unanimously in the House of Representatives by a majority of 30 votes IN FAVOUR of the directly elected MPs, and despite the fact that there was a convincing majority of 9 votes IN FAVOUR in the House of Peoples, these acts of law were rejected by votes AGAINST of the 4 delegates of the House of Peoples from the territory of Republika Srpska. This case represents a very illustrative example of the multiple inequality of the votes of the directly elected members of the House of Representatives in relation to the indirectly appointed delegates of the House of Peoples, but also of the delegates of the House of Peoples among themselves - considering the entity affiliation, where the will of the political minority expressed through only 4 votes AGAINST is imposed as the ruling over the will of a unanimous majority in the House of Representatives (of 30 votes IN FAVOUR) and a convincing majority in the House of Peoples (of 9 votes IN FAVOUR). This is only one of numerous examples of the disparity in the value of votes of the elected members

of the House of Representatives compared to the indirectly appointed delegates of the House of Peoples, where it is evident that the protective mechanisms in the form of the so-called entity voting are being abused and in practice are being used as mechanisms of absolute blockade aimed at the degradation of the institutions of Bosnia and Herzegovina, and even when it comes to such important decisions that seek to preserve the lives of citizens threatened by the pandemic. This is also the case when entities – as internal administrative units of BH and their interests were not being endangered in any way by proposed acts of law.

In simplified terms, bearing in mind the voting results in this case, Bosnia and Herzegovina is the only nominally democratic country in which 2 or 4 is greater than 39. However, the situation is identical in the House of Representatives, where there is also a pronounced inequality of the values of votes of the elected MPs thanks to the so-called entity voting. From 2018 until the middle of 2021, dozens of proposals for important acts of law, as well as many parliamentary initiatives, etc., were stopped by the (mis)use of the so-called entity voting in the House of Representatives of the BH Parliamentary Assembly, even though they had a convincing majority in this House. In the period from December 2018 to mid-2021, a total of 55 acts of law were blocked through the so-called entity voting (a number of these were related to fulfilling obligations from the EU integration process). At the same time, the acts of law that were blocked in this way had nothing to do with the collective rights of the constituent peoples or the position of the entities, but concerned all citizens and their rights, so it is a matter of pure abuse for the purpose of political blockade of the entire system Such continuous (mis)use of decision-making mechanisms within the House of Representatives and the House of Peoples, which leads to an unbearable level of inequality of the directly elected MPs as well as citizens who elected them, is the cause of general stagnation, loss of trust in institutions, blockage of institutions - even in times of a pandemic, undermining democratic society, stagnation on the way to European integration, and the creation of a state of general insecurity and a continuous crisis that threatens to regional peace and security.

Thanks to such constitutional solutions, in the period 1997–2007 alone, the adoption of as many as 59.9% of reform acts of law were blocked, of which 136 were due to the lack of consent from the entity RS and 20 due to the lack of entity consent from the Federation of BH (see: Trnka et al., 2009, pp. 77–90).[7] It was mainly about acts of law of importance for the process of European integration and for other key processes of interest to the all citizens of BH.

[7] Trnka, K. *et. al.*, *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine*, Konrad Adenauer, Sarajevo, 2009, pp. 77-90.

In addition, it is possible to stop the adoption of any decision/law in the House of Peoples by using the mechanism to protect the vital interests of the constituent peoples[8] (see: Article IV/3. e) and f) of the BH Constitution). However, the vital interest protection mechanism is relatively rarely used, since political parties from RS entity exercise absolute control over the legislative process in the state legislature by using the mechanism of entity voting. Thus, delegates from the ranks of the Serb constituent peoples in the state House of Peoples have never used the vital interest protection mechanism, but MPs and delegates from Republika Srpska regularly use the mechanism of entity voting in order to block legislative activity at the state level. This is due to the fact that when using entity voting, unlike the vital interest protection mechanism, there is no provision for constitutional-judicial control that can unblock the decision-making process because it is a regular way of decision-making, thus there is an open possibility of abusing this mechanism.

At least two more important details related to the decision-making process in the BH Parliamentary Assembly should be added to this. Thus, even though Article IV/2. b) of the Constitution of BH establishes that the quorum in the House of Representatives consists of a majority of the total number of members, and despite the fact that Article IV/3 d) of the Constitution of BH stipulates that decisions in both Houses are made by majority of the votes of those who are present and who vote, according to practice and the Rules of Procedure of the House of Representatives and the House of Peoples, the necessary one-third of the votes from each entity are not counted according to the number of MPs and delegates who are present and who vote at the session, but are always counted with regard to the total number of MPs in the House of Representatives and delegates in the House of Peoples - regardless of the real number of them who are present at the session.[9] In this sense, one can justifiably ask the question whether this practice is in accordance with the Constitution of BH at all?

Another very important detail, which has no example in any democratic or even non-democratic country, is the position of the Chair and Deputy Chairs of the Houses of the BH Parliamentary Assembly in the process of passing laws and other decisions. The Constitution of BH in Article IV/3 b) stipulates that the leadership of the House of Representatives as well as the House of Peoples consists

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8 O principu konstitutivnosti naroda, vidi šire: Ribičič, C.; Begić, Z.; Pavlović, D., *Bosnia and Herzegovina after Sejdić-Finci Case*, Universitätsverlag, Regensburg, 2016, pp. 8-35; Trnka, K., *Konstitutivnost naroda*, Vijeće kongresa bošnjačkih intelektualaca, Sarajevo, 2000, pp. 47-58, etc.

9 See: The Rules of Procedure of the House of Representatives of the Parliamentary Assembly of BH, Official Gazette of BH No. 79/14, 81/15, 97/15, 78/19, 26/20, 53/22, 59/23, 87/23), Article 85, and the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of BH, Official Gazette of BH No. 58/14, 88/15, 96/15 and 53/16, Article 75.

of the Chair and two Deputy Chairs who are elected from among the constituent peoples - Bosniacs, Serbs and Croats. Therefore, the election of the Chair and Deputy Chairs of the House of Representatives is carried out with severe discrimination against all MPs who do not belong to the constituent peoples and who, according to the Constitution itself, do not have the right to run for these very important positions due to their ethnicity. Bearing in mind the structure of the House of Peoples of the Parliamentary Assembly of BH, which consists of five Bosniac, Serb and Croat delegates, and the fact that a citizen of BH who does not belong to these ethnic groups cannot run for the position of the delegate, by the nature of things the Chair and two Deputy Chairs of this House are elected also exclusively from Bosniac, Serb and Croat constituent peoples. In addition to the fact that the Chair and Deputy Chairs of the Houses of the Parliamentary Assembly are elected on the basis of discriminatory norms, their very important position is of particular importance in terms of passing laws and other decisions, when the Chairs and Deputy Chairs of the Houses take over the legislative procedure.

Thus, the Rules of Procedure of the House of Representatives and the House of Peoples prescribe and specify the procedure for passing laws and all other decisions. However, in the first place, Article 85 of the Rules of Procedure of the House of Representatives and Article 75 of the Rules of Procedure of the House of Peoples stipulate that the prescribed decision-making procedures apply to all decisions of the House, including acts of law. Then, in paragraph 1 and 2 of the aforementioned articles of these Rules of Procedure it is prescribed that if the majority of votes in the procedure for making all decisions of the House of Representatives and House of Peoples does not include at least one-third of the votes from each entity (the so-called entity voting), the Chair and Deputy Chairs will try to reach an agreement within three days. If they reach an agreement, the relevant decision of the House of Representatives as well as House of Peoples (including acts of law!) is considered adopted, and the relevant House are only informed about it. If the Chair and Deputy Chairs do not reach agreement, only in that case the Houses will vote in the second round. Therefore, the Chair and Deputy Chairs of both Houses of the BH Parliamentary Assembly (the House of Representatives and the House of Peoples) take over the course of the legislative procedure and by their decision - that is, by their consent they can pass the acts of law and any other decision in situations where the majority of votes does not include one third from each entity - which is a very frequent, almost constant occurrence.[10]

[10] See: e.g. Report on efforts to reach agreement on the Proposal of the Law on Amendments to the Law on Value Added Tax, number 02-50-6-16-10/23 dated 6 October 2023.

However, in Bosnia and Herzegovina, the decision-making process of the representative legislative body can be taken over by only three persons in the function of Chair and two Deputy Chairs in each Houses of the BH Parliamentary Assembly - who represent exclusively the constituent peoples (Serbs, Croats and Bosniacs). In addition, as can be seen from the above, Bosnia and Herzegovina is a state where Roma, Jews, Bosnians and Herzegovinans and all others who do not belong to the so-called constituent peoples cannot be elected to one of the two Houses of the state legislative body (House of Peoples), nor can they be candidates for the position of Chair and Deputy Chairs in both Houses.

4. DECISION-MAKING PROCEDURES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA IN THE CONTEXT OF RULE OF LAW AND EFFECTIVE POLITICAL DEMOCRACY – SHORT OBSERVATIONS

Elections based on democratic standards (and non-discrimination norms!) are not an end in themselves, the goal of conducting elections is to ensure the participation of citizens in the performance of public affairs indirectly through their democratically elected representatives. These are the foundations of representative democracy – in short, where the equality of the vote in the election phase is an imperative that is achieved by constitutional guarantees and, in particular, by the creation of electoral units, while the equality of the positions of those who are elected in the elections for the representative bodies is simply implied in every democratic society (except in Bosnia and Herzegovina!).

In democratic countries, there may be deviations regarding the principle of equality of citizens through possible deviations regarding the modelling of electoral units, which then has a negative impact on the principle of equal representation of citizens in the decision-making procedure of representative bodies, but there is no known case of inequality of citizens that is realized within the representative body based on the unequal position and value of the votes of its members - who represent citizens in decision-making legislative procedures (except in Bosnia and Herzegovina).

Of course, in some states, there are bicameral representative bodies, but the rule is – of a legal nature that in that case both chambers must be elected based on norms that must not be of an undemocratic and discriminatory character. At the same time, the position of lower houses in democratic countries of comparative law is, as a rule, dominant in terms of the position and competencies in relation to the upper houses, and that the position of both houses in terms of mutual

relations and the competencies assigned to them is in direct proportion to the level of democratic legitimacy and democratic capacity they possess according to the method of election (direct or indirect) - which are also generally accepted democratic standards of a legal nature codified by the norms of international and inner law. In Bosnia and Herzegovina, the upper house - the House of Peoples - is elected based on norms that are extremely discriminatory - about which there are judgments of the European Court for Human Rights - as explained above. These norms discriminate not only those BH citizens who do not belong to the constituent peoples (national minorities and those who connect their nationality to the state affiliation of Bosnia and Herzegovina), but also the citizens who belong to the constituent peoples – Croats and Bosniacs from the entity of the RS and Serbs from the entity of the Federation of BH. These citizens do not have the right to run for office and to be appointed to the position of member of the House of Peoples due to entity territorial affiliation. They cannot even influence in any way the appointment of delegates to the House of Peoples for the reason that the procedure for their appointment is indirect and firmly in the hands of individuals who belong to the constituent peoples based on entity territorial affiliation. In contrast to that, quite understandably, all decisions/laws that are passed in the decision-making procedure of such an established legislator, greatly affect the rights, freedoms and status of the all citizens - including those who have no influence on the appointment of the House of Peoples - either by the fact of their adoption - or by their non-passing/blocking due to undemocratic decision-making procedures in which there is a privileged minority - not only in the House of Peoples, but also in the House of Representatives thanks to the so-called entity voting as a regular form of decision-making in these two Houses, but also thanks to the inadequate position of the House of Peoples within relations and procedures in the BH Parliamentary Assembly.

In addition, this Chamber is not elected directly, but appointed indirectly, where the key role in the process of selecting candidates and appointing them to this position is played by the narrow leadership of political parties - which, due to the solutions of the DPA and the accompanying electoral geometry, mainly come from the circles of the nationalistic political parties. Despite all this, the House of Peoples in the process of passing laws and other decisions of the Parliamentary Assembly of BH, according to the Dayton Constitution itself, has an equal role and position with the House of Representatives - which is directly elected by the citizens, in the sense that any law or other general decision must be adopted in the same text in both Houses to enter into force. In practice, the position of the House of Peoples is much stronger compared to the House of Representatives, bearing in mind the pure mathematics and logic of numbers according to which the House

of Representatives consists of 42 members, while the House of Peoples consists of 15 members. This means that any law, even if it was unanimously adopted in the House of Representatives, cannot be adopted unless it has the support of at least two delegates of the House of Peoples from the RS entity, and four delegates from the Federation of BH entity.

However, without a democratic legislative procedure and democratic relations within the legislative procedure, there can be no democratic society, and especially no rule of law and effective political democracy. Any non-democratic deviation within this procedure inevitably, by a domino effect, leads to the disruption of all other values within society - in the areas of rule of law in general, human rights and freedoms, stability, security and peace.

As can be seen, Bosnia and Herzegovina have a serious problems in these both key phases of the functioning of democracy – in the phase of elections as well as in the phase of functioning of representative body as a central institution of the constitutional system, which produces concrete consequences of an undemocratic nature directly to the principle of effective political democracy, and then spreads very negative consequences for the entire society and democracy - precisely for the reason that deviations are present at the very source from which the organization of the society that was supposed to develop as democratic begins.

However, pronounced discrimination regarding the inequality of the status and value of the votes of the members of both chambers of Parliamentary Assembly of BH by ethnicity and entity territorial affiliation is not only the result of the so-called entity voting in both Houses, but also the special - inadequate position of the House of Peoples within the relations and procedures in the Parliamentary Assembly of BH. This was stated by the Venice Commission in its Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative No. CDL-AD (2005) 004 from March 11-12, 2005.[11] Thus, in paragraph 36 of the aforementioned Opinion of the Venice Commission, it is stated as follows: "The drawback of this arrangement is that the House of Representatives becomes the chamber where legislative work is done and necessary compromises are made in order to achieve a majority. The role of the House of Peoples is only negative as a veto chamber, where members see as their task to exclusively defend the interests of their people without having a stake in the success of the legislative process. It would therefore seem preferable to move the exercise of the vital interest veto to the House of Representatives and abolish the House

[11] Venice Commission, Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative No. CDL-AD (2005) 004 from March 11-12, 2005 – available at [https://www.venice.coe.int].

of Peoples. This would streamline procedures and facilitate the adoption of legislation without endangering the legitimate interests of any people. It would also solve the problem of the discriminatory composition of the House of Peoples."

In paragraph 101 of this Opinion of the Venice Commission it is stated: "the time seems ripe to start a process of reconsideration of the present constitutional arrangements in BH and the impetus provided by the Parliamentary Assembly in this respect is most welcome. Constitutional reform is indispensable since present arrangements are neither efficient nor rational and lack democratic content."

Paragraph 29 of the aforementioned Opinion of the Venice Commission also states that:"a balance has indeed to be struck between the need to protect the interests of all constituent peoples on the one hand and the need for effective government on the other."

Further, in paragraph 34 of the Opinions of the Venice Commission regarding the so-called entity voting, this Commission took the following position:"This veto, which in practice seems potentially relevant only for the RS, appears redundant having regard to the existence of the vital interest veto." In fact, this position shows that the Venice Commission also recognized the privileged position of members of the Houses of the Parliamentary Assembly of BH from the Republika Srpska in relation to other members of these houses.

At the same time, the relations in both Houses of the Parliamentary Assembly of BH, including the position of the House of Peoples, have no example in any democratic country. It is not even a question of the so-called qualified majority, which is usually necessary for the adoption of certain decisions of the representative body (e.g. passing amendments to the Constitution), but rather a "qualified minority" that has the power to absolutely stop any act of law or other decision of the democratic majority based on the entity territorial and ethnic affiliation through so-called entity voting as a regular form of decision-making.

In this regard, the position of elected individuals in the relations within the state representative body of BH with regard to entity and ethnic affiliation should be observed as well. They are a participants in relations within the Parliamentary Assembly of BH, as an individual with his own individual personality and integrity, in any case when they do not have the constitutional or legal right and obligation to represent the institution of which they are members, nor the public authority or the BH state itself. In this case, however, there are also those who cannot even be part of the leadership of the both Houses because they do not belong to the constituent peoples, as explained above.

In this respect, for example, are the views of the European Court of Human Rights in the case of Forcadell and Lluis and others v. Spain (No. 75147/17, May 7, 2019), where the European Court recognized the right of a group of members of the representative legislative body to submit an application as admissible to this Court, because the rights they invoked concerned them individually and could not be attributed to Parliament as an institution. In the case of Mathieu-Mohin and Clerfayt v. Belgium (application no. 9267/81, March 2, 1987) the European Court also declared the application as admissible and allowed the applicant, who was a member of a representative legislative body, to participate in the proceedings before the European Court.

Regarding the unequal status and multiple inequality of votes in the decision-making procedures of the Parliamentary Assembly of BH, proceeding was initiated before the European Court of Human Rights in Strasbourg in 2021 (case no. 34891/21, *Begić v BH*). In this paper, there will be no more words about this case for reasons of correctness, bearing in mind that the proceeding before the European Court of Human Rights is ongoing.

5. CONCLUSION

The European Convention, as well as the European Court of Human Rights through its practice, give special importance to the principles of effective political democracy and the rule of law, which are very closely related (see: United Communist Party of Turkey and Others v. Turkey of 30 January 1998 Reports 1998-I, paragraph 45; *Refab Partisi and Others v Turkey* from 13 February 2003, paragraphs. 86-87; *Kjeldsen, Busk Madsen and Pedersen v Denmark*, application No.: 5095/71, 5920/72 and 5926/72, series A-23, p. 27. etc.).

If the representative body in BH (House of Peoples) is elected on the basis of expressed discrimination on ethnic grounds (on which there are already judgments of the European Court in the mentioned cases), if the representative legislative body established in this way consists of two Houses that have an unequal level of electoral legitimacy and therefore democratic capacity, if in that representative body the indirectly appointed House - the House of the People has a stronger position than the directly elected House of Representatives, if there is pronounced inequality in the House of Representatives itself according to the entity affiliation of the citizens elected to represent other citizens (MPs) - then such a situation cannot be called a "separation of power in a democratic society" (as it is often presented, especially as the position of the defendant BH in proceedings before the European Court of Human Rights), rather, it is about the absence of democracy, which reminds a lot of a kind of apartheid on European soil and in the 21st cen-

tury. Both regarding the gross restriction of voting rights of citizens on the basis of ethnicity, as well as on the established relations of multiple discrimination and inequality within the representative body on the basis of ethnic/national and entity affiliation - which is ultimately based on the entity's ethnic structure, which is a direct consequence of genocide, war crimes and crimes against humanity.

Such a situation led to complete dysfunctionality in the exercise of the legislative function. For many years, Bosnia and Herzegovina has not been able to respond to the demands of all its citizens, even in the extraordinary circumstances of a pandemic, when the health of the population is at risk - as explained above, thanks to the extremely undemocratic decision-making procedures of the state representative legislative body, nor can it effectively fulfill its obligations of a legal nature on the way to European and Atlantic integrations. The prescribed structure, procedure of election and decision-making procedures of the Parliamentary Assembly of BH abounds with elements of an undemocratic nature that lead to the inequality of the votes of the citizens' representatives and thus, ultimately, to the pronounced inequality of the citizens. The reason for the non-implementation of, for example, the Judgments of the European Court of Human Rights, as well as legal obligations from the European Convention and its protocols, which are ratified instruments referred to by the BH Constitution of BH, is not in the absence of a democratic majority, but in the undemocratic procedures of decision-making where the political and privileged minority (mostly from the territory of the Republika Srpska entity) blocks the decision-making of the democratic majority. The adoption of European democratic standards on the way to European integration must certainly include the necessary reform of the institution of the Parliamentary Assembly of BH - as a representative legislative body, which in every democratic society is the central institution from which democracy begins and which ensures democracy. This, in the first place, by respecting the principles of effective political democracy and the rule of law - which include mostly of all other generally accepted codified democratic standards of a legal nature which are derived from mentioned principles, on which every democratic society and democratic system is based.

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THE RULE OF LAW, THE DOCTRINE OF LEGITIMATE EXPECTATIONS AND THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Anita Blagojević, PhD, Full Professor
Josip Juray Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
ablagoje@pravos.hr

Marijana Majnarić, PhD candidate
Constitutional Court of the Republic of Croatia
Trg Svetog Marka 4, 10000 Zagreb, Croatia
marijana_majnaric@usud.hr

ABSTRACT

An important source of the Croatian legal system is found in the Constitutional Court's case law, which has been instrumental in shaping constitutional principles and implementing them in the proceedings of ordinary courts. Relying primarily on previously established constitutional principles, on doctrines legally binding to EU member states and their citizens, and on interpretations of EU law, legal proceedings must, above all, comply with the constitutional principle of the rule of law as one of the highest values of the constitutional order of the Republic of Croatia. All proceedings must include the requirement that legal consequences should be proportionate to legitimate expectations of parties in each individual case. Furthermore, requirements for laws stemming from the principle of the rule of law must not be such as to directly challenge the doctrine of legitimate expectation of individuals having faith in those laws and other individual legal acts. It should be noted that no legitimate expectation of exercising a certain right may arise without sufficient grounds in domestic law, separating mere "hope" and "belief" from a clear basis in a legal act or provision. Accordingly, protection of the doctrine of legitimate expectation can be viewed through the principle of procedural fairness/just proceedings guaranteed by Article 29 of the Constitution, but also as a component of ownership rights guaranteed by Article 48 thereof. The rule of law, as an essential component of every democracy, is thus also achieved through protection of the doctrine of legitimate expectation. This paper discusses the doctrine of legitimate expectation in general, as expressed by the Constitutional Court in its practice, and analyzes the most relevant Constitutional Court decisions pertaining

to the protection of the doctrine of legitimate expectation within the standard of fair and just proceedings.

Keywords: *Constitutional court, just proceedings, legitimate expectation, rule of law*

1. INTRODUCTION

In scientific literature, and especially in European and domestic case law, increasing attention is given to the application of the doctrine of legitimate expectation, which can be said to be widely accepted today in safeguarding the subjective rights of individuals. The integration of the doctrine of legitimate expectation into the legal framework of the Republic of Croatia in general was prompted by its establishment in the Constitutional Court's case law, and also in the legal system of the European Union as a whole, placing it among the fundamental principles protected by the Constitution and an indispensable tool in upholding the rule of law. This doctrine, and the associated principle of legal certainty, are key elements of the rule of law and of respect for human and civil rights as fundamental constitutional values. Nevertheless, safeguarding legitimate expectations is primarily incumbent upon each individual judicial or state body, tasked with evaluating, in each specific case, the legitimacy of such expectations and the necessity of their protection, which may entail acknowledging corresponding rights[1] or offering compensation for any resulting damage[2]. The Constitutional Court's review (assessment) of laws, bylaws and ordinary court judgments, with the aim of ensuring proper criteria and correct (lawful) decisions, has certainly contributed to guaranteeing this protection. In this regard, there is an emerging need to regulate and incorporate the doctrine of protecting legitimate expectations through domestic legal norms and/or practice, according to expectations and/or restrictions set by the EU legal framework. This paper will describe the content and meaning of the concept of legitimate expectations, and then proceed to demonstrate on the example of specific Constitutional Court decisions if and under what circumstances particular legitimate expectations warrant protection, focusing on enhancing their reasonableness and legal foundation as prerequisites for their existence (acknowledgment) as such.

2. THE DOCTRINE OF LEGITIMATE EXPECTATIONS

While the origin of the doctrine of legitimate expectations is attributed to Kant's protection of "legitimate expectations of citizens as requirements underpinning

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1 Constitutional Court Decision No. U-I-5612/2011 etc. from 23 January 2013.

2 Supreme Court Decisions No. Rev 1532/2014-3 from 23 January 2018 and Rev 2321/2018-3 from 19 May 2020, related to the Constitutional Court Decision cited above – assessment of the Law on public bailiffs.

relationships of individuals in a community"[3], it is important to note that its historical predecessor is found in the German principle of *Vertauenschutz*, denoting protection of trust and directly related to the protection of vested rights.[4] In the first judgments of German administrative courts in the 1950s and 1960s, the principles of good faith and of legal certainty are cited as the basis for the protection of legitimate expectations, while later developments formulated the principle as "autonomous manifestation of the rule of law".[5] Over time, especially from the late 1960s onwards, the doctrine of legitimate expectations has transcended national jurisdictions and spread to other states' legal systems. The establishment of this doctrine in the EU legal framework has undoubtedly bolstered its global recognition. Although the Court of the European Union has been citing the doctrine of legitimate expectations since the late 1950s, it was not until twenty years later (in the 1970s) that the principle was established as a fundamental principle of EU law and a cornerstone of individuals' legal certainty.[6]

The Court of the European Union classifies the doctrine of legitimate expectations as a general principle of law – one whose role comes forth in resolving contentious issues in the absence of specific legal norms.[7] We should note that there are no explicit provisions[8] regulating the doctrine of legitimate expectations and the associated principle of protecting vested rights in the fundamental document of the European Union on human rights, the Charter of Fundamental Rights of the European Union[9]. The Convention on the Protection of Human Rights and Fundamental Freedoms[10] also lacks a provision on the protection of legitimate

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3 Đerđa, D., *Zaštita legitimnih očekivanja u upravnom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 34, No. 1, 2013, p. 84.

4 De Amboris Vigna, A., Kijowski, D. R., The Principle of Legitimate Expectations and the Protection of Trust in the Polish Administrative Law, Bialostockie Studia Prawnicze, Vol. 23, No. 2, 2018, p. 40.

5 *Ibid.*

6 Đerđa, D., *op. cit.*, note 3, p. 85.

7 Court of Justice of European Union, Kratki vodič o EU-u. General principles of law are unwritten sources of law developed through case-law. A general principle of law which in the EU prevails over secondary laws (ordinances, directives, suggestions, opinions), [https://op.europa.eu/webpub/com/short-guide-eu/hr/], Accessed 1 March 2024.

8 In literature concerning European administrative law, protection of legitimate expectations and vested rights are generally discussed together. See, for example, Schonberg, S., *Legitimate Expectations in Administrative Law*, Oxford University Press, Oxford, 2000. According to Đerđa, vested rights are certain authorizations a party has acquired in the past, while legitimate expectations pertain to the right of a party to acquire a certain right in the future, which the law guarantees in the moment of initiating an administrative procedure. See Đerđa, *op. cit.*, note 3, p. 96.

9 The Charter of Fundamental Rights of the European Union, Official Journal C 326, 26 October 2012; Croatian translation: SL C 202, 7 June 2016; hereinafter: Charter.

10 The Convention on the Protection of Human Rights and Fundamental Freedoms [https://www.echr.coe.int/web/echr/european-convention-on-human-rights], Accessed 1 March 2024; hereinafter: Convention.

expectations, but it has been established in practice that under certain circumstances such expectations are to be considered "ownership" protected by Article 1 of Protocol No. 1 to the Convention[11].

The Constitution of the Republic of Croatia[12] also contains no mention of the legal principle of legitimate expectations, although it could be understood in a broader sense as the principle of legal certainty, synonymous with the rule of law, which, along with predictability, certainty, definiteness and precision of legal norms and certainty of legal and judicial consequences, encompasses the principle of protection of legitimate expectations and the principle of protection of vested rights. The absence of explicit constitutional provisions and differences in interpretation result in a lack of clarity in applying this doctrine, underscoring the vital role of the Constitutional Court[13] in its evolution and application. This role is especially evident in ensuring legal certainty[14], which is essential for ensuring the rule of law, realized in each specific case through vested rights and legitimate expectations of individuals. In the complete absence of codified rules concerning the protection of the principle of legitimate expectations, which have been raised to constitutional level in Croatia and are among its fundamental values[15], the pivotal role of the Constitutional Court becomes apparent in establishing standards and guidelines for safeguarding this doctrine through its rulings. It is therefore always necessary to make a detailed analysis of the circumstances of each specific case and

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11 Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: strasbourški acquis*, Novi informator, Zagreb, 2013, p. 961.

12 Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.

13 The Constitutional Court has expressed its position on the doctrine of legitimate expectations in a series of its early rulings, for example Constitutional Court Judgment U-I-2921/2003 etc. from 19 November 2008, Official Gazette No 137/08; Judgment No. U-IIIB-1373/2009 from 7 July 2009 Official Gazette No. 88/09; and Decision No. U-III-2646/2007 from 18 June 2008, Official Gazette" No. 104/08.

14 A state free of uncertainty regarding the content and application of legal norms that constitute the legal order or part thereof.

15 Constitutional Court Judgment No. U-IIIB-4366/2005 from 5 April 2006: "The highest values of the constitutional order of the Republic of Croatia are the rule of law and respect for human rights. They are the basis for interpreting the Constitution. The obligation to respect said constitutional values inevitably leads to interpreting relevant laws and other regulations in accordance with two important principles that comprise said constitutional values. These are the principle of legal certainty and the associated principle of protecting legitimate expectations of parties in proceedings deciding on their rights and obligations. The Constitutional Court has, in its judgment and decision No. U-I-659/1994 etc. from 15 March 2000 … highlighted the general content of these two principles, emphasizing that, "in a legal order based on the rule of law, laws must be applicable and equal for all, and legal consequences should be certain for those the law is applied to. The Court also points out that legal consequences must be proportional to legitimate expectations of parties in each specific case where the law directly applies to them."

decide whether arguments (principled positions) applied thus far can be applied in similar or related cases[16].

3. THE CONTENT AND PROTECTION OF LEGITIMATE EXPECTATIONS

The protection of legitimate expectations is applied in cases when the legal situation (regime) is changed, specifically when the new framework comes into conflict with the potential exercise of individuals' rights. In such cases it is essential to resolve whether the individual can rely on the consistency of the legal system and depend on its continuity and predictability. The concept of legitimate expectations is associated with the concept of vested rights, which represent subjective rights that may not be derogated, restricted or left unprotected[17]. Applying the theory of vested rights ensures the implementation of the principles of fairness, legality, and especially of legal certainty, because the latter sometimes prevents even the legislature from derogating an individual's vested rights or depriving them of protection by enacting new norms.[18] Therefore, vested rights serve as the foundation for anticipating their exercise in the future, so any change in the legal framework aimed at restricting or abolishing them may result in a violation of the interests of individuals who relied on them based on the legal norm.[19]

Furthermore, the rules and conditions for safeguarding legitimate expectations are neither prescribed nor deducible from legal regulations; instead, they are established through case law and evaluated in each specific case. For an expectation to be legitimate, it must be reasonable[20] and founded in law, so an expectation that is unreasonable cannot legitimate and subject to protection. In assessing whether a legitimate expectation is subject to protection, it is necessary to balance the interest of the individual seeking such protection with the public interest[21] that may be infringed by making a decision in favor of the individual. This implies that private interest will be protected only when its priority over public interest is determined

16 See overview of Constitutional Court judgments.

17 Hartley, T. C., *The Foundations of European Union Law: an introduction to the constitutional and administrative law of the European Union*, Oxford University Press, Oxford, 2010, p. 162165, and Craig, P.; Burca de, G., *EU law: text, cases and materials*, Oxford University Press, Oxford, 1998, p. 357-364.

18 *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 1526.

19 Pranevičienė, B.; Mikalauskaitė-Šostakienė, K., *Guarantee of principles of legitimate expectations, legal certainty and legal security in the territorial planning process*, Jurisprudence, Vol. 19, No. 2, 2012, str. 648.

20 According to the Court of European Union jurisprudence, a reasonable expectation is one that a "reasonable citizen" would have, Đerđa, D., *op. cit.*, note 3, p. 90.

21 Kolinsky, D., *A Legitimate Expectation of a Successful Challenge?,* Judicial Review, Vol. 17, No. 2, 2012, p. 174-176.

in a specific case.[22] In summary, all the above values must be carefully weighed when deciding whether an individual's expectation is reasonable and lawful, and whether it will be given priority over public interest or if it will eventually encroach on it, or on the interests of third parties. Protection of the concept of legitimate expectations can be interpreted through Article 29 of the Constitution[23], Article 48 of the Constitution[24], and Article 1 of Protocol No. 1 to the Convention.

3.1. Legitimate Expectations within the Meaning of Article 1 of Protocol No. 1 to the Convention

The concept of "possessions" in the first part of Article 1 of Protocol No. 1 to the Convention is autonomous and encompasses "existing possessions" and assets[25], including claims, based on which an applicant may argue to have at least a "legitimate expectation". "Possessions" include "*in rem*" and "*in personam*" rights. Thus, Article 1 of Protocol No. 1 to the Convention defines the concept of ownership (its proprietary nature) in a fundamentally different way than domestic legislation

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22 If we consider the interference of the state in ownership rights, it is important to note that the ECHR will protect the right of ownership through the application of three rules. First, that everyone has the right to quiet enjoyment of property. Second, depriving a person of the right to property must fulfill certain prerequisites. Third, the state has the right to control the use of property in accordance with common interest. While determining common interest, national legislation allows some degree of freedom, because it is generally better equipped to do so than international institutes. Nevertheless, the ECHR offers guidelines that the concept should be broadly defined and reasonably founded. Of course, in realizing ownership rights and the common interest of the community, proportionality must be respected. In other words, the ECHR makes it clear that a violation of rights occurs whenever the applicant bears or has borne an individual and excessive burden. In such cases, it needs to be determined whether a balance has been achieved between social interests of the community and the appeal to protect the basic rights of the individual. Gović Penić, I.*, Izabrana praksa Europskog suda za ljudska prava i građanski postupci pred hrvatskim sudovima*, Organizator, Zagreb, 2022, p. 1206.

23 Compare Constitutional Court Judgment No. U-III-2646/2007 from 18 June 2008: "Court proceedings must adhere to the principle of the rule of law as the highest value of the constitutional order of the Republic of Croatia. Their conduct should not only comply with the requirement of lawful proceedings of state authorities, but also respect the legitimate expectations of parties in each specific case. Such expectations certainly include the expectation that the dispute will be resolved by applying legal standards in force at the time of its initiation, which also upholds the principle of just proceedings from Article 29 of the Constitution." .. "Everyone has the right to have an independent ... court established by law fairly ... decide on his rights and obligations...".

24 The right of ownership is guaranteed.

25 Every natural or legal person has the right to quiet enjoyment of their possessions. The Convention, and the Protocols accompanying it, do not define what constitutes possessions, but the concept has been elucidated through numerous judgments by the ECHR and the Constitutional Court. According to Article 1 of Protocol No. 1 to the Convention, objects of protection are: economic interests related to a company's business, stocks and shares of companies, intellectual property, claims and debts, contractual rights, future income, legitimate expectations and social security rights *ad personam*, Omejec, J., *op. cit*. note 11, p. 957.

– so possessions within the meaning of the Convention refer to things – movable and immovable, as well as all that constitutes movable and immovable assets (other ownership interests). The term "ownership" has an autonomous meaning, independent of official categorization in the domestic legal system, and is not limited to possession of physical goods: certain other rights and interests representing possessions may also be considered "ownership rights" and thereby "assets". Through its case-law, the Constitutional Court has introduced an understanding of ownership rights within the meaning of the Convention, so in some circumstances "legitimate expectations" of property (possessions) acquisition may also enjoy protection under Article 1 of Protocol No. 1 to the Convention. Besides not defining the concept of ownership, Article 1 of Protocol No. 1 to the Convention does not establish a right to acquire property, but envisages protection of property that also includes, in some circumstances, "legitimate expectations".[26] For an "expectation" to be legitimate, it needs to be more concrete than mere hope and it needs to be founded in a legal provision or legal act, such as a court judgment, pertaining to the property interest in question. According to the Constitutional Court's position, legitimate expectations for realizing a specific claim can only arise if they have a robust foundation in domestic law. "However, a legitimate expectation has no independent existence; it must be attached to a proprietary interest for which there is a sufficient legal basis in national law".[27]

It follows that a legitimate expectation must be based on a reasonably justified reference to a legal act that has a solid basis and pertains to property rights.[28] Another aspect of the concept of "legitimate expectations" involves a situation where "legitimate interest" alone does not constitute a property interest, but refers to how domestic law would treat a claim concerning what is considered "property".[29]

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[26] This position was also expressed by the ECHR in its judgment *Marija Božić v Croatia*, Application No. 50636/09, from 24 April 2014, paragraph 46.

[27] *Bikić v Croatia*, Application No. 50101/12, Judgment from 29 May 2018, paragraph 46.

[28] The term "legitimate expectations", in the context of Article 1 of Protocol No. 1 to the Convention, was first established by the ECHR in its judgment Pine Valley Developments *LTD v Ireland* from 29 November 1991, Application No. 12742/87, Series A no. 222, p. 23, and reiterated in judgment *Stretch v United* Kingdom from 24 June 2003, Application No. 44277/98. In both cases applicants were authorized to rely on and refer to the fact that the specific legal act under which they assumed financial obligations would not retroactively be found null and void to their detriment. Thus, in this group of cases, "legitimate expectation" was based on "reasonably justified confidence in a legal act, which had a legitimate legal basis and pertained to property rights."

[29] The other aspect of the term "legitimate expectations", in the context of Article 1 of Protocol No. 1 to the Convention, was developed by the ECHR in its *judgment Pressos Compania Naviera S.A. and others v Belgium*, from 20 November 1995, Application No. 17849/91, Series A no. 222, p. 22. This case concerned damage caused by a collision of ships due to the negligence of Belgian sawmillers for which, under Belgian law, the state is responsible. According to domestic Belgian tort law, such claims are actionable from the time of the incident. The ECHR qualified the applications as "claims" falling under

Furthermore, it has been repeatedly pointed out in the constitutional and conventional case-law that applicants have no "legitimate expectation" unless they can be found to have an "active enforceable claim"[30] which has been "sufficiently established"[31], so a claim can be considered an asset only if it is sufficiently established to be enforceable. By contrast, a conditional claim (one that depends on a future uncertain event) cannot be considered an "asset". The belief that the current law will be changed in the applicant's favor may not be considered a form of "legitimate expectation" within the meaning of Article 1 of Protocol No. 1 to the Convention, and neither can a claim that had no chance of succeeding due to foreseeable legislative intervention. Furthermore, in cases where there is a dispute regarding the correct interpretation or application of domestic law, and national courts subsequently dismiss the applicant's submissions, it cannot be asserted that a "legitimate expectation" exists.[32] Considering all of the above, for the admission of an "asset" consisting of a "legitimate expectation", the applicant must be able to

protection of Article 1 of Protocol 1 to the Convention. It further noted that, based on a series of rulings by the Belgian Court of Cassation, the applicants may claim to have a "legitimate expectation" that their applications arising from the aforementioned incident, would be adjudicated in accordance with general tort law or law of damages. In this particular case, the "legitimate expectation" was not a component of property law, nor associated with it, as was determined in cases *Pine Valley Developments Ltd and Stretch*. The ECHR here pointed out that it was understood that "legitimate expectation" does not come into consideration if there is no "claim" within the meaning of Article 1 of Protocol 1 to the Convention (in this particular case, a damage claim). It is therefore evident that the acknowledgment of a legitimate expectation in this case did not inherently confer property rights. Rather, it primarily concerned the treatment of the applicants' claim — categorized by the ECHR as a "damage claim" — under Belgian domestic law. This encompassed the assurance that established precedents from Belgian national courts, notably the Kopecký judgment, would extend to the damages already incurred by the applicants.

30 In the case *Nikola Gavella v Croatia*, Application no. 33244/02, Decision from 11 July 2006, the applicant complained that the Constitutional Court's decision revoking provisions of the Denationalisation Act on pre-emption rights had deprived him of those rights, contrary to Article 1, Protocol No. 1 to the Convention. The ECHR pointed out that, according to the Denationalisation Act, the decision to sell the flat was at the sole discretion of its current owners who could as well have chosen not to sell it. In this sense, the applicant could not enforce his claims against them. The sale of flats was therefore a possible, not a certain event. It follows that the applicant never had enforceable claims against the owners and that, in fact, his claims were conditional from the outset. Therefore, the application was rejected as inadmissible.

31 In the Grand Chamber's decision on the admissibility of the application in the case *Gratzinger and Gratzingerova v. Czech Republic*, from 10 July 2002, Application no. 39794/98, in which the applicants did not fulfill one of the major legal requirements for realizing the rights they claimed, the Grand Chamber of the ECHR decided that the application was not sufficiently established within the meaning of Article 1 of Protocol No. 1 to the Convention. Property can encompass "existing possessions" or claims that are sufficiently established to be considered "assets".

32 In the case *Radomilja and others v Croatia*, Applications no. 37685/10 and 22768/12, Judgment from 20 March 2018, paragraph 149, the ECHR states: "the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention. It is for that reason that the Court has held that, in principle, it cannot be said that an applicant has a sufficiently established claim amounting to an 'asset' for the purposes of Article 1 of Protocol No. 1, where there is a dispute as to

claim to have a right that constitutes a sufficiently established substantive proprietary interest under the national law.[33]

4. ON LEGITIMATE EXPECTATIONS AS ASSETS PROTECTED BY THE CONSTITUTION

Apart from ECHR case-law, the doctrine of legitimate expectations has been a part of European law for decades, and this includes the Croatian constitutional framework.[34] In cases of specific constitutional review[35], the Constitutional Court has adopted an approach of autonomous interpretation of constitutional property rights whose content and scope are determined in accordance with the terms and principles developed in the ECHR case-law[36], and reiterated its already established position that property, in the sense of Article 48, paragraph 1 of the Constitution, "must be interpreted very broadly", because it encompasses "practically all proprietary rights", including economic interests that are inherently related to property, but also to legitimate expectations of parties that their proprietary rights, founded on legal acts, will be respected, and their realization protected. Given that the legal positions of the ECHR (and the Court of the European Union) on legitimate expectations correspond to article 48, paragraph 1 of the Constitution, and are thus applicable within the constitutional framework of the Republic of Croatia, the Constitutional Court has embraced them, whereby the institute of legitimate expectations has become an inherent part of Croatian constitutional law.

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the correct interpretation and application of domestic law and where the question whether or not he or she complied with the statutory requirements is to be determined in judicial proceedings."

33 For example, it follows from the ECHR's Judgment in the case *Béláné Nagy v Hungary*, from 13 December 2016, that if a person was granted, by decision, the right to a disability pension, he or she has obtained "existing ownership" within the meaning of Article 1 of Protocol No. 1 to the Convention. Based on such a decision, the beneficiary had a "legitimate expectation" that she would continue to receive the disability pension as long as her working capacity remained reduced to a certain degree. A "legitimate expectation" has thus become a property right within the meaning of Article 1 of Protocol No. 1 to the Convention.

34 Advocate general Lenz stated in joined cases *Finsider v Commission*, 1985 E. Comm. Ct. J. Rep. 2857, p. 2865, and the Constitutional Court, more than 25 years ago, in Judgment No. U-I-659/1994 etc. from 15 March 2000, that "in a legal order based on the rule of law, laws must be universal and equal for all, and legal consequences should be certain for those the law will apply to, …legal consequences must be appropriate to the legitimate expectations of parties in each specific case in which the law is directly applied to them."; Roberts, Melanie, Public law Representations and Substantive Legitimate Expectations, Modern Law Review, 2001, p. 112-114.

35 Constitutional Court Judgment No. U-IIIB-1373/2009 from 7 July 2009, Official Gazette No. 88/09.

36 The legal position of the ECHR contends that, under certain conditions, legitimate expectations of parties must be recognized as "assets" entitled to protection under Article 1 of Protocol No. 1 to the Convention.

In assessing whether a claim, in the circumstances of a specific case, and under certain conditions, constitutes legitimate expectations deserving recognition as assets under protection of Article 48, paragraph 1 of the Constitution and Article 1 of Protocol No. 1 to the Convention, the Constitutional Court examines whether a specific claim warrants the designation of a "legitimate", and thereby a legally protected expectation.

4.1. Selected Examples from the Constitutional Court's Case-Law

4.1.1. Constitutional Court Judgment No. U-IIIB-1373/2009 from 7 July 2009[37]

In the present case, the applicants were issued a building permit and their building right was affirmed by a final decision, but after they began construction, the permit was revoked, under the authority of supervision. This is *de facto* a case of depriving the applicants of their property in the sense of their legitimate expectations that the conditions from their issued, final building permit, which was part of their assets, will be met. Until the decision to revoke the building permit was made on the authority of supervision, the applicants had at least a legitimate expectation that they were authorized to build an object on their land in accordance to the issued building permit, once it became final, and that they acted rationally and responsibly when they took on the burden of financial responsibility, based on their protected building right affirmed by the final decision, with the expectation that these actions would not result in the bank exercising its right to sell their property to third parties.

The Constitutional Court could only conclude that in the instant case, the state's interference in terms of revoking the building permit under the authority of supervision, constituted a factual deprivation of the applicants' property. It found that the applicants harbored a "legitimate expectation" that the conditions stipulated in the building permit, based on which they assumed financial obligations, will be met, considering that the expectation stemmed from a reasonably justified confidence in the final administrative act, resting on a robust legal foundation. There is therefore no doubt that their application was sufficiently established, and thus enforceable, which qualifies it as an "asset" in the sense of Article 1 of Protocol No. 1 to the Convention. The Constitutional Court thus concluded that the stated legitimate expectation was in itself constitutive of the applicants' proprietary interest, and in the instant case the final building permit is an integral part of

[37] Published at www.usud.hr.

the applicants' assets protected under Article 48, paragraph 1 of the Constitution and Article 1 of Protocol No. 1 to the Convention.

4.1.2. Constitutional Court Judgment No. U-III-2624-2007 from 18 June 2008[38]

The present case concerned a civil proceeding before the Supreme Court in which the applicant's appeal for review was dismissed due to the low value of the subject matter in dispute. The Constitutional Court found that court proceedings must be conducted according to the constitutional principle of the rule of law as the highest value of the constitutional order of the Republic of Croatia (whose application clearly transcends any formalistic interpretation of legal provisions concerning the admissibility of appeals for review). The proceedings should not only conform to the mandate for legality of proceedings of state authorities, but should also incorporate the principle that legal consequences must align with the legitimate expectations of the parties involved in each particular case. Such expectations certainly include the expectation that the dispute will be resolved by applying the legal standards valid at the time of their initiation, thereby fulfilling the principle of just proceedings from Article 29 of the Constitution. In this specific case, the Supreme Court of the Republic of Croatia based its decision on the admissibility of the applicant's appeal on a formalistic rather than a realistic assessment of the value of the subject matter in dispute, thereby infringing upon her right to access this legal remedy as stipulated in Article 29, paragraph 1 of the Constitution.

4.1.3. Constitutional Court Judgment No. U-III-2244/2014 from 6 June 2016[39]

This case concerned an administrative procedure and dispute concerning the restitution of property confiscated during the Yugoslav communist regime. The Constitutional Court examined whether the annulled final decision on restitution bestowed ownership rights upon the applicants over the disputed co-ownership part, safeguarded by constitutional and conventional guarantees of property rights, in terms of its inviolability as the highest value within the constitutional order of the Republic of Croatia. It was examined whether there were legitimate expectations that would constitute the applicants' ownership on the disputed co-ownership part. The Constitutional Court found that, in the instant case, the applicants had a legitimate expectation that the decision on restitution, through which they obtained ownership in the land registry over the contested co-ownership part, would not be subsequently altered due to their relation to the previous owner. This expectation

[38] Official Gazette"no. 104/08, the constitutional complaint is accepted.

[39] Official Gazette no. 57/16, the constitutional complaint is accepted.

was based on reasonably justified confidence in a final administrative act backed by a valid legal foundation and underwent a series of legally mandated supervision procedures, and represented a credible statement of their indisputable position, leaving the applicants with neither real nor legal grounds to anticipate a subsequent annulment of that administrative act. The Constitutional Court concluded that the said legitimate expectation is in itself constitutive of the applicants' ownership of the co-ownership part, which therefore has to be recognized. In this specific case, the decision on restitution concerning the disputed co-ownership part became part of the applicants' assets within the scope of the guarantee of Article 48, paragraph 1 of the Constitution and Article 1 of Protocol No. 1 to the Convention. Furthermore, the Court determined that the state had no authority to unilaterally interfere with the applicants' property (in terms of confiscating their co-ownership part that was recognized by a final decision on restitution) by annulling the final decision on restitution, unless it had previously established an interest of the Republic of Croatia in doing so, and secured compensation of the market value to the applicants.

4.1.4. Constitutional Court Judgment No. U-III-2731/2018 from 11 July 2023[40]

The present case concerned a civil dispute wherein the applicant sought to establish their legal status as the holder of a tenancy right and requested the issuance of a judgment substituting the purchase agreement of the flat in question. The Constitutional Court found that the applicant had no reason to doubt the content of the certificate issued by the competent public authority and signed by an official, and could have reasonably expected the defendant to decide favorably on his request to obtain tenancy rights to this flat. The Constitutional Court concluded that, by rejecting as unfounded the applicant's request for the issuance of a judgment substituting the purchase agreement of the disputed flat, the applicant's property rights were infringed upon. It determined that, in the circumstances of this case, the applicant had a sufficiently established claim[41] constituting an "asset" within the meaning of Article 48, paragraph 1 of the Constitution[42], while the reasons given by the Supreme Court for applying relevant legal provisions in this case produced consequences incompatible with Article 48, paragraph 1 of the Constitution and Article 1 of Protocol No. 1 to the Convention.

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40 Published at www.usud.hr, the constitutional complaint is accepted.

41 A legitimate expectation does not exist independently of an ownership interest which is itself founded in national law.

42 It must be determined whether the interference was "legally justified", whether it intended to achieve a legitimate aim, and whether there was a reasonable relationship of proportionality between the means employed and the intended aim.

4.1.5. Constitutional Court Judgment and Decision No. U-III-444/2017 and U-III-554/2018 from 1 April 2020[43]

The present case concerned a civil proceeding for compensation of damage due to unlawful actions of the Ministry of Privatization in the voucher privatization process. The applicants claimed that the Ministry, in violation of relevant provisions of the Regulation, included privatization shares of unprofitable and insolvent companies in the Voucher bidding program. Based on Article 48, paragraph 1 of the Constitution, the applicants believed their rights, as voucher holders, should be considered assets, i.e. property rights deserving protection, "specifically, the applicants' right as lawful voucher holders to obtain the right to shares, in full (for all vouchers), of companies that were solvent and profitable at the time of their inclusion in the Program." They alleged that the arbitrary application of substantive law in the present case prevented them from realizing legitimate expectations that they would be paid the claimed compensation for lost profits. The Constitutional Court decided that, due to the nature of the Ministry's failure to adhere to the Regulation by including profitable and solvent companies in the Program, the applicants could not have reasonably expected to receive a fair value for privatization shares, disregarding the aforementioned regulations and circumstances of the case. Considering the insufficient legal foundation for the applicants' claims in substantive law, the Constitutional Court concluded that, under the circumstances of this case, no legitimate expectations protected by law could have arisen to allow the applicants to realize claims for compensation for lost profits.[44]

4.1.6. Constitutional Court Judgment and Decision No. U-III-1744/2023 etc. from 14 November 2023[45]

The present case concerned constitutional complaints in the procedure of assessing the legality of a general act - the Decision on amendments to the Decision on financial aid for stay-at-home parents. The status of stay-at-home parent and the corresponding financial aid were established by the Decision, reflecting the political will of the representative body of the City of Zagreb to financially support a specific group of individuals. These decisions did not confer legally guaranteed rights, and

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43 Published at www.usud.hr, constitutional complaint is dismissed and rejected.

44 In this context, the Constitutional Court points out that the ECHR, in cases Łącz *v Poland*, Application no. 22665/02, Decision from 23 June 2009; and *Depalle v France*, Application no. 34044/02, paragraph 86, Judgment from 29 March 2010, concluded that individuals who, at the time of obtaining property rights, were aware of legal and factual limitations of such rights, cannot subsequently claim that those limitations were the cause of unlawful or unproportional interference of the state with their property.

45 Published at www.usud.hr, constitutional complaints are dismissed and rejected.

local and regional government bodies were not mandated to regulate the matters covered by these decisions. In other words, financial aid for stay-at-home parents is not a right in the classical sense, but a form of aid that public authorities have the discretion to provide or withdraw, and which is based not on obligation but on solidarity. This is also the key difference between the legal situation of stay-at-home-parents resulting from adopting the disputed Decision, and the ECHR Judgment Béláné Nagy v. Hungary. The Constitutional Court reiterates that in a democratic society, provided that the legislative intervention reforming a social system has a legitimate aim, the addressees of legal norms that are being changed or revoked do not have a legitimate right to expect a given legal framework to remain permanently unchanged. That is, the state's discretionary power must not produce consequences deviating from the fundamental constitutional values underlying the constitutional order of the Republic of Croatia, and the same requirement exists for local and regional authorities. The principles of the rule of law dictate that changes in regulations affecting the status of stay-at-home parents and their right to financial aid should be implemented according to the principle of fair balance, with as few consequences as possible for those affected by those changes. A significant fact in the present case is that beneficiaries of compensatory measures provided to stay-at-home parents by the City of Zagreb do not lose their financial aid; rather, they continue to receive financial aid according to the terms and conditions specified by the Decision. The Constitutional Court accepted the lower court's assessment that, by said compensatory measures, the City of Zagreb has achieved a balance between public interest and the protection of legitimate expectations of addressees of the disputed Decision, supporting their return to work.

However, a dissenting opinion by judge Šumanović, dated 21 November 2023[46], argues that, from the perspective of the Convention, the rights of persons with the stay-at-home parent status, confirmed by individual final and enforceable decisions of competent local authorities, have the legal meaning of tangible existing possessions, within the meaning of Article 1 of Protocol No. 1 to the Convention, as correctly assessed in principle by the High Administrative Court, which issued the disputed judgment. Autonomously defined in the Convention and regularly used in the stable case-law of the ECHR, the term "asset" includes income received from the social security system, as well as legitimate expectations. Therefore, holders of the right to the disputed financial aid provided by the stay-at-home parent measure, in line with the known and well-established practices of both Strasbourg and the Croatian Constitutional Court, have a currently enforceable claim that

[46] The Dissenting opinion is part of the Constitutional Court's Judgment, published alongside it at www.usud.hr.

was sufficiently established, so protection of rights thus established reflects the requirement of legal certainty, inherent in the rule of law.

4.1.7. Constitutional Court Decision No. U-I-2921/2003 etc. from 19 November 2008[47]

The subject of Constitutional Court review were proposals to institute proceedings to review the constitutionality of the ALD[48]. Proponents found the deletion of Article 180 of the ALD from the legal framework unacceptable, reasoning that parties who submitted their complaints before 3 February 1996 had a "legitimate expectation" that their (property) claims would be decided based on Article 180 of the ALD. It must be taken into account that the legislator, starting with 3 February 1996, stopped all court proceedings initiated by complaints lodged in reference to Article 180 of the ALD, because there was no longer a legal basis for deciding on claims for compensation for acts of terror, as this provision was deleted by law. It was established that the legal intervention was justified, because it had a legitimate aim and sought to realize public or common interests of the community. The proponents' belief that their claims would have been found justified, had Article 180 of the ALD been applied – which would also shift the court decision in their favor, granting them full compensation of material and non-material damage they sought – remains just a belief, which, according to the Constitutional Court's assessment, cannot be treated as a "legitimate" expectation warranting legal protection within the meaning of Article 1 of Protocol 1 to the Convention. This holds true regardless of the fact that such claims were not resolved by competent courts by the time of their deletion from the legal framework. All the more so because the deletion of Article 180 of the ALD from the legal framework did not delete the applicants' claims themselves. They were simply integrated into the new legal framework.

4.1.8. Constitutional Court Decision No. U-I-5612/2011 etc. from 23 January 2013[49]

The subject of Constitutional Court review, based on the proposal of appointed public bailiffs, was the Law on public bailiffs and the Law amending the Law

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47 Official Gazette no. 137/08; rejection of proposals to institute proceedings to review the constitutionality of the Act on liability for damage resulting from acts of terrorism and public demonstrations, Official Gazetteno. 117/03.

48 Act on liability for damage resulting from acts of terrorism and public demonstrations, Official Gazette no. 117/03; hereinafter ALD.

49 Official Gazette no. 13/13; proposals to initiate proceedings to review the constitutionality of the Law on public bailiffs, Official Gazette no. 139/10, 150/11 and 70/12; and the Law amending the Law on public bailiffs, Official Gazette no. 150/11.

on public bailiffs. In the present case, the legislator had the obligation to ensure a balance between common or public interests of the community (introducing a new legislative model abolishing the service of public bailiffs) and protection of rights of individuals – appointed public bailiffs, to whom this same legislator had previously conferred professional status and employment, while also imposing obligations inherent in the position, which required considerable financial investment. This is not only a matter of compensation for the damage suffered. In their case there had been a violation of their legitimate expectations, which were based on valid legal acts of the state, and on the confidence of individuals in state institutions and the law they create. If the legislator had, for any reason, decided to abolish the service of public bailiffs, it was obliged to strike a fair balance between realizing that aim in the public or common interest, and protecting the interests of individuals serving as public bailiffs. Since the legislator did not establish a transitional legislative regime to adequately address the issue of previously appointed public bailiffs following the abolition of that institution, the fair balance between the objective the legislature sought to achieve by its abolishment in the general or public interest, and the protection of the interests of persons appointed as public bailiffs, has been disrupted. This omission also contravenes the principles that laws must adhere to under the rule of law, and directly violates the principle of legitimate expectations of individuals who relied on laws and valid individual legal acts adopted under those laws. The rule of law permeates all articles of the Constitution and implies the duty of state and public authorities to act in a way that ensures their measures are not arbitrary and that the burden of those measures is distributed fairly. This is the only way public confidence in state and public authorities can be preserved – confidence in their commitment to the rule of law and the protection of human rights, and confidence in the law these institutions create. The satisfaction provided by the Constitutional Court serves to preserve that confidence. It does not affect the right of the appointed public bailiff to seek compensation for the damage suffered in court proceedings according to general provisions of the law of obligations.[50]

4.1.9. Constitutional Court Decision No. U-I-4455/2015 from 4 April 2017[51]

The Constitutional Court assessed proposals to initiate a procedure to review the constitutionality of the Law amending the Law on consumer credit. The proponent believed she had a legitimate expectation that she would collect the principal along with the agreed interest from the consumer, which became impossible due

[50] Supreme Court Decisions Nos. Revd 2668/2020-2 from 23 February 2021, Revd 1232/2021-3 from 7 June 2022, Rev 1532/2014-3 from 23 January 2018 and Rev 2321/2018-3 from 19 May 2020.

[51] Published at www.usud.hr.

to legislative intervention. The Constitutional Court examined whether the proponent had a sufficiently established claim arising from Article 48, Paragraph 1 of the Constitution, which could be considered a legitimate expectation. In the specific situation resulting from invalidating the credit agreement based on the (added) Article 19, paragraph 1 of the Law on Consumer Credit, the legislator had the authority to impose a special regime for reimbursing the amount received under such an agreement. Nevertheless, as certain legal and natural persons continued to engage in consumer lending activities without the required authorization – a legal prerequisite for their lawful conduct – any expectations arising from such activities in subsequent court proceedings could not have reasonably led to the full realization and protection of their claims arising from the consumer credit agreements. However, that case concerned a legislative intervention in the area of consumer lending, not in final administrative acts as in the present case. It involved private law agreements with an international character, which, even with the enforceability clause, do not confer acquired rights, and may be challenged by civil law mechanisms. The essence of the above decision lies in recognizing that, in this case, the proponents, acting as creditors or credit intermediaries, were already in illegal territory (not having obtained line ministry approval). Consequently, it was established that they could not have had any legitimate expectations of fully realizing their contractual rights. It follows that subsequent legal nullification of these agreements, which were in the execution phase, could not have resulted in unlawful interference in their property rights as protected by law.

5. OVERVIEW OF SOME RELEVANT JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the further text of the paper, we will present several relevant judgments of the European Court of Human Rights.

On 2 April 2015, the ECHR issued a judgment in the case Solomun v. Croatia[52], affirming a violation of the right to peaceful enjoyment of possessions from Article 1 of Protocol No. 1 to the Convention, because the Supreme Court quashed the final judgment made in the applicant's favor, and the County Court, in a remitted proceeding, ruled against his interests. The ECHR points out that the first and most important requirement of Article 1 of Protocol No. 1 to the Convention is that any interference by a public authority with the peaceful enjoyment of possessions must be lawful. Deprivation of property can only be justified if it is shown to be "in the public interest" and if it meets the requirement of proportionality

[52] Judgment from 2 April 2015, Application no. 679/11, paragraph 60; the Constitutional Court rejected the constitutional complaint in Decision no. U-III-419/2007 from 29 April 2010.

by striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. To be lawful, interference must have a legitimate aim in realizing a specific public or common interest.

On 20 May 2010, the ECHR ruled in the case Lelas v. Croatia[53], affirming a violation of the right to peaceful enjoyment of possession from Article 1 of Protocol No. 1 to the Convention. The Court found it sufficiently established that the applicant's claims for daily allowance for demining work qualified as "assets" implying protection by Article 1 of Protocol 1 to the Convention. Consequently, the Court determined that the domestic courts' rejection of these complaints undoubtedly constitutes interference with his right to peaceful enjoyment of possessions. In cases where a financial claim is not enforceable, because the limitation period has passed, the ECHR clarified that such claims still qualify as "assets" and therefore constitute "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention.

In its judgment in Damjanac v. Croatia[54] on 24 October 2013, the ECHR affirmed a violation of the right to peaceful enjoyment of possessions from Article 1 of Protocol No. 1 to the Convention, pertaining to cessation of the applicant's pension payments. In the judgment, the court states that, if a contracting state has legislation in force regulating the right to payment of a welfare benefit or pension – whether dependent on the prior payment of contributions or not – that legislation must be regarded as generating a proprietary interest for persons who meet its requirements, as per Article 1 of Protocol No.1. Therefore, if the sum of the financial aid or pension is reduced or eliminated, this could constitute interference with possessions that must be justified by common interest.

On 26 June 2018, the ECHR issued a judgment in the case Čakarević v. Croatia[55], affirming a violation of the right to peaceful enjoyment of possessions from Article 1 of Protocol No. 1 to the Convention, because the applicant had been ordered to repay unemployment benefits, which she had received due to the error of competent state bodies. The Court concluded that the applicant had a legitimate expectation that she had the right to the payments received, given that this right was

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53 Judgment from 20 May 2020, Application no. 5555/08, paragraph 56; the Constitutional Court rejected the constitutional complaint in Decision no. U-III-653/2006 from 10 April 2008.

54 Judgment from 24 October 2013, Application no. 5294/10, paragraph 85; the Constitutional Court rejected the constitutional complaint in Decision no. U-III-1833/2007 from 11 March 2010.

55 Judgment from 26 April 2018, Application no. 48921/13; the Constitutional Court rejected the constitutional complaint in Decision no. U-III-4992/2010 from 14 March 2013, while its Decision No. U-III-5442/2012 from 19 December 2012 declared it inadmissible.

confirmed by an administrative decision, that the payments were regularly made by the competent administrative body and that the applicant had not in any way contributed to the administrative body's mistake.

In the case Bikić v. Croatia[56], on 29 May 2018, the ECHR decided there was no violation of Article 1 of Protocol No. 1 to the Convention. The judgment was issued by a five-vote majority. The applicant alleged that her right to peaceful enjoyment of possessions was violated by the refusal of her request to purchase her flat. The ECHR found that the applicant did not fulfill the key legal prerequisite to purchase the flat, i.e. she did not have a tenancy right (she did not acquire a final decision confirming her tenancy) and thus this flat did not constitute her "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention, so refusing her request did not violate her right to peaceful enjoyment of ownership. Because she had not fulfilled the key legal prerequisite, it cannot be said she had a legitimate expectation, i.e. an asset in the sense of Article 1 of Protocol No. 1 to the Convention. However, two judges thought the applicant had a legitimate expectation that she would be able to purchase the flat, but the fulfillment of this expectation was thwarted through the fault of the relevant authorities, making it a right safeguarded by Article 1 of Protocol No. 1 to the Convention. It follows that non-fulfillment of the permitted legal requirement, provided its fulfillment was possible, but prevented by the local authorities, should not affect the application of Article 1 of Protocol No. 1 to the Convention due to the absence of legitimate expectations. Instead, the fact of ownership should be presumed whenever the substantive property interest was otherwise sufficiently established according to national law. In such a scenario, legitimate expectation should play a part in examining fair balance as an argument in the applicant's favor against other claims. It would follow that she had a legitimate expectation to realize effective enjoyment of that right, which therefore constituted an "asset", and therefore "ownership" within the meaning of Article 1 of Protocol No. 1 to the Convention.

6. CONCLUSION

The principle of protection of legitimate expectations has been present for centuries in many national legal systems, and apart from Convention-based law, it has been an undeniable part of European law for centuries. The Court of the European Union has been citing the doctrine of legitimate expectations since the late 1950s, and some twenty years later (since the late 1970s), it was established as one of the fundamental elements of the legal certainty of individuals. The said

[56] Judgment from 29 May 2018, Application no. 50101/12; the Constitutional Court rejected the constitutional complaint in Decision no. U-III-2663/2008 from 11 May 2012.

doctrine is, for good reason, gaining relevance in the Croatian legal framework. The application of the protection of legitimate expectations usually occurs in cases where the legal situation (regime) changes, particularly when the new order comes into conflict with the potential realization of individuals' rights. In those cases, it is imperative to resolve the question of whether the individual can rely on the consistency of the legal order, and have confidence in its continuity and predictability. The concept of legitimate expectation builds upon the concept of acquired rights, which represent subjective rights that may not be derogated, restricted or left unprotected. Acquired rights are the basis for the expectation of their future exercise, so a change in the legal regime aimed at their restriction or abolishment may lead to a violation of the interests of individuals who relied on them, based on the legal norm. Furthermore, the rules and conditions for the protection of legitimate expectations are not prescribed and cannot be derived from legal provisions, but are instead developed through the practice of courts in assessing each specific case. For an expectation to be legitimate, it must be reasonable and founded in law, so an expectation that is not reasonable is not legitimate and is not subject to protection. In assessing whether a legitimate expectation is subject to protection, both the interest of the individual seeking that protection, and the public interest that may be harmed by making a decision in the individual's favor, need to be evaluated. It follows that private interest will be protected only when its priority over the public interest is determined in the instant case. So, all the above values must be carefully weighed before deciding whether an individual's expectation is reasonable, founded in law, and whether it will be given priority over public interest or if it will eventually encroach on public interest and/or the interest of third persons. Protection of the concept of legitimate expectations can be viewed in light of Article 29 and Article 48 of the Constitution, and Article 1 of Protocol No. 1 to the Convention. In interpreting the concept of property (ownership) from Article 1 of Protocol No. 1 to the Convention, it is imperative to correctly understand the Constitutional Court's and the ECHR's case-law and the way it applies to specific cases. Accordingly, the above concept includes the protection of claims which can be said to have at least a "legitimate expectation".[57] However, for the legitimate expectations of individuals to be adequately protected, both the legislator (especially when repealing certain legislative solutions) and ordinary courts, whose case-law should be consistent and lawful, must make sure to do so, to prevent legal uncertainty. In upholding the principles outlined above, the Constitutional Court plays a key role, shaping and advancing legal doctrines through its rulings, drawing upon the interpretations provided by the ECHR. These doctrines serve as the cornerstone for legal standards and established values in the

[57] Gović Penić, I, *op. cit.,* note 19, p. 1204.

practice of ordinary courts, ensuring legal certainty and the associated principle of legitimate expectations of parties involved. We conclude that only a universal and homogenous application of law ensures the generality of legal provisions, equality before the law, and legal certainty in a state governed by the rule of law. The universal application of law promotes the public perception of fairness and justice, and strengthens public trust in the legal system as a whole.

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Review article

FREQUENT EXTRAORDINARY PARLIAMENTARY ELECTIONS AS A THREAT TO THE RULE OF LAW IN SERBIA

Vladimir Mikić, PhD, Research Associate
Institute for Comparative Law
Terazije 41, Belgrade, Serbia
v.mikic@iup.rs, mikic.vlada@gmail.com

ABSTRACT

In December 2023, another extraordinary parliamentary election was held in the Republic of Serbia, the fourth in the last decade. Serbia has held no less than thirteen general elections since the multiparty system was introduced in 1990, with only three of them not being extraordinary. The aftermath of almost every early election consisted of the same dominant political party staying on power. This implies that almost every extraordinary election aimed at political capitalization on the status of current executive power-holder. In addition, this type of election is often held simultaneously with local elections. This cannot easily be regarded as a welcome democratic procedure.

Resorting to untimely dissolution of the National Assembly of the Republic of Serbia may be assessed as a tool of expressing the dominant position of the executive in relation to the National Assembly. According to the frontal provision of its Constitution, Serbia is based on the rule of law, and it is committed to European principles and values. Another constitutional provision clearly determines that the duration of the term of a legislature is four years. However, caretaker governments, with much restricted legitimacy, appear to have become an objectionable rule rather than an exception.

It seems to be quite unusual for a candidate state for membership in the European Union to hold so many elections earlier than constitutionally scheduled. While the practice is not formally endangering Serbia's negotiations with the EU, relevant reports presented by the European Commission, the OSCE, and the Venice Commission express concern in this regard. In one of the reports, adopted in December 2022, it is recommended that the Serbian Constitution should be interpreted in such a way that a legitimate limitation of periodical recourse to early elections is enabled.

In this paper, method of comparative normative analysis of legal framework of extraordinary parliamentary elections held throughout Europe is used, as well as method of analyzing comments and recommendations of competent European political and legal authorities. After the

introductory part, the survey of Serbian legal framework envisaging possibilities for dissolving the National Assembly is presented. This part is followed by the analysis of the history of early dissolutions of the National Assembly. In the fourth part, comments and recommendations on Serbian snap elections of various European bodies are examined. In conclusive part of the paper, normative suggestions are laid out in order to curtail the possibly unconstitutional practice of arbitrary dissolution of the National Assembly. These are coupled with recommendations aiming at fostering a stable practice of protecting full-term legislative periods from frequent obstructions by the executive branch of power, since opportunistic parliamentary election timing appear to represent an indirect assault on the rule of law and on the separation of powers in Serbia.

***Keywords**: Constitution of Serbia, extraordinary elections, snap elections, risks to the rule of law*

1. INTRODUCTION

In theory, dissolution of parliament is a legitimate tool in any constitutional democracy. It is a very useful instrument for the general public – when it is truly necessary – to get acquainted with voters' political preferences when it comes to the structure of the legislative body. In this way, dissolution of a legislature before the expiration of its constitutional term has for the function to bring the people's representatives closer to primary sources of political legitimacy – the citizens.[1] It resides in a typical domain of the executive power – either the chief of state (the president of the republic) or the government – to which the counterweight clearly is represented by the executive's responsibility before the legislative body. This mechanism presents one of the core elements of the principle of the separation of powers, which is recognized as one of the crucial components of the rule of law by the United Nations,[2] as well as by the Constitution of the Republic of Serbia.[3]

However, by resorting too often to the instrument of calling early general elections, the executive branch of power may find herself in a position in which such moves of the executive could be assessed as a form of abuse of constitutional powers. This is significantly important because the dissolution can be (and usually is) esteemed as a *political move*, rather than as a strictly *legal act*. The consequence of such a con-

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1 The core purpose of the dissolution of parliament is to settle out conflicts between the legislative and the executive branches of power by transferring the decision-making power to the citizens, who are the original holders of sovereignty: Orlović, S. P.; Rajić, N. N., *Raspuštanje parlamenta – vršenje ili zloupotreba ustavnih ovlašćenja*, Zbornik radova Pravnog fakulteta u Novom Sadu Vol. 4, 2018, p. 1546.

2 "The "rule of law" (…) requires (…) measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency", United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, 23 August 2004, Art. III para. 6.

3 See Part 2 of this paper, "Legal framework on the rule of law and on the dissolution of the National Assembly".

clusion is that it is exceptionally difficult, if not outright impossible, to formally scrutinize the early dissolution of parliament before the constitutional court. The criteria of conveniency, rather than legality (constitutionality), constitutes the basis of such an advance, because it is usually motivated solely by political considerations and electoral projections of the ruling political party or coalition. Practically, „if it is taken into account that the government emerges from the parliamentary majority, it is clear that, under regular circumstances, it will not cause the dissolution of the representative body because it would also collapse its own political existence", and, thus, „the right of dissolution established in this way is used exclusively in rare situations of conflict between the parliament and the government".[4]

The rule of law and timely elections *do* stand in a mutually reinvigorating relation. Although from the comparative perspective snap elections are not a rarity,[5] it is plausible to claim that the respect of ordinary functioning of state institutions, including the complete fullfilment of their respective terms of office, stands in a relation to the appreciation of relevant components of the principle of separation of powers. Democratic governance may indirectly be endangered by continuous dissolution of a legislature when there is no need for doing so in perpetuity. If the decision on the dissolution of parliament is in the executive's hands, and at the same time the identical executive commands the confidence of the majority of members of parliament, one may reasonably be suspicious when it comes to the motives of the chief of state or of the government to resort to such an action. If the rule of law is "a multilayered value that encompasses (…) values such as democracy",[6] the practice of routinely putting a legislature's term to an early end can be assessed as detrimental to the rule of law itself.

Ever since Serbia adopted its first post-Communist constitution in 1990, its legislative body (the National Assembly) has been dissolved without well founded political justification too many times. This means that the National Assembly is regularly forced to make a sudden discontinuation in its functioning without any semblance of a hung parliament or of an unreliable parliamentary majority. Thus, commanding a stable support in the National Assembly provides no guarantees for the executive in Serbia to restrain itself from repeatedly resorting to snap elections.

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4 Simović, D. Z., *Institucionalne pretpostavke usklađivanja ustavnopravnog realnog položaja predsednika Republike Srbije*, NBP – Nauka, bezbednost, policija, Vol. 18, No. 1, 2013, p. 14.

5 Turnbull-Dugarte, S. J., *Do opportunistic snap elections affect political trust? Evidence from a natural experiment*, European Journal of Political Research Vol. 62, 2023, p. 308.

6 Vlajković, M., *Rule of law – EU's common constitutional "denominator" and a crucial membership condition on the changed and evolutionary role of the rule od law value in the EU context*, EU and Comparative Law Issues and Challenges Series (ECLIC) Vol. 4, 2020, p. 235.

In the paper, historical analysis of early elections for the National Assembly is exposed, as well as the chronology of holding simultaneous parliamentary, presidential and local elections in Serbia. The reader is invited to consult the analysis of the legal framework on elections in Serbia. The problem of snap elections is also analyzed from the perspective of Serbia's progress in the process of its perspective full membership in the European Union (the EU), including the recommendations of relevant institutions of the European Union, Organization for Security and Cooperation in Europe (OSCE), and the Council of Europe. For this purpose, in the paper comparison of the practice of extraordinary parliamentary elections with other candidate countries is laid out. Author also aims at suggesting improvements in the constitutional framework in order to reduce risks posed to the rule of law by frequent calling of early general elections.

One of the less desired effects of frequent extraordinary elections may be the *voter fatigue* – a higher voter abstention created by the fact that elections are held more often than it is expected or verifiably needed. This represents a general trend in Europe. Namely, authors of a recently organized survey across 26 European countries concluded that, "while it appears that no form of constitutional rules for early election is directly related to citizen satisfaction with democracy, when early elections are called by prime ministers or presidents, democratic satisfaction drops significantly, and this effect is more pronounced the later in the term the early election is called."[7] It can also be claimed that "snap elections have a causal impact on political trust" – and that of a negative type.[8] Voters' dissatisfaction with frequently organized elections may form a particular form of vulnerability of the rule of law, because it leads to the lower level of overall legitimacy of political actors and elected constitutional institutions. According to the OSCE International Election Observation Mission (OSCE IEOM), organizing early elections in Serbia "has further eroded public confidence in the functioning of democratic institutions".[9]

2. LEGAL FRAMEWORK ON THE RULE OF LAW AND ON THE DISSOLUTION OF THE NATIONAL ASSEMBLY

The frequency of early elections in Serbia arrives mostly from the shortcomings of the *implementation* of the actual constitutional framework, although the latter

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7 Morgan-Jones E.; Loveless M., *Early Election Calling and Satisfaction with Democracy*, Government and Opposition: An International Journal of Comparative Politics Vol. 58, 2023, Cambridge University Press, Cambridge, 2023, p. 598.

8 Turnbull-Dugarte, S. J., *op. cit.*, note 5, p. 308.

9 OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), *Republic of Serbia: Early Parliamentary Elections (17 December 2023): Final Report*, Warsaw, 28 February 2024, (hereandafter: OSCE/ODIHR 2024 Final Report on Serbia), p. 1.

may be regarded as ripe for useful amendments.[10] In this part of the paper, constitutional dispositions on the rule of law, the separation of powers, and the dissolution of the National Assembly, will be analyzed.

In the current Constitution of the Republic of Serbia,[11] the rule of law is defined as "a fundamental prerequisite for the Constitution which is based on inalienable human rights" (Art. 3 Para. 1). This principle of governance is mentioned as the very basis of the "just, open, and democratic society", as Serbia is self-recognized by its Constitutions wording,[12] and it is "exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities" (Art. 3 Para. 2). If it is conceded that the principle of separation of powers represents nothing less than "a pillar of every modern democratic state founded on principles of the rule of law",[13] it represents no surprise that the separation of powers is recognized as one of the constitutionally designed means for enabling the establishment and maintenance of the rule of law. Additionally, the Constitution stipulates that "relation between three branches of power is based on balance and mutual control" (Art. 4 Para. 3).

When it comes to the dissolution of the National Assembly, it should be noted at the first place that the term of office of members of parliament lasts four years (Art. 102 Para. 1 of the Constitution), which is in line with the dominant model in comparative constitutional law. The Constitution stipulates that the National Assembly „shall be dissolved if it fails to elect the Government within 90 days from the day of its constitution" (Art. 109 Para 3). It is interesting to note that the cited provision has never been applied in the history of the Constitution, because the parliament had always been dissolved within the constitutionally fororddained period of time. The constitutional body authorized to dissolve the parliament is the President of the Republic. This prerogative of his (or hers) is exercised "upon the elaborated proposal of the Government" (Art. 109 Para. 1), which is logical, because the Government is put in the position to make a reasonable assessment whether it still enjoys the confidence of the parliamentary majority or

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10 See Part 5 of this paper, "Certain suggestions for improving the legal framework on early elections in Serbia".

11 Constitution of the Republic of Serbia (Ustav Republike Srbije), Official Gazette, No. 98/2006, 115/2021.

12 "Guarantees for inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open, and democratic society based on the principle of the rule of law.", Art. 19 of the Constitution of 2006.

13 Andrun, M., *Raspuštanje parlamenta prema Ustavu Republike Srbije od 2006. godine: neka otvorena pitanja*, Arhiv za pravne i društvene nauke Vol. 3, 2023, p. 109.

not. However, the phrase "elaborated proposal" obviously leaves wide space for various politically useful deviations from the supposed original intention of the Constitution-writers. Therefore, a constitutional amendment may be required to limit the possibility of resorting to unneeded early general elections, in ways that the dissolution of parliament can no longer be used arbitrarily, i.e. to be abused.[14]

The cited formulation was practically inherited from the Art. 89 Para. 1 of the previous Constitution of the Republic of Serbia (adopted in 1990),[15] which might serve as an explanation for the continuity in the practice of dissolving the National Assembly without much reason ever since the democracy was reinstated in Serbia, slightly before the break-up of former Yugoslavia. Although from the theoretical point of view the scale of stability of the government and of the parliament's session was secured in this way (in comparison to the French Constitution of 1958),[16] the linguistic construction in question did not represent a barrier built in a way powerful enough in order to stop the holders of the executive power determined to call early elections whenever they calculated it was convenient. This is the line of thought of important Serbian constitutional scholars from the late 20th and early 21st century, who claim that President's parliamentary dissolution powers cannot easily be dissected from the interest that he or she might share with the government in office.[17]

This was particularly evident on the occasion of the 2023 parliamentary election, in the wake of which the President of the Republic threatened to resign from office in case the result of the election does not suit his political party's interests, *i.e.*, if the opposition parties gain ennough electoral support to form the new Government. Three years earlier, after the general elections of 2020, the President of the Republic announced that the newly elected legislature's term of office (four years) will be shortened by half, in order for it to expire in 2022 (so that the following general elections could be held simultaneously with the presidential election). This early announcement of the soon-to-be-exercised dissolution of the National Assembly served as „an instructive illustration of the political reality of Serbia, which is characterized by the subordination of central constitutional institutions to party

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14 See Part 5 of this paper, "Certain suggestions for improving the legal framework on early elections in Serbia".

15 Constitution of the Republic of Serbia (Ustav Republike Srbije), Official Gazette, No. 1/1990.

16 Marković, M., *Moć i nemoć predsednika Republike Srbije* (*The power and powerlessness of the President of Serbia*), Anali Pravnog fakulteta 3-4/LII, 2004, p. 339.

17 Details about these authors' conclusions are summed up in: Simović, D., Ustavni amandmani iz nužde – Kritički osvrt na ustavnu reformu sudske vlasti (*Constitutional Amendments Resulting from Necessity – A Critical Overview of the Constitutional Reforms of the Judiciary*), Zbornik radova Pravnog fakulteta u Novom Sadu, 1/2022, p. 89.

interests".[18] The cited announcement rendered the constitutionally set term of a legislature unenforceable and not binding on the executive (particularly on the President of the Republic).

From the perspective of the systematic constitutional interpretation, it is important to underline that, according to the text of the Constitution, besides through referendums and people's initiative, citizens' sovereignty is exercised through "freely elected representatives" (Art. 2 Para. 1). However, the right of the people (the citizens) to freely elect their representatives, whether on local, provincial, or national level, can effectively be curtailed by the dominant political powers resorting to unnecessary early elections. Holding on to the existing practice might lead to endangering exercise of the sovereignty by compromising one of the most important tools for its practical appearance.

3. THE HISTORY OF EARLY PARLIAMENTARY ELECTIONS AND SIMULTANEOUS MULTI-LEVEL ELECTIONS IN SERBIA

On December 17 2023, extraordinary parliamentary elections were held in Serbia, after only a year and ten months have passed since the last elections were held. On the same date, extraordinary provincial elections were organized in one of its two autonomous provinces, Vojvodina, and snap elections for the capital city of Belgrade and 65 other local self-governments in Serbia (approximately a third of municipalities in the country). This was a political headliner in itself, but it was not a deviation from the usual practice of organizing multi-level snap elections. On the contrary, Serbia is a country where holding early elections has become a tacit constitutional custom.

Thirteen parliamentary elections were held since the restoration of the multiparty political system in Serbia (in 1990), with only three of them (1997, 2012, 2020) not being prematurely held,[19] which include two (1997 and 2020) that were boycotted by influential opposition parties. At the same time, incumbent party, or party coalition, remained in power after the eight out of ten snap elections that were organized.[20] This strongly leads to the conclusion that in most of the cases there was no need to hold an early general election in the first place. Drawing from this analysis, dissolution of the legislature may be regarded as successful political

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18 *Ibid*.

19 Early general elections were held in: 1992, 1993, 2000, 2003, 2007, 2008, 2014, 2016, 2022, and 2023.

20 This was the case after the elections held in: 1992, 1993, 2007, 2008, 2014, 2016, 2022, and 2023.

move, effectuated at the moment when the opinion polls were obviously encouraging for the political options in power.

Serbia has a long history of tactical dissolutions of parliament and of holding unnecessary early general elections. Only in 1993, 2007, and 2008 at the moment of its dissolution the National Assembly had no functional majority, which led to the fact that the Government could not rule the country. All the other early general elections were most likely held only in order to consolidate the incumbent political forces, without any obvious previous interparty or inter-coalition disputes.

General elections were held concurrently with Serbian presidential elections in 1992, 1997, 2012, and 2022, and, hypothetically, the same might be the case in 2027, the year in which the term of office of the president of the republic expires, as well as that of the actual legislature. In all of these cases, the president of the republic dissolved the parliament, in accordance with the constitutional framework, but probably with the intention that the atmosphere of the presidential elections will probably affect the outcome of the general elections.

Since the reintroduction of multi-party democracy in Serbia no less than seventeen governments have been elected, under the authority of twelve prime ministers, while only five presidents of the Republic were elected during the same period. An observer may be drawn into conclusion that the presidency, by factual means of holding the office longer than a prime minister or a government, represents a higher political authority than its executive counterparts. This argument appears to be even more solidly constructed when it comes to comparing the political and institutional authority of the president of the republic and that of the parliament.

Instead of passing legislation and controlling the government, functions of the National Assembly have been practically greatly reduced because of the lack of appropriate period of time to fulfill its important tasks. Additionally, with the one sole exception (during the so-called cohabitation period from 2004 to 2007), the President of the Republic was the member of the political party that held the dominant political position in the Government in any sequence of the analyzed period, from 1990 up until 2024.

Another important institutional consequence of frequent parliamentary elections deserves to be noticed. Historically, it has taken an unusually long time for the National Assembly to elect the government, counting the period since the election day. In addition, since after each dissolution every work in the parliament comes to an end, caretaker governments, with very restricted legitimacy, continue

to govern.[21] In 1994 and 2004 it took three months for the Serbian parliament to put its confidence in the new government's hands, while in 2016 and 2020 (the latter had been postponed due to grave epidemiological circumstances) this period was longer, and it consisted of four months. In 2007 and 2022, the government was formed after five and slightly less than six months respectively. The reader is invited to observe the critical sounding of the expression used by the European Commission, when, after the general election of 2022, it stated that „the new government was appointed and sworn in on 26 October 2022, within the constitutional deadline, albeit almost 7 months after election day".[22] At the time of the submission of this paper, the general public in Serbia is still waiting for the new government to be sworn in after the December 2023 election (more than three months have passed since), although the incumbent parties hold a comfortable majority of parliamentary seats in the new legislature.

When it comes to local elections, a concern may be expressed that frequent simultaneous organization of local (and provincial) and national elections (2008, 2016, 2020,[23] and, partly, in 2023) can put the very concept of local autonomy at risk. The reason is that, "because of their differences in size, scope and bias, the factors that shape electoral politics in most local elections are very different from those in presidential or state elections".[24] When it comes to partial local elections held in 2023, they were held "following the sudden and simultaneous resignation of mayors from the ruling party",[25] while "several opposition and civil society members publicly expressed concerns that the early local elections were called without a clear explanation".[26]

Any deliberate concurrent organization of national (either presidential, or parliamentary) elections and local elections erodes public trust in local autonomy, because the topics on which voters decide in local elections tend to become irrelevant and covered by the strategic issues of general national (as well as the regional and international) politics. Thus, "voters in local elections mainly express support or distrust of the national government. Local policies and local parties are not relevant to voters' decisions."[27] As it is stated in the official the Office for Democratic Institutions and Human Rights of the OSCE (OSCE/ODIHR) 2023

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21 Concurrently, any dissolved National Assembly is entitled to "perform only current or urgent tasks, stipulated by the Law", Art. 109 Para. 7 of the Constitution.

22 European Commission Serbia 2023 Report, Brussels, November 8th 2023, p. 13.

23 Nastić, M., *Local elections in Serbia: A critical overview*, Studia Wyborcze Vol. 30, 2020, p. 120.

24 *Ibid*, p. 113.

25 OSCE/ODIHR 2024 Final Report on Serbia, *op. cit.*, note 9, p. 5.

26 *Ibid*, p. 5, fn. 5.

27 Nastić, M., *op. cit.*, note 24, p. 114.

Report on Serbia, "the frequency of the early elections further eroded public trust in democratic institutions and electoral processes, and detracted from the efficiency of democratic governance."[28] The traces of the "trend of "nationalization of local elections"[29] can be identified as early as in 2004, when the majority electoral system for the local elections was replaced by the proportional system, and when the mode of direct mayoral elections in four major cities in Serbia was abandoned.

The habit of calling early elections in Serbia has attracted the attention of competent European political authorities. Most recently, in its report adopted after the 2023 local and early parliamentary elections,[30] OSCE/ODIHR concluded that "the government formed after the 2022 early parliamentary elections held office for less than 13 months", and, therefore, „many ODIHR EOM interlocutors noted that frequent early elections effectively stalled the work of the executive and legislative branches on some strategic issues and reforms".[31] The decision of Serbian authorities to delay the more important tasks in order to call an early election in the same period was also noted by the European Commission. In its 2023 Report on Serbia this EU institution concluded that "developments following the two tragic mass shootings [in a Belgrade primary school, in May 2023], the ensuing protests, and speculations about snap parliamentary elections led to a shift in the reform priorities".[32] In its Statement of Preliminary Findings and Conclusions issued on 18 December 2023, a day after the elections, OSCE IEOM concluded that "the frequency of early elections (…) together with the lack of political will left needed reforms unaddressed".[33]

4. EARLY ELECTIONS IN SERBIA FROM THE PERSPECTIVE OF ITS POTENTIAL MEMBERSHIP IN THE EUROPEAN UNION

Serbia has been a candidate for EU membership since 2012. Frequency of holding early elections does not necessarily make Serbia's dedication to the EU full membership more relative, abstract, or distant. However, frequent elections might lead to deterioration of condition of one of the primary values of the EU – the rule of

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28 OSCE/ODIHR 2024 Final Report on Serbia, *op. cit.,* note 9, p. 5.

29 Nastić, M., *op. cit.*, note 24, p. 114.

30 Local elections for the City Assembly of Belgrade were also held prematurely. Namely, the previous ones were held in 2022, which means that regularly they ought to have been scheduled for 2026, specifically because the ruling parties have secured the majority in the local parliament of the Serbian capital.

31 OSCE/ODIHR 2024 Final Report on Serbia, *op. cit.,* note 9, p. 5, fn. 7.

32 European Commission Serbia 2023 Report, *op. cit.*, note 23, p. 3.

33 OSCE/ODIHR 2024 Final Report on Serbia, *op. cit.,* note 9, p. 1.

law, which remains "one of the most important conditionality criteria for the EU enlargement policy".[34]

In the Treaty on European Union (the TEU)[35] adopted in Lisbon in 2007 it is confirmed that the rule of law is one of the founding elements of the EU itself, alongside with "the values of respect for human dignity, freedom, democracy, equality" and respect for human and minority rights (Art. 2 of the TEU). Additionally, representatives of the EU member states confirmed their attachment, among other principles, to the rule of law, which found its place in the corps of "the universal values" that were developed from "the cultural, religious and humanist inheritance of Europe" (Preamble, Para. 5 and 3 of the TEU). When it comes to the subject of this paper, it is even more significant to remind that the EU promised in its constituent act that its "action on the international scene shall be guided by the principles (…) which it seeks to advance in the wider world: democracy, the rule of law", the protection of basic rights and freedoms, human dignity, equality, solidarity, and respect of international law (Art. 21 Para. 1 of the TEU). Thus, promotion and protection of the rule of law in international relations constitutes a legal obligation of the EU and its member-states,[36] as part of the *acquis* which candidate States have to accept.

It is important to outline that in the case of Serbia (as well as Montenegro, another candidate state) "the EU Commission's documents seem to determine the rule of law criteria in a more precise and detailed manner than in the previous enlargement rounds."[37] As with all the other Western Balkans candidate states, "the strong rule of law conditionality will determine the pace of negotiations, and more importantly the opening and closing of the accession negotiations".[38] The mentioned tacit pre-accession conditionality implies that the respect of all the components of the rule of law is ever more important, in particular when it comes to the context of a noticed rise of the disrespect of the rule of law in one of the EU member states – Hungary[39] and Poland, the latter being the cause of the final triggering by the EU of "the infamous Article 7" of the TEU,[40] which regulates the

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34 Vlajković, M., *op. cit.*, note 6, p. 235.

35 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

36 This obligation is further confirmed in Art. 21 Para. 2 point "b".

37 Vlajković, M., *op. cit.*, note 6, p. 248.

38 *Ibid*, p. 251.

39 Bugarič, B., *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, LSE 'Europe in Question' Discussion Paper Series No. 79, 2014, p. 13.

40 Vlajković, M., *op. cit.*, note 6, p. 237.

activation of internal EU mechanisms against a member state which persistently exercises the breach of the EU values.[41]

eriodical resorting to early elections in Serbia is not esteemed as a welcome development by competent European political and expert institutions. In a joint report of OSCE/ODIHR and the Venice Commission of the Council of Europe, issued on December 2022, it is recommended that the Constitution of Serbia should be interpreted in such a way that recourse to snap elections could be limited. The report recommends "an interpretation of the Constitution that would limit recourse to early elections, specifically that the President only dissolves the Parliament on the basis of a well elaborated proposal and preferably only when necessary due to the parliamentary situation."[42]

Comparison of the practice of holding extraordinary elections in Serbia to other recognised candidates for membership in the EU leads to compelling conclusions. Even in Hungary and Poland, two EU member states whose democratic governance has been criticized for a number of years, parliamentary elections have been steadily regular since the fall of the Socialism. However, the primary object of the analysis in this part of the paper is consisted of examination of the frequency of dissolving parliaments in candidate states for EU membership. The results of this examination point out that the Serbian authorities resort to snap general elections more often than other candidate states.

In Albania, stability of the term of legislature has characterized no less than *six* legislatures in row: parliamentary elections in this country have been held on regular basis for almost three decades. General elections were held regularly in 1997, 2001, 2005, 2009, 2013, 2017, and 2021, and the next ones are expected to be held in June 2025. This sort of a *golden standard* might be seen as an atypical expression of institutional confidence in respect of the full term of parliamentary legislatures, if there was no example of Bosnia and Herzegovina. Since 1998, all parliamentary elections held at the national level (Bosnia and Herzegovina is composed of two federal units) were *regular*. The same goes for Georgia, another EU candidate country in which several regular parliamentary elections have been held one after another: from 2004 to the ones held on March 28 2004, which suggests that five legislatures have served for full four-year terms.

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41 "The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations", Art. 7 Para. 2 of the TEU.

42 European Commission Serbia 2023 Report, *op. cit.*, note 23, p. 11.

However, there are countries placed at the threshold of full EU membership in which regular parliamentary elections cannot be easily assessed as standard. In Moldova in the last 20 years eight general elections were held, with three successive legislatures having been dissolved prematurely (from April 2009 to November 2010). Early elections were held twice in Montenegro since the independence of the country in 2006: voters went to the polls earlier than was expected in 2009, 2012, and 2023, with two parliamentary elections held after the constitutional term of the legislature had expired (in 2012 and 2020). Similarly, in North Macedonia, five snap elections were held between 2006 and 2016 (in 2006, 2008, 2011, 2014, and 2016), although in April 2024 second regular general election in row will be held. In Turkey, regular general elections were held in 2007 and 2023, whilst snap elections were organized in 2011, 2015, and 2018. Finally, Ukrainian parliamentary legislatures completed their constitutional term in 2002, 2012 and 2019, and the next ones are about to be held in 2024, whereas early general elections were held in 2007 and 2014 (as in Turkey, the term of the national legislature of Ukraine expires after five, not four, years).

Opportunistic election timing cannot be regarded as a habit of the executive branch solely in Serbia. However, in comparison with Albania, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, and North Macedonia, early elections were held much more frequently in Serbia than it is necessary for a constitutional democracy aiming at the full membership of the EU. The rule of law is one of the basic values (principles) of the EU, and continuous tactical calling of extraordinary parliamentary election, combined with the organization of simultaneous parliamentary, presidential, provincial, and local elections, may threaten the European perspective of Serbia.

5. CERTAIN SUGGESTIONS FOR IMPROVING THE LEGAL FRAMEWORK ON EARLY ELECTIONS IN SERBIA

Constitutional amendments may be the key for effectively constraining the unwelcome practice of periodical premature dissolution of the National Assembly and holding concurrent elections on many (or all) levels of government. Raising public awareness of harmfulness of the mentioned custom would be very contributing to resolving the problem in case, but it seems that establishing rigid legal barriers is the more convenient tool for rectifying the misdeeds brought upon early and simultaneous elections. The suggestions for improving Serbia's constitutional framework in this regard are fourfold: the ban of the possibility of dissolving the National Assembly until the half of its term has expired, reformulation of the legal basis for the dissolution, shortening the period for constituting the parliamentary

session and electing the government, and formal separation of general elections from other types and levels of elections.

Calling early elections might in this way be regarded not as (and just potentially) a move of dubious legal foundation. The application of such a constitutional (and, consequently, legislative) revision would make any unfounded and arbitrary dissolution of the National Assembly outwardly unconstitutional. Ending the session before its constitutionally prescribed term can be bypassed by explicitly banning the badly founded dissolution of the parliament. For that purpose, the Constitution may be amended in order to forbid the dissolution of the National Assembly in the last several months of the president's term of office (three months, as is stipulated by Art. 99 Para. 7 of the Constitution of Bulgaria, or, even more efficient, six months, as is prescribed by: Art. 94 Para. 4 of the Constitution of Belarus, Art. 58 Para. 3 of the Constitution of Lithuania, Art. 85 Para. 4 of the Constitution of Moldova, Art. 172 Para. 1 of the Constitution of Portugal, Art. 89 Para. 3 of the Constitution of Romania, Art. 102 Para. 1 point "e" of the Constitution of Slovakia, or Art. 90 Para. 5 of the Constitution of Ukraine).

The Constitution of Serbia might be amended in order to include the ban of dissolution of the National Assembly twice in a row for the same reason, following the model contained in the Constitution of Greece (Art. 41 Para. 2) and the Constitution of Austria (Art. 29 Para. 1). Another useful suggestion is that the National Assembly should not be exposed to the possibility of dissolution until at least a half of its mandate has passed.[43] Whichever modality is chosen, it appears that there exists a necessity for effectively limiting the possibility of arbitrary ending of a legislature's period of existence.

Putting aside the single explicitly cited cause for the dissolution (Art. 109 Para. 1 of the Constitution), the President of the Republic is not formally *obligated* to dissolve the National Assembly. Therefore, the absence of any sort of duty from the chief of state should be made more explicit. In order to decrease the possibility of abusing the right to dissolve the parliament, it is possible to outline clearer forms of basis for resorting to such a radical move. More precise grounds for the dissolution of parliament can be constructed, based at a clear recognition that the government does not command majority in parliament, or that the government aims at specific policy issues that to do not easily reconcile with its pre-election programme or public announcements.

Also, time limits for the election of the Government should be shortened. In Art. 101 Para. 1 of the Constitution, it is stipulated that the President of the

[43] Andrun, M., *op. cit.,* note 13, p. 117.

Republic calls the elections for the National Assembly 90 days before the end of the legislature's term of office, and that the elections have to be completed within the following 60 days. Additionally, the first meeting of the session is to be held within 30 days following the declaration of the election results (Art. 101 Para. 2). Another possibility for prolonging the effective commencement of parliament's work is provided by the provision in which it is stated that the National Assembly is to be dissolved if it fails to elect the Government within 90 days from the day of its constitution. Finally, by dissolving the National Assembly, the President of the Republic schedules elections, which must be finished within 60 days from the day of their announcement (Art. 101 Para. 6).

When all the mentioned constitutional deadlines are added up, one arrives at a surprisingly long period of time (270 days) for the commencement of the work of a parliamentary session. In terms of these deadlines, a theoretical post-electoral negotiation process may look like a depressing prospect, potentially dragging for almost a year. With the advantage of historical hindsight, it appears that the shortening of the deadlines truly is a necessity. Basically, all of the time periods enumerated in Art. 101 of the Constitution can be abbreviated. There is no particular need for waiting for 30 days to convene the new legislature after the election results are officially pronounced, and one can hardly find a plausible justification for stipulating that the election of the Government must take place within the time limit of 90 days. This period of time may be twice, or three times as short, and it may still provide enough space for various sorts of political arrangements even for the most stubborn negotiators in the coalition-making process, not to mention the situations that do not request any coalition-building, which have occurred very frequently in Serbia.

Ultimately, different levels of elections need to be separated. In the current state of affairs, "voters are unable to differentiate behaviour at the local and national levels; their behaviour in local elections is only a reflection of electoral behaviour at parliamentary or presidential elections."[44] Precise time intervals between the elections at various levels can (must) be inserted in the Constitution, or within the sub-constitutional normative framework. Minimal time difference between the general elections on one side, and presidential, provincial, and local elections on the other side, should consist of six months, in order to create enough space for voters to address their political choices to different types of electoral topics. In addition, since the introduction of proportional representation for local elections, combined with simultaneous local and general elections, "led to the depersonali-

[44] Nastić, M., *op. cit.*, note 24, p. 114.

zation of candidates and councilors",[45] a return to majority system for local elections and direct elections of mayors should be considered, whether at the level of the Constitution or the law regulating local elections.

6. CONCLUDING REMARKS

From the historical point of view, pre-term parliamentary elections in Serbia have served to ensure political survival of a particular government in office. In this sense, the unnecessary dissolution of parliament can indeed be assessed as "manipulative evasion of the Constitution",[46] and a mechanism for "perpetuating power".[47] The same implication might arrive from observing the usual practice of holding simultaneous elections on many levels of government. Verifiably functional governments do not need to resort to early elections, and should not be entangled in the habit of doing the same wrong thing over and over again.

In comparison with most of the other candidate states for EU membership, Serbia is the country with an elevated custom of holding snap parliamentary elections. One of the most influential tools in the process of preventing the regular cycles of parliamentary elections, and of putting the practice of holding concurrent multilevel elections to an end, lays in introducing precise and strict mechanisms for the protection of the integrity of each parliamentary session in the text of the Constitution.

The rule of law is the principle of governance designed to be constructed gradually, by small but resolute steps serving to accomodate the normative life of a country to ideals, values, and procedures stipulated by its highest legal act – the constitution. One must admit that these ideals, values, and procedures suffer, from time to time, from certain deviations even in traditional and well-established democracies. Serbia's Constitution englobes the values of a democratic society, with respect of the separation of powers and promotion of accountability and precise terms of office of the very central institutions of the state. Nevertheless, a particular aversion to holding regular parliamentary elections has arised during many years of political instrumentalization of the institute of dissolution of the National Assembly.

Although the institute of dissolution of parliament is marked by a "deep political connotation",[48] presence of the practice of calling snap elections in Serbia is alarm-

[45] *Ibid*, p. 120.

[46] Orlović, S. P.; Rajić, N. N., *op. cit.*, note 1, p. 1550.

[47] Bojanovska Popovska, D., *Snap elections in illiberal democracies: Confirming trust or establishing hegemony? The case of North Macedonia*, Constitutional Studies Vol. 8, No. 1, 2022, p. 121.

[48] Orlović, S. P.; Rajić, N. N., *op. cit.*, note 1, p. 1549.

ing, because it rarely has anything to do with political currents, at least when it comes to possibilities of forming and maintaining stable governments. This habitude tends to lead to a fictive separation of power, the one in which the legislative branch of power is fully submitted to manifestations of the whim of the executive, as well as to a state of continuous electoral fever.

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Review article

THE ROLE OF THE EU AS A PROMOTER OF JUDICIARY REFORM IN CANDIDATE COUNTRIES: THE CASE OF VETTING PROCESS IN ALBANIA

Gentjan Skara, **PhD**
Epoka University, Department of Law
Tiranë-Rinas, Km. 12, Vorë Tirana, Albania
gskara@epoka.edu.al

Bojana Hajdini, PhD, Associate Professor
Epoka University, Department of Law
Tiranë-Rinas, Km. 12, Vorë Tirana, Albania
bhajdini@epoka.edu.al

Najada Kilic, Msc
Epoka University, Department of Law
Tiranë-Rinas, Km. 12, Vorë Tirana, Albania
nkilic@epoka.edu.al

ABSTRACT

The European Union (EU) enlargement policy has been considered the most effective tool of the EU as an "EU external governance" in exporting democracy, the rule of law, fundamental freedoms, and other values on which the EU is founded in third countries. Considering the lessons learned from previous accession cases– especially Romania, Bulgaria and Croatia, the EU approach to addressing the rule of law reforms early in the accession process shifted toward a bold strategy. This paper analyses the role of the EU as a promoter of judiciary reform in candidate countries, focusing on the vetting process in Albanian. The paper argues that a dilemma exists between legal compliance with EU standards and implementing reforms. While the EU, through judiciary reform, aims to transform the Albanian judiciary system in compliance with the Justice and Home Affairs acquis, political polarisation in Albania has hampered institutional set-up, effectiveness, independence, and the fight against corruption. Moreover, the vetting process has paralysed the judiciary system by increasing the backlog and delaying the length of proceedings. By adopting a dogmatic legal methodology, the paper provides a detailed theoretical discussion of the EU's external dimension as a (legal) normative power and analyses the Europeanization of the judiciary system in Albania. Moreover, the paper assesses

the impact of judiciary reform and discusses the extent to which judiciary reform in Albania is considered successful.

***Keywords**: Albania, EU acquis, Europeanization, Judiciary Reform, Rule of Law*

1. INTRODUCTION

In the EU context, the principle of the rule of law has undergone a profound gradual affirmation, becoming part of other fundamental principles such as liberty, democracy, respect for human rights and four freedoms.[1] The European Coal and Steel Community[2] and the European Economic Community, established by the Treaty of Rome,[3] did not foresee the concept of the rule of law either as a principle or as a fundamental principle of the Community. This is understandable since the EEC was more of an economic project.

Despite its non-recognition, the principle of the rule of law became well-known by judicial practice. In the *Les Vert* case, the European Court of Justice (ECJ) explained that "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[4] By making reference on a "Community based on the rule of law", the ECJ underlined the right of individuals to judicial protection of their rights and interests.

As the EEC/EU evolved from an economic organisation to a more cooperation organisation, the Maastricht Treaty recognised the rule of law as one of the founding principles of the Union, which is common to the Member States, and as a guiding objective of foreign policy.[5] The Lisbon Treaty, which entered into force on 1 December 2009, reaffirmed the principle of the rule of law in internal and external dimensions. Internally, the rule of law has been listed among the founding principles of the Union. Article 2 TEU stipulates that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

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1 Appicciafuoco, L., *The Promotion of the Rule of Law in the Western Balkans: The European Union's Role,* German Law Journal, Vol. 11 No. 08, pp. 744-758; Skara, S., *The Bumpy Road of EULEX as an Exporter of Rule of Law in Kosovo,* Academicus – International Scientific Journal [2017] No. 16.

2 Treaty establishing the European Coal and Steel Community (ECSC Treaty) [1951] OJ Special edition.

3 Treaty establishing the European Economic Community (EEC Treaty) [1957] OJ Special edition.

4 Judgement of 23 April 1986, *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166, para 23.

5 Consolidated Version of the Treaty on European Union [1997] OJ C 340/145, Articles 6 and 11(1).

Additionally, Article 7 TEU envisaged a mechanism for safeguarding the rule of law within the Member States. It introduces 2 different procedures. According to Article 7 (1), based on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, after obtaining the consent of Parliament, may determine the existence of a clear risk of a serious breach by a Member State of the values stipulated in Article 2. Before deciding, the Council hears the Member States in question. Secondly, acting by unanimity on a proposal by one third of the Member States or by the Commission, the Council, after obtaining the consent of the European Parliament may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.[6] In case that a Member State is determined responsible for a serious and persistent breach of fundamental principles (including the rule of law), the Council may decide to suspend certain of the rights.[7]

In the absence of a definition of the rule of law, in 2014, the Commission issued a communication setting out "a new framework to ensure an effective and coherent protection of the rule of law in all Member States".[8] The Commission highlighted the importance of the principle of the rule of law and unpacked the content around six principles, namely: i) legality; ii) legal certainty; iii) prohibition of arbitrariness of the executive powers; iv) independent and impartial courts; v) effective judicial review including respect for fundamental rights; and vi) equality before the law.[9] Such definition of the principle of the rule of law was embedded in Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.[10]

Externally, the promotion of the rule of law is a guiding principle of the Union's external relations, especially in the Common Foreign and Security Policy and the enlargement policy. As noted in Article 21 TEU, "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law […]". In addition, the EU has promoted

6 TEU, Art 7 (2).

7 TEU, Art 7 (3).

8 Commission, *A New Framework to Strengthen Rule for Law*, COM(2014) 158 final, p. 4.

9 Commission, *A New Framework to Strengthen Rule for Law*, COM(2014) 158 final, p. 4.

10 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [202] OJ L 433 1/1. Article 2 (a) reads as follows: "the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.".

the rule of law in third countries through the Common Security and Defence Policy (CSDP) mission which is an integral part of the Common Foreign and Security Policy. In the Santa Maria da Feira Summit (2000), the European Council laid down its approach to promoting the rule of law in third countries by civilian operations. In Annex 1, the European Council acknowledged the following measures to be considered for strengthening the rule of law: i) deploying in third countries judges, prosecutors penal experts and other relevant categories within the judicial and penal system; ii) promoting guidelines for the selection and training of international judges and penal experts in liaison with the UN and regional organisations (particularly the Council of Europe and and the Organisation for Security and Cooperation in Europe); and iii) supporting the establishment/renovation of infrastructures of local courts and prisons as well as recruitment of local court personnel and prison officers.[11] Since 2003, the EU has launched in total over 40 civilian and military missions on three continents. As of 15 March 2024, 13 civilian operations are ongoing.[12] These missions are focusing on rule of law promotion, security, reforming the police sector and border security.

In the context of Enlargement policy, the promotion of rule of law is rooted in the socalled Copenhagen Criteria. In 1993, the European Council decided that each country wishing to join the Union was required to achieve "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."[13] At that time, Copenhagen Criteria served as a blueprint for candidate countries to join the EU. These criteria were not foreseen in the treaties (TEU or TEC). With the entry into force of the Treaty of Lisbon, Article 49 (1) TEU explicitly acknowledges the legally binding nature on the conditions of eligibility agreed by the European Council. Thus, fulfilment of Copenhagen Criteria is obligatory for candidate countries.

The EU enlargement policy has been considered the most effective tool of the EU as an "EU external governance" in exporting democracy, the rule of law, fundamental freedoms, and other values on which the EU is founded in third countries. Considering the lessons learned from previous accession cases – especially those in Romania, Bulgaria and Croatia, the EU approach to addressing the rule of law

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11 European Council, *Santa Maria da Feira European Council 19 and 20 June 2000: Conclusions of the Presidency*, Annex 1, Appendix 3B,
[https://www.europarl.europa.eu/summits/fei2_en.htm#an1], Accessed 1 April 2024.

12 European Union External Action, *EU Missions and Operations*,
[https://www.eeas.europa.eu/eeas/missions-and-operations_en], Accessed 1 April 2024.

13 European Council, *Conclusion of the Presidency*, SN 180 / 1 / 93 Rev 1, 21 – 22 June 1993, pt 7A (iii) [https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf], Accessed 1 April 2024.

reforms shifted toward a bold strategy. Accordingly, the 2011 Enlargement Strategy emphasised the importance of issues related to the judiciary and fundamental rights and to justice and home affairs and stipulated that "these should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records".[14]

Following the Commission approach, on 21 - 22 June 2016, the Albanian parliament, with the "blessing" of the EU and USA, approved constitutional changes by revamping the "Europeanization" of the judiciary system. The 2016 judiciary reform package aimed to make the country's judiciary independent and impartial, strengthen professionalism, fight corruption, end politicians' impunity and rebuild public confidence in the judiciary.

Due to the scope of this article, this paper analyses the role of the EU as a promoter of the rule of law in candidate countries, with a particular interest in the vetting process in Albania. The vetting process consists of re-evaluation process of all judges, prosecutors, and their legal advisers based on three cumulative criteria: i) the assets of judges and prosecutors, ii) the detection or identification of their links to organized crime, and iii) the evaluation of their work and professional skills. To vet the magistrates, two institutions were established, namely: the Independent Qualification Commission and the Appeal Chamber. The paper argues that a dilemma exists between legal compliance with EU standards and implementing reforms. While the EU, through judiciary reform, aims to transform the Albanian judiciary system in compliance with the Justice and Home Affairs *acquis*, political polarisation in Albania has hampered institutional set-up, effectiveness, independence, and the fight against corruption.

By adopting a dogmatic legal methodology, the paper provides a detailed theoretical discussion of the EU's external dimension as a (legal) normative power and analyses the Europeanization of the judiciary system in Albania. Moreover, the paper assesses the impact of judiciary reform and discusses the extent to which judiciary reform in Albania is considered successful.

The paper contains this introduction and 4 sections. The second section provides a literature review on the Europeanization of Judiciary Reform in candidate countries. The third section introduces the 2016 judicial reform focusing on the vetting process. The remaining sections discuss whether and to what extent the vetting process has been a successful model.

[14] Commission, *Enlargement Strategy and Main Challenges 2011-2012*, COM(2011) 666 final, p. 5.

2. EUROPEANIZATION OF JUDICIARY REFORM IN CANDIDATE COUNTRIES

In the academic literature, Europeanization represents a distinct research area in European studies. It is used for internal and external purposes to denote domestic changes as a result of EU influence.[15] For internal purposes, Europeanization is linked to the EU's influence on the polity, politics, and policies of the EU Member States.[16] In this regard, the EU has influenced the Member States to adapt their institutional and legal structures in accordance with EU requirements. Externally, Europeanization is associated with the growing role of the EU as a global actor in various policies and initiatives toward third countries.[17] For instance, Europeanization was the driving force in the accession of the Central and Eastern European countries which were obliged to adopt the EU acquis in order to meet the membership criteria.[18] Likewise, Europeanization has been used in the case of Western Balkan countries.[19]

The first who provided a concrete definition of the concept of Europeanization is attributed to Robert Ladrecht. In his article, Ladrecht defined Europeaniza-

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15 Petrov, P.; Kalinichenko, P., *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, The International and Comparative Law Quarterly, Vol. 60, No. 2, 2011, pp. 325-353, 326.

16 Ágh, A., *Europeanization of Policy Making in East Central Europe: The Hungarian Approach to EU Accession,* Journal of European Public Policy, Vol. 6, No. 5, 1999, pp. 839–854; Ladrech, R., *Europeanization of Domestic Politics and Institutions: The Case of France*, Journal of Common Market Studies, Vol. 32, No. 1, 1994; Cowles, M.G. *et al.*, *Transforming Europe: Europeanization and Domestic Change*, Cornell University Press, Cornell, 2001.

17 Cremona, M., *The Union as a Global Actor: Roles, Models and Identity*, CMLR, Vol. 41, pp. 553-573.

18 Schimmelfenning, F.; Sedelmeier, U., (eds.), *The Europeanization of Central and Eastern Europe*, Cornell, Cornell University Press, 2005; Cowles *et al.*, *op. cit.,* note 14; Grabbe, H., *The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe*, Palgrave, 2006; Papadimitriou, D.; Phinnemore, D., *Europeanization, Conditionality and Domestic Change: The Twinning Exercise and Administrative Reform in Romania*, JCMS: Journal of Common Market Studies, Vol. 42, Issue 3 pp. 619-639; Sotiropoulos, A D., *Southern European Public Bureaucracies in Comparative Perspective*, West European Politics, Vol. 27, Issue 3, 2004, pp. 405-422; Lippert, B. *et al.*, *Europeanization of the CEE Executives: EU Membership Negotiations as a Shaping Power*, Journal of European Public Policy, Vol. 8, No. 6, 2001, pp. 980–1012.

19 Knezović, S., *EU's Conditionality Mechanism in South-East Europe – Lessons Learned and Challenges for the Future*. European Perspectives – Journal on European Perspectives of the Western Balkans, 2009, p. 93; Anastasakis, O., *The Europeanization of the Balkans* The Brown Journal of World, Vol. XII, Issue 1, 2005, pp. 77-88; Anastasakis, O.; Bechev, D. *EU Conditionality in South East Europe: Bringing Commitment to the Process*, St. Antony's College University of Oxford, 2003; Börzel, A T. *When Europeanization Hits Limited Statehood: The Western Balkans as a Test Case for the Transformative Power of Europe,* KGF Working Paper Series, 2011 [http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_30.pdf], Accessed 1 April 2024; Bradford, A., *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, 2020.

tion as "an incremental process reorienting the direction and shape of politics to the degree that European Community (EC) political and economic dynamics become part of the organisational logic of national politics and policy-making."[20] Ladrecht's definition of "organisational logic of national politics and policy-making" includes governmental and non-governmental actors. Changes in organisational logic refer to the adaptive processes of organisations to a changed or changing environment.[21]

In 2001, Risse, Cowles, and Caporaso published a book that highlights the impact of Europeanization on national legal systems, domestic institutions, and political cultures. [22] In the introduction chapter, Cowles *et al* have defined Europeanization as "the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem-solving that formalise interactions among the actors, and of policy networks specialising in the creation of authoritative European rules".[23]

Drawing upon Ladrecht's definition, Claudio Radaelli has provided the most comprehensive definition of Europeanization. Radaelli defined Europeanization as the "process of construction, diffusion, and institutionalisation of formal and informal rules, procedures, policy paradigms, styles (ways of doing things) and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies".[24]

As can be seen from the abovementioned definition, Europeanization is understood broadly not only as a foreign policy to regulate the international relations with third countries, but also as a form of "governance export" and "norm diffusion".[25] The academic literature on the Europeanization of the Central Eastern European

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20 Ladrech, R., *op, cit.,* note 16, p. 69.

21 *Ibid*, p. 71.

22 Cowles, M. G. *et al*., *op. cit.,* note 17.

23 Risse, T., *et al*., *Europeanization and Domestic Change: Introduction,* in: Cowles, *et al.*, (eds), Transforming Europe: Europeanization and Domestic Change, Cornell, Cornell University Press, 2001, p. 3.

24 Radaelli, CM., *The Europeanization of Public Policy*, in: Featherstone, K.; Radaelli, CM. (eds.), The Politics of Europeanization*,* OUP, 2003, 30.

25 Schimmelfenning, F., *International Socializaton in the New Europe: Acton in a Rational Institutional Environment*, European Journal of International Relations, Vol, 6, Issue, 1, 2000, pp. 109-139; Mungiu-Pippidi, A., *The EU as a Transformation Agent. Lessons Learned from governance reforms in East Central Europe*, Hertie School of Governance, Working Papers 33:22, 2008; Kmezić, M., *Europeanization by Rule of Law Implementation in South East Europe*' in: Kmezić, M., (ed.), Europeanization by Rule of Law Implementation in the Western Balkans, Institute for Democracy SOCIETAS CIVILIS Skopje, 2014.

countries (CEEc) has confirmed the role of the EU "as a massive exporter of EU norms" through enlargement policy.[26]

In the case of the Western Balkan countries, the main strategy designed to Europeanize this region is the Stabilisation and Association Process. The Stabilisation and Association Agreement (SAA), the main treaty relations between the EU and Member States and candidate countries, offers a clear prospect of membership based on the conditionality of carrying out necessary reforms. Conditionality is considered one of the predominant mechanisms for the Europeanization of the candidate countries to diffuse its norms in an unprecedented way.[27] Conditionality is defined as "the linking of perceived benefits (e.g. political support, economic aid, membership in an organisation) to the fulfilment of a certain programme, in this case, the advancement of democratic principles and institutions in a "target" state)".[28] By relying on the conditionality mechanisms, the EU exerting its power "to address the difficulties of the post-conflict and ethnically divisive situation in the Western Balkans, the weakness of their state structure, and the delayed character of their political transition."[29]

While all SAAs signed with the Western Balkan countries provide a clear perspective of membership based on conditionality, it induces the necessary incentives to carry out the required reforms on the approximation and implementation of the EU *acquis,* including reform of the judiciary system. For instance, Article 78 of the SAA with Albania states that:

> The Parties shall attach *particular importance to the consolidation of the rule of law*, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. *Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of the*

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[26] Schimmelfenning, F.; Sedelmeier, U., (eds.) *op. cit.,* note 16; Kochenov, D., *Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, European Integration online Papers, Vol. 8, Issue 10, 2004; Grabbe, *op. cit.*, note 16; Kmezić, M., *Literature Review on Europeanization and Rule of Law*" in: Kmezić, M., (ed.), Europeanization by Rule of Law Implementation in the Western Balkans, Institute for Democracy SOCIETAS CIVILIS Skopje, 2014.

[27] Schimmelfenning, F.; Sedelmeier, U., (eds.) *op. cit.,* note 19.

[28] Kubicek JP., *International Norms, the European Union, and Democratization: Tentative Theory and Evidence*, in: Paul J Kubicek, JP., (ed.), *The European Union and Democratization*, Routledge, 2003, p. 7.

[29] Anastasakis, O., *The EU's Political Conditionality in the Western Balkans: Towards a more Pragmatic Approach*, Southeast European and Black Sea Studies, 2008, p. 368.

police and other law enforcement bodies, providing adequate training and fighting corruption and organised crime.[30]

In addition, the EU has used accession negotiation as an instrument to induce domestic reforms in the Western Balkan countries, particularly in the judiciary reform.[31] Thus, an independent and functioning judiciary system is a fundamental component of the rule of law and democratisation of a country. Researchers have analysed the EU's transformative power with regard to the effectiveness of the rule of law and judicial sector reform. Marko Kmezić has investigated the Europeanization of judicial independence in the Western Balkans.[32] His contributions provide a comprehensive historical and legal analysis of the EU's role as a promoter of the rule of law in the Western Balkan. Elbasani and Šabić have analysed the rule of law, corruption and accountability in the course of EU enlargement. Their article draws on a cross-comparison between Albania and Croatia.[33]

The cases of Romania, Bulgaria, and Croatia showed that the EU paid more attention to judicial reformation in the pre-accession phase. According to Kristian Turkajl, a former member of the Negotiation Team responsible for Chapters 23 and 24 for Croatia, Chapter 23 on 'Judiciary and Fundamental Rights' is considered to be "crucial" for the outcome of the entire negotiation process. [34] For these reasons, in October 2011, the Commission proposed a new approach to the rule of law issues in candidate countries. The new approach rests on the principle that issues related to judiciary and fundamental rights (Chapter 23 of the acquis) and justice, freedom, and security (Chapter 24) "should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records."[35] Likewise, in the 2012 annual Enlargement Package, Commissioner Stefan Füle said: "[o]ur recommendations place the rule of law firmly at the centre of the accession process. To create a more stable and prosperous Europe, momentum needs

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30 Emphasise added by author.

31 Preshova, D., *et al., The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a solution or a new cause of Concern for Judicial Reforms*, CLEER Papers, 2017/1, p. 7; Bobek, M.; Kosar, D., *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, German Law Journal, Vol. 15, Issue 7, 2014, pp. 1275-1276.

32 Kmezić, M., (ed.), *Europeanization by Rule of Law Implementation in the Western Balkans*, Institute for Democracy SOCIETAS CIVILIS, Skopje, 2014; Kmezić, M., *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans,* Routledge, 2017.

33 Elbasani, A.; Šabić, S.S., *Rule of law, corruption and democratic accountability in the course of EU enlargement,* Journal of European Public Policy, Vol. 25, Issue 9, pp. 1317-1335.

34 Quoted in Kmezić, M., *Europeanization by Rule of Law Implementation in South East Europe' op. cit.* note 33.

35 Commission, *Enlargement Strategy and Main Challenges 2011-2012*, COM(2011) 666 final, p. 5.

to be maintained both for merit-based enlargement process on the EU side and for reforms on the ground in the enlargement countries".[36] As progress on the rule of law reforms was slow, in 2018, the Commission highlighted the need to address the rule of law issues in Montenegro and Serbia "before technical talks on other chapters of the accession negotiations can be provisionally closed".[37] While this approach was not followed, the new enlargement methodology (2020) emphasised the importance of judiciary reforms, which are included in the first cluster (fundamentals), which are opened first and closed last.

While strengthening the rule of law is considered a key criterion for accession, as rooted in the Copenhagen criteria,[38] in the case of Western Balkan countries, it has been identified as a "continuing major challenge and a crucial condition for countries moving towards EU membership".[39] Judicial reform in Western Balkan countries has become the 'Achille wheel' of the enlargement process. In its 2018 communication on enlargement and the Western Balkans, the Commission clearly acknowledged the serious rule of law situation in the region, stating that there were "clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests".[40] Moreover. citizen's perception in the judiciary system is very high. According to the SELDI Corruption Monitoring System 2019, between 55% and 94% of the citizens believe that judiciary officials in the Western Balkans countries are corrupt.[41] The main deficiencies in the governance and functioning of the judiciary are as follows: i) the influence of legislative and executive branches in the selection and promotion of judges and prosecutors; ii) the bodies governing the judiciary and the prosecutions are not defined properly; iii) the procedures for appointment and dismissal of judges and prosecutors are not transparent; iv) the enforcement of the disciplinary accountability and of the codes of ethics for judges and prosecutors is very limited; and v) public prosecutor's offices lack resources.[42]

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36 Commission, *Commission outlines next steps for EU enlargement*, (Press Release) [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_12_1087/IP_12_1087_EN.pdf], Accessed 1 April 2024.

37 Commission, *A Credible Enlargement Perspective for and enhanced EU engagement with the Western Balkans*, (Communication) COM(2018) 65 final, p. 9

38 Hoxhaj, A., *The Rule of Law Initiative Toward the Western Balkans*, Hague Journal on the Rule of Law, Vol. 13, 2021, p. 143.

39 Commission, *Enlargement Strategy and Main Challenges 2011-2012*, COM(2011) 666 final, p. 4 .

40 Commission, *A Credible Enlargement Perspective for and enhanced EU engagement with the Western Balkans*, (Communication) COM(2018) 65 final, p. 3.

41 SELDI, *Corruption in the Western Balkans 2019: Trends and Policy Options*, SELDI Policy Brief No. 9, December 2019.

42 SELDI, *Western Balkans 2020: State-Capture Risks and Policy Reforms*, SELDI, 2020.

Establishing an independent, impartial and efficient judiciary is considered to be the main component of the rule of law. Chapter 23 on the Judiciary and Fundamental rights provides the following explanation for judiciary reform:

> EU policies in the area of judiciary and fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. *The establishment of an independent and efficient judiciary is of paramount importance*. *Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law*. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure respect for fundamental rights and EU citizens' rights, as guaranteed by the acquis and by the Fundamental Rights Charter.[43] (emphasise added)

Pursuant to the content definition of the rule of law[44] and the abovementioned explanation, the EU rule of law promotion in the enlargement policy tends to "translate the rule of law into an institutional checklist, with primary emphasis on the judiciary." [45] Thus, the alignment of domestic judiciary legislation with the EU acquis is measured by legal and institutional benchmarks.

The following section analyses the 2016 judiciary reform in Albania, which has been one of the requirements for opening accession. Due to the limited scope of this paper, the focus will be only on the vetting process and its impact on the judiciary system.

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43 Commission, *Chapters of the Acquis*, [https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/conditions-membership/chapters-acquis_en], Accessed 31 March 2024.

44 Commission, *A New Framework to Strengthen Rule for Law*, (Communication), COM(2014) 158 final, p. 4; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 1/1.

45 Carothers, T., (ed.), 2006. *Promoting the Rule of Law Abroad: In search of Knowledge*. Carnegie Endowment for International Peace, p. 20.

3. ALBANIA JUDICIAL REFORM: THE VETTING PROCESS

In Albania, the Europeanization process has been focused on reforming the rule of law, with specific attention on tackling corruption and organised crime and reforming the judiciary.[46] Reforming the judicial system was a key condition for opening accession talks. The judiciary reform package aims to make the country's judiciary independent, capable of fighting corruption, and end impunity for politicians. Before the 2016 judicial reform, the Albanian judicial system was characterised by: i) a low level of public trust; ii) a high corruption rate; iii) personal connections of judges and prosecutors with organised crime; iv) political interests and pressure on sensitive cases; v) the inactivity of the National Judicial Conference, which affects the selection negatively, career advancement, training, and disciplinary proceedings against judges.[47]

Judiciary reform consists of establishing a new judicial governance system to guarantee its integrity, independence, impartiality, accountability, efficiency, and transparency.[48] Albanian legislators identified around 40 laws and by-laws to implement the reform. The laws addressed the establishment of new judicial institutions and the re-evaluation of judges, prosecutors, and legal advisors.

The vetting process (temporary re-evaluation) was introduced to address two issues. First, the judiciary system was considered highly corrupt by international experts and domestic organisations.[49] The 2014 European Commission (EC) Progress report also noted this observation, acknowledging that "institutions involved in the fight against corruption remain vulnerable to political pressure and other undue influence. Corruption remains prevalent in many areas, including the judiciary, and remains a particularly serious problem."[50] Second, public trust in the

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46 Fagan, A.; Indraneel, S., *Judicial Independence in the Western Balkans: Is the EU's 'New Approach' Changing Judicial Practices?*, MAXCAP Working Paper No. 11, p. 6.

47 GRECO (Group of States against Corruption), *Corruption prevention in respect of members of Parliament, judges and prosecutors: Evaluation Report Albania*, 4th Evaluation Round, Greco Eval IV Rep, 2013, para. 4-5; Group of High-Level Experts, *Strategy on Justice System Reform*, 2015, [https://euralius.eu/images/Justice-Reform/Strategy-on-Justice-System-Reform_24-07-2015.pdf], Accessed 15 March 2024, p. 38; GHLE (Group of High-Level Experts), *Analysis of the Justice System in Albania: Document open for evaluation, comments and proposals,* 2015, [https://euralius.eu/images/Justice-Reform/Analysis-of-the-Justice-System-in-Albania.pdf], Accessed 15 March 2024, p. 10; Commission, *Albania 2014 Progress Report*, SWD(2014) 304 final.

48 Group of High-Level Experts, *Strategy on Justice System Reform*, *op. cit.,* note 47, p. 10-20.

49 GHLE (Group of High-Level Experts), *Analysis of the Justice System in Albania: Document open for evaluation, comments and proposals, op. cit.,* note 47, p. 10.

50 Commission, *Albania 2014 Progress Report*, SWD (2014) 304 final, p. 45.

judiciary system was very low.[51] Accepting these facts, the Venice Commission issued two *amicus curiae* to support the judiciary reform, including the vetting process.[52] Based on the previous similar situation in Ukraine, [53] the Venice Commission believes that:

> a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude.[54]

Pursuant to the Venice Commission's positive recommendation to proceed with the vetting process, constitutional changes were needed as the process would interrupt the judge's career and undermine the guarantee of independence for the judge in office.[55] Moreover, as a result of the vetting process, some rights guaranteed by the Constitution would be temporarily limited.[56] To address these two constitutional issues, the Constitution of the Republic of Albania laid down the foundations for the vetting process through a special Annex. The Annex contains 10 detailed articles explaining the principles, procedure, and responsible institu-

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51 Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, 2015 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e], Accessed 15 March 2024, para 98.

52 Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, 2015 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e], Accessed 15 March 2024; Venice Commission, *Albania: Draft Amicus Curiae Brief for the Constitutional Court*, 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2016)040-e], Accessed 15 March 2024.

53 Venice Commission, *Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine*, 2015, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)007-e], Accessed 15 March 2024.

54 Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, 2015 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e], Accessed 15 March 2024, para 100.

55 *Cf*., Law 8417/1998 *The Constitution of the Republic of Albania* [1998] OJ 28, Arts 138 and 147 (7).

56 The Constitution of Albania, Annex, Article A (1) reads as follows: "To the extent necessary to carry out the re-evaluation the application range of some articles of this Constitution, in particular provisions regarding privacy, to include Articles 36 and 37, provisions related to the burden of proof, and other provisions including Articles 128, 131, paragraph f, 135, 138, 140, 145 paragraph 1, 147/a paragraph 1, letter b), 149/a paragraph 1, letter b), are partly limited in accordance with Article 17 of the Constitution."

tion of the vetting process. After the adoption of the Constitutional Amendment, a special law was adopted which regulated all the material and procedural aspects of the vetting process.[57]

Article C of the Annex of the Albanian Constitution established two special institutions to carry out the vetting process. The first institution is the Independent Qualification Commission, which carries out the re-evaluation process at the first level. The second body is the Appeal Chamber, which examines the complaints submitted by the subjects. In addition, two other institutions were set up: i) the public commission whose function is to protect the public interest and can file an appeal against the Independent Qualification Commission's decision;[58] and ii) the International Monitoring Operation (IOM) which is an institution consisting of observers named by the partners of European integration and Euro-Atlantic cooperation led by the European Commission.[59] The IOM main function is to support the re-evaluation process through monitoring and supervision of the entire process with the help of observers appointed by them. After two levels of review, subjects that are re-evaluated can appeal to the European Court of Human Rights.[60]

The vetting process is based on evaluating three criteria: i) the asset criteria; ii) background assessment, and iii) proficiency assessment (assessment of professional skills).[61] The asset criteria aim to identify whether the magistrates' fortunes are made by legal sources. The background assessment seeks to verify magistrate connections with organised crime. While the professional criterion evaluates the work performed, as well as their professional skills.[62] The decision on the final evaluation of the magistrate is based on: i) one or several criteria, ii) on an overall evaluation of the three criteria, or iii) the overall assessment of the proceedings.[63] At the end of the process, the Commission may decide regarding the subject of re-evaluation: i) confirmation in duty; ii) suspension from duty for a period of one year and the obligation to follow the training program according to the curricula approved by the School of Magistrates; iii) dismissal from office.[64]

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57 Law 84/2016 On the transitional re-evaluation of judges and prosecutors in the Republic of Albania [2016] OJ 180 (hereafter Law 84/2016).

58 The Constitution of Albania, Annex, Arts B, C, F.

59 The Constitution of Albania, Annex, Art B.

60 The Constitution of Albania, Annex, Art F (8).

61 Law 84/2016, Art 4 (2).

62 The Constitution of Albania, Annex, Arts Ç, D, DH, E.

63 Law 84/2016, Art 4 (2).

64 Law 84/2016, Art 58 (1).

In contrast to the criminal proceedings, in the vetting process, the burden of proof is on the magistrates, who are subject to re-evaluation. This exception has been foreseen in Article Ç paragraph (5) of the Annex to avoid any confusion in the future. Additionally, the independent institution, entitled to make the re-evaluation, shall exercise their duties "based on the principles of equality before the law, constitutionality and lawfulness, proportionality and other principles which guarantee the rights of assessees for a due legal process".[65] Whereas the right to information may be limited only by "complying with the principle of proportionality if giving the information causes evident and grave damage to the administration of the re-evaluation process".[66]

About 805 magistrates are subject to the vetting process.[67] According to the constitutional provisions, the vetting process for the first level would be closed within 5 years, while the Appeal chamber would close its activities after 9 years.[68] As of 11 April 2024, out of 805 magistrates who are subject to the vetting process, 693 judges/prosecutors have been vetted. 303 judges/prosecutors have been confirmed in office, 237 judges/prosecutors have been dismissed, and 153 judges/prosecutors have voluntarily resigned.[69]

4. THE VETTING PROCESS IMPLEMENTATION AND ITS CONSEQUENCES

Although Albanian politics received the vetting process positively and the international community (most prominently the US and EU) supported it, its implementation encountered several challenges and, in certain cases, was criticised for delays, political influence, lack of professionalism, and double standards. The remaining part of this section discusses some of the problems encountered during its implementation.

From the beginning, the vetting process was adopted as an extraordinary and temporary tool. The Law on the vetting process was adopted by the Assembly on 30 July 2016.[70] While the whole vetting process was foreseen to last 5 years for the first level, the Independent Qualification Commission began with a delay of about 2 years

65 Law 84/2016, Art 4 (5).

66 Law 84/2016, Art 4 (7).

67 Commission, *Albania 2023 Progress Report*, SWD(2023) 690 final, p. 19.

68 Law 84/2016, Art 5 (2).

69 Reporter.al, *Vetingu*, [2024], [https://reporter.al/vetingu/], Accessed 11 April 2024.

70 Law 84/2016 On the transitional re-evaluation of judges and prosecutors in the Republic of Albania [2016] OJ 180.

and the first hearing was held on March 2018.[71] The main reason for such delay is the Albanian Constitutional Court suspension decision as a result of the complaint made by a group of 1/5 of the deputies and the Union of Judges which required the repeal as incompatible with the Constitution the Law 84/2016 (Vetting Law), and suspension of the enforcement of the Vetting Law.[72] Another delay relates to the appointment of the Commission and Appeal Chamber members or supporting staff. The appointment of the Commission and Appeal Chamber members took about 10 months.[73] Supporting staff appointments were made seven months after the appointment of the Commission members (first-level institution).[74]

The delay in establishing vetting bodies, the temporary work suspension of the High Council of Justice and the High Prosecutorial Council in the COVID-19 situation, and the continuation of maintaining the same standard served as the main justification for extending the mandate.[75] The Albanian Constitution foresaw the situation of not completing the process within the set deadline (end of 2022). In Article 179/b (8), the Albanian Constitution predicted that the new governing bodies would continue with the vetting process of the magistrates who would not be vetted within the deadline.[76] Even the Venice Commission, which was asked about the constitutional changes, suggested the possibility of extension.[77] Until the time of the Venice Commission's opinion on mandate extension

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71 Merkuri, E., *Organet e sistemit të drejtësisë: Monitorimi i Zbatimit të Reformës në Drejtësi I*, OSFA, 2020, p. 33.

72 Judgment of 18 January 2017, Constitution Court Decision No 2/2017.

73 The vetting law was adopted in July 2016, whereas members were elected in June 2018.Vendim Nr. 82/2017 Për Miratimin e Listës në Bllok të Kandidatëve të Zgjedhur në Institucionet e Rivlerësimit, sipas Ligjit Nr. 84/2016 "Për Rivlerësimin Kalimtar të Gjyqtarëve dhe Prokurorëve në Republikën e Shqipërisë" [https://kpk.al/wp-content/uploads/2018/04/vendim-nr-82-dt-17-6-2017-1.pdf], Accessed 11 April 2024.

74 Komiteti Shqiptar i Helsinkit, *Raport Përmbledhës i Gjetjeve dhe Rekomandimeve Kryesore: Monitorimi i Procesit të Vettingut të Gjyqtarëve dhe Prokurorëve,* [2018] [https://ahc.org.al/wp-content/uploads/2018/06/Draft-Raport-Monitorimi-i-procesit-te-vettingut.pdf], Accessed 11 April 2024, p. 10.

75 Commission, *Albania 2020 Progress Report*, SWD(2020) 354 final, p. 19.

76 Article 179/b (8) of the Constitution of Albania reads as follows: "The mandate of the Commission and the Public Commissioner expires after five years of operation. The Appeal Chamber shall cease to exist after nine years of operation. After the dissolution of the Commission pending cases shall be conducted by the High Judicial Council in accordance with the law. Pending cases of the prosecutors shall be conducted by the High Prosecutorial Council in accordance with the law. After the dissolution of the Public Commissioner, their competencies shall be exercised by the Chief Special Prosecutor of the Special Prosecution Office. The judges at the Appeal Chamber shall serve until the end of their 9 year mandate. Any appeals shall be adjudicated by the Constitutional Court."

77 Venice Commission, *Compilation of Venice Commission Opinions and Reports Concerning Vetting of Judges and Prosecutors,* 2022, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)051-e], Accessed 12 April 2024.

(2022), half of the magistrates were not evaluated. To vet other magistrates, Law 16/2022 was adopted, which extended the mandate until 31 December 2024.[78]

Another controversy was the selection of the Commission and Appeal Chamber members. To be a member of these Commissions, Article C (5) of the Annex of the Albanian Constitution stipulated as a first criterion that its members should come from judiciary and prosecutor system, law professor, advocate, notary, senior employees in public administration, or other legal profession related to the justice sector.[79] However, Qualification Commission (first-level institution) was filled by lawyers who met the formal criteria. Their professional experience was either in public administration or private sector.[80]

During the Assembly hearings and election process, the candidates were put under political pressure, mainly dealing with formal legal criteria rather than professional training.[81] From the beginning, it was intended to select persons with high professional qualifications and integrity. However, a member of the Independent Qualification Commission was accused of a false statement in fulfilment of the criteria. Against him, a criminal proceeding was initiated which ended with dismissal and a sentence.[82] Based on this decision, several dismissed magistrates appealed their case.[83]

Furthermore, the principle of impartiality has been undermined in several cases. The Independent Qualification Commission has applied different standards on

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78 Ligji 16/2022 Për një ndryshim në ligjin nr. 8417, datë 21.10.1998, "Kushtetuta e Republikës së Shqipërisë", të ndryshuar [2022] FZ 37.

79 Article C (5) of the Annex of the Constitution of Albania reads as follows: "All members of the Commission and the judges of the Appeal Chamber shall have a university degree in law, and no less than fifteen years' experience as a judge, prosecutor, law professor, advocate, notary, senior employees in public administration, or other legal profession related to the justice sector. Candidates for member of the Commission and judges at the Appeal Chamber may not have been judges, prosecutors or legal advisors or legal assistants in the two years prior to their nomination. They shall not have held a political post in the public administration or a leadership position in a political party for the past 10 years before becoming af nominee."

80 Independent Qualification Commission, *About Commissioners,* 2024, [https://kpk.al/komisioneret/], Accessed 1 June 2024.

81 Komiteti Shqiptar i Helsinkit, *Raport Përmbledhës i Gjetjeve dhe Rekomandimeve Kryesore: Monitorimi i Procesit të Vettingut të Gjyqtarëve dhe Prokurorëve,* 2018, [https://ahc.org.al/wp-content/uploads/2018/06/Draft-Raport-Monitorimi-i-procesit-te-vettingut.pdf], p. 8

82 Decision of 9 December 2021, Appeal Chamber, [https://kpa.al/wp-content/uploads/2021/12/Vendim-JD-5_2021_Luan_Daci_anonimizuar-1.pdf], Accessed 11 April 2024.

83 *Judgment*, *Besnik Cani v. Albania* (2022) Application No. 37474/20.

decision making process concerning on cases with similar issues.[84] For instance, E.T. was confirmed in office irrespective of the fact that he had deficiencies in completing the statements. While one magistrate was dismissed for inaccuracies similar to the ones in another case. In both these cases, the 2/3 of the Independent Qualification Commission members were the same.[85] Such examples have led to criticism of the Independent Qualification Commission's work by using double standards in the decision-making process.[86]

Another problem relates to the length of proceedings and lack of clarity in the reasoning of the decisions. In the first stage of the process, decision-making lasted over one year and, in some cases, over two years.[87] The main reasons for such delay are related to: i) investigations on the three criteria; ii) examination of requests for exclusion of the judging panel; iii) the duration of the subjects' tenure and the complexity of the evidence; iv) collection of evidence from other institutions; v) investigation of related persons; vi) postponement to guarantee the right of defence; and vii) the consequences of the Covid-19 pandemic.[88] Moreover, the Independent Qualification Commission decisions are relatively long, and they lack clarity. This makes it difficult to understand the reasons that led to concrete decision-making.[89]

Also, the implementation of the vetting process has been criticised as deviating from the intention of the legislator. Article 4 (2) of the Vetting Law stipulated the following criteria for re-evaluation: i) the assets of judges and prosecutors, ii) the detection or identification of their links to organised crime, and iii) the evaluation of their work and professional skills.[90] The decision on the final re-evaluation is based on: i) one or several criteria, ii) on an overall evaluation of the three criteria, or iii) the overall assessment of the proceedings.[91] Nevertheless, a large number

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84 Komiteti Shqiptar i Helsinkit, *Mbi Vendimarrjen e Institucioneve të rivlerësimit Kalimtar (Vetingu): Janar – Dhjetor 2019,* 2020, [https://ahc.org.al/wp-content/uploads/2020/10/Raport-Studimor_Vendimmarrja-e-Organeve-te-vettingut_2019.pdf], Accessed 11 April 2024; Karaj, V., *Ekspertët rezerva për cilësinë e vetingut, progresin dhe standardet*, 2018, [https://www.reporter.al/2018/11/28/ekspertet-rezerva-per-cilesine-e-vetingut-progresin-dhe-standardet/], Accessed 11 April 2024.

85 Komiteti Shqiptar i Helsinkit, *op. cit.,* note 84, pp. 9-10; Karaj, V., *op. cit.,* note 84.

86 Karaj, V., *op. cit.,* note 84.

87 Skendaj, E., *et al.*, *Proçesi i Vetingut në kuadër të detyrimeve të Integrimit në Bashkimin* Evropian, 2022, [https://ahc.org.al/wp-content/uploads/2022/05/Final_Policy-Paper-1-_-Vetting-Process.pdf], Accessed 11 April 2024, p. 24.

88 *Ibid*, p. 24.

89 *Ibid*, p. 23.

90 Law 84/2016 On the transitional re-evaluation of judges and prosecutors in the Republic of Albania [2016] OJ 180, Art 4.

91 Law 84/2016, Art 4 (2).

of cases are closed with dismissal based on the evaluation of one or two criteria without analysing all three criteria. The Independent Qualification Commission approach to assess the subject of vetting in only one criterion is criticised by Albanian lawyers.[92] Recently, the European Court of Human Rights, in the decision Thanza v Albania, concluded that

> "Considering the above-mentioned findings cumulatively, *the Court concludes that the vetting bodies' approach to the assessment of the second component of the vetting process*, resulting in far-reaching findings deemed to be sufficient for dismissal from office, *did not comply with the fairness requirement of Article 6 § 1 of the Convention in the present case*. There has therefore been a violation of that Article in relation to the second component of the vetting process" (Emphasise added by Authors).[93]

5. THE IMPACT OF THE VETTING PROCESS IN THE JUDICIARY SYSTEM

Considering the situation in the judiciary system, the vetting process was necessary to restore public trust in the judiciary. In this context, the vetting process has been the most effective tool to increase magistrates' integrity by dismissing corrupt magistrates, those linked to organised crime, or those with insufficient professional skills. Five years after the vetting process, citizens' trust in the judiciary system, particularly in the magistrates' figure, has increased.[94] As noted by the Institute for Democracy and Negotiations report, 50 percent of Albanians trust the Special Prosecution Office against Organized Crime and Corruption (SPAK). This percentage is higher compared to the trust levels reported towards the prosecution (35.2 percent) and courts (36.2 percent).[95]

While the vetting process has had a positive impact on increasing magistrates' integrity, such an extreme measure had negative consequences on i) the efficiency of the judiciary, ii) the quality of the delivery of justice, and iii) further implementation of judicial reform.

At the beginning of the Vetting process approval, no one expected a large number of magistrates to be dismissed or voluntarily resign. As noted in the previous sec-

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92 Karaj, V., *op. cit.,* note 84.

93 *Judgment, Thanza v Albania* (2023) Application no. 41047/19, para 123.

94 RCC, *H60_1 How much trust do you have in judicial institutions (e.g. courts)?*, [https://www.rcc.int/balkanbarometer/inc/get_indic.php?id=68&cat_id=2], Accessed 11 April 2024; IDM, *Opinion Poll 2022: Trust in Governance,* (10 edition, IDM 2023) pp. 25-26.

95 IDM, *Opinion Poll 2022: Trust in Governance,* 10 edition, IDM, 2023, p 27.

tion, 390 judges/prosecutors out of 693 judges/prosecutors who been vetted are out of the judiciary system. This number is higher compared with judges/prosecutors confirmed in office. Consequently, dismissal or resignation affected negatively the judiciary system.

In addition to the vetting process, the 2016 Judicial Reform had other objectives such as: i) increasing court efficiency, ii) the quality of justice delivery, and iii) increasing access to justice.[96] To address these issues, it was necessary to reshuffle the judiciary administration system, which was considered ineffective. New judiciary bodies were expected to be composed of magistrates with high integrity who had passed the vetting process. Thus, judicial reform required the establishment of new judicial governing bodies parallel to the vetting process.

As new judicial bodies were to be composed of members who passed the vetting process, a priority list of candidates was compiled. The vetting process adopted a top-down approach, starting first with the Constitutional Court and High Court judges. The results of the vetting process were surprising. Only one judge from the Constitutional Court and one judge from the High Court passed the vetting successfully. Other judges either were dismissed as not complying with vetting criteria or opted to leave duty due to retirement time and the end of their legal mandate.[97]

Such dismissal or resignation of judges seriously affected the operation of the judicial system because the other institutions responsible for the governance of the judiciary system and the appointment of new judges were not established yet.[98] For these reasons, the Constitutional Court and the High Court were not functional for about 2 years.[99] The last vacancy in the Constitutional Court was filled in December 2022.

As the vetting process began with delay and did not have the expected results, it directly impacted the establishment of judicial bodies. The High Judicial Council and the High Prosecutorial Justice were constituted at the end of 2018 (about 20 months late) as two new institutions dealing with the governance of judges and prosecutors.[100] Also, during 2016 – 2017, the Justice Appointment Council, which is an independent institution responsible for assessing the judges in the Constitutional Court and for the candidates of the High Inspector of Justice,

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96 Group of High-Level Experts, *Strategy on Justice System Reform*, *op. cit.,* note 47, pp. 10-20.

97 Commission, *Albania 2018 Progress Report*, SWD(2018) 151 final, pp. 18-19.

98 The High Judicial Council held its first meeting on 20 December 2018. Whereas the KLP held the first meeting on 19 December 2018.

99 Vacancies were filled in 2022.

100 For an overview on these two institutions see Law 115/2016. "On Governance Institutions of the Justice system" [2016] OJ 231as amended by Law 47/2019 [2019] OJ 113.

was not functional as the majority of the members were dismissed by the vetting process.[101] Such delay affected the establishment of another institution, the High Inspector of Justice. In January 2020, the Chairman of High Inspector of Justice was elected and only after some months was it partially filled with inspectors and supporting staff.[102] Currently, the High Inspector of Justice body is not fully functional due to shortages in the staff of inspectors coming from the judiciary.[103]

The vacancies created by the vetting process undermined the principle of access to justice as the judges' workloads and backlogs increased considerably. According to the 2022 Annual Report, 70 percent of Courts (25 out of 38) have operated with a reduced capacity of judges. Whereas at the national level, 56 percent of judges were effectively in the office.[104] Based on the WR indicator, the workload for a judge was as follow: i) an average of 2,880 cases for a judge in High Court; [105] ii) an average of 3 952 cases for a judge in Court of Appeal (administrative jurisdiction);[106] iii) an average of 981 cases for a judge in Court of Appeal (general jurisdiction) whereas for Court of Appeal in Tirana the average is 2 142 for a judge; [107] and iv) an average of 776 for a judge in the Court of First Instance.[108] This high workload undermines the quality.

The judicial vacancies due to the vetting process have increased the accumulated backlog. Before the 2016 Judicial reform, in 2014, the backlog was 12 000 cases in administrative courts and at the High Court and 30 600 cases in first-instance and appeal courts.[109] In 2019, the High Court had 28 657 cases, which increased to 36 060 in 2021. As of December 2023, the number of backlog cases in the High Court is 23 811. In the Courts of Appeal (general jurisdiction), the backlog was 28 140 cases until December 2022 (24% more compared to 2021). [110] Whereas

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101 Artan Hoxha *et al.*, *Monitorimi i Zbatimit të Reformës në Drejtësi*, OSFA 2019, p. 11.

102 Parliament of Albania Decision No 2/2020 [2020], [https://ild.al/en/high-inspector-of-justice/], Accessed 11 April 2024.

103 ILD, *Stafi Yn*, 2024, [https://ild.al/sq/zyra-e-inspektorit-te-larte-te-drejtesise/stafi-yne/], Accessed 11 April 2024. There are still 6 vacancies.

104 Këshilli i Lartë Gjyqësor, *Raport mbi Gjendjen e Sistemit Gjyqësor dhe Veprimtarinë e Këshillit të Lartë Gjyqësor për Vitin 2022*, 2023, [https://klgj.al/wp-content/uploads/2023/07/RAPORT-VJETOR-2022-shkarko.pdf], Accessed 11 April 2024, p. 9.

105 *Ibid*, p. 58.

106 *Ibid*, p. 79.

107 *Ibid*, p. 73.

108 *Ibid*, p. 85.

109 Commission, *Albania 2015 Progress Report*, SWD(2015) 213 final, p. 15.

110 Këshilli i Lartë Gjyqësor, *op. cit.*, note 105, p. 76.

in the Courts of Appeal (administrative jurisdiction), the backlog was 21 166 cases until December 2022 (15% more compared to 2021).[111] In the court of first instance, the backlog is 40,866 cases for general jurisdiction[112] and 7354 cases in administrative jurisdiction.[113]

Such accumulated backlog has a significant impact on the clearance rate and capacity of judges to process cases in due time as the average number of cases per judge remains high. According to the 2023 High Judicial Council Annual Report, the average number of cases per judge has been increased from 536 in 2021 to 561 in 2022.[114]

Another problem relates to filling vacancies. To increase the quality and integrity, the judiciary reform provided the possibility to fill the vacancies by increasing the quotas at the School of Magistrate. Before the judiciary reform, the maximum number of quotas for judges and prosecutors was less than 25 for both positions.[115] The number increased to 46 in 2018 and 96 in 2023. In the 2023-2024 academic year, only 66 magistrates were registered out of 96 places in total.[116] While the School of Magistrate increased the admission quotas, still there are a lot of vacancies in Court of First Instance and Court of Appeal. The main problem remains filling Court of Appeal vacancies which requires professional experience. It remains to be seen to what extent the increase of admission quotas will affect the.

6. CONCLUSION

To conclude, undoubtedly, the EU enlargement policy is considered the most effective policy in promoting democracy, the rule of law, and its values. Learning to the cases of Romania, Bulgaria and Croatia, the EU approach on promoting the rule of law reforms in Western Balkan countries became a priority. In contrast to previous accession, in the case of the Western Balkan countries, the Chapters 23 and 24 were considered opened in the beginning.

As a result of the Europeanization effect, in 2016, Albanian parliament adopted a profound judicial reform. The principal objective was to restore public trust in judiciary system by fighting high level of corruption among the magistrates and

111 *Ibid*, p. 81.

112 *Ibid*, p. 90.

113 *Ibid*, p. 98.

114 *Ibid*, p. 9.

115 School of Magistrates, *Graduates through years*, [https://www.magjistratura.edu.al/sq/te-diplomuar-nder-vite], Accessed 11 April 2024.

116 Commission, *Albania 2023 Progress Report*, *op, cit.,* note 63, p. 22. The vacancies were not filled due to lack of candidates to obtain minimum points.

increasing the independence, transparency and efficiency. To achieve these objectives, the first measure establishment of two institutions, the Independent Qualification Commission and the Appeal Chamber, to vet all judges, prosecutors, and legal advisers. In addition, the 2016 judicial reform consisted in other measures such as: i) consolidation of the status of the magistrates, professional training, career advancement, accountability, and discipline; ii) establishment of separate structures to investigate and deal specifically with corruption and organized crime; and iii) establishment of new judicial governance bodies.

By analysing only the vetting process, the paper showed a dilemma between EU legal standards enshrined in the reform and implementing standards in practice. While the EU transformative power was very effective to induce judicial reform in Albania, its implementation was hampered by political polarisation which affected the institutional set-up, effectiveness, independence, and the fight against corruption.

In the case of vetting process, institutions became functional with around 2 years of delay. The Independent Qualification Commission member lacked a high professional experience to vet the magistrates. For same facts in two different cases, different decisions were taken. Moreover, the vetting process paralysed the judiciary system. Around 56 percent of the magistrates are dismissed or resigned. Due to vacancies created, the backlog of the cases has been increased tremendously. Consequently, the average number of cases per judge to be adjudicated is very high. Also, the average length of a case to be adjudicated at the appeal court was 893 days in 2022 and 5 820 days for a criminal case at the Tirana Appeal Court.[117] This length undermines Article 6 of the European Convention on Human Rights which stipulates that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In conclusion, despite great expectation from the judicial reform, the vetting process in Albania is far away as "success model" due to the way how it was implemented.

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Review article

BALANCING HOUSING POLICIES: EXAMINING RENT CONTROLS IN EU MEMBER AND CANDIDATE COUNTRIES THROUGH THE LENS OF CONSTITUTIONAL RIGHTS

Meliha Sermin Paksoy, PhD, Associate Professor
Altinbas University School of Law
Büyükdere Caddesi, No: 147, 34000 Esentepe /İstanbul, Turkey
sermin.paksoy@altinbas.edu.tr

ABSTRACT

The social housing policies in many European Union (EU) member and candidate countries, coupled with challenges in the private property market, have resulted in an inability to adequately address the housing needs of low and middle-income households. Approximately one-third of the EU population resides in privately rented housing, prompting several member and candidate countries to implement rent controls due to a significant surge in rents within the private housing sector. These controls may involve setting rent ceilings, limiting the annual increase in rental rates, and other similar interventions.

For instance, in Turkey, the legislature has imposed a 25% limit on the increase of rental prices in existing contracts over the past two years. It is noteworthy, however, that the official inflation rates declared by the government in 2022 and 2023 were almost three times higher than the rental increase limit imposed by the legislature. The implementation of such interventions has sparked debates on the compatibility of such rent controls with the constitutions of the relevant countries and the European Convention on Human Rights (ECHR).

Various cases, including James and Others v the United Kingdom, Aquilina v Malta, and Urbárska Obec Trenčianske Biskupice v Slovakia, illustrate instances where the European Court of Human Rights (ECtHR) has addressed restrictions on landlords' rights. According to the court, countries have a margin of appreciation in implementing such restrictions, but they must ensure that the limitations imposed are proportionate and guarantee fair and adequate rent.

Several constitutional courts, including the Turkish Constitutional Court, have also examined the constitutionality of rent controls. The objective of this paper is to establish criteria for acceptable rent controls based on the decisions of the ECtHR and the constitutional courts of EU member and candidate countries. These criteria aim to guide policymakers in striking a

balance between addressing housing challenges and respecting property rights and freedom of contract for landlords.

Keywords: *ECHR, freedom of contract, housing shortage, landlords' rights, Rent controls, tenant protection*

1. INTRODUCTION

Rent control can be defined as any form of tenancy legislation that imposes restrictions on rent setting and/or rent increases in rental agreements. Both national constitutional courts and the European Court of Human Rights (ECtHR) have acknowledged that rent controls particularly interfere with the property rights of housing and occasionally business owners. However, both the European Convention on Human Rights (ECHR) Protocol 1, Article 1, and the constitutions of many countries stipulate that property rights can be limited for the public interest[1]. In questioning the compatibility of rent controls with the ECHR, it must be established on what grounds and to what extent public interest can be used as a reason to intrude into private legal relationships. Additionally, it is important to establish a balance in regulating the tenant and landlord relationship in accordance with the principle of proportionality.

In an analysis serving this purpose, it is crucial to first point out the objectives of states in adopting rent controls. Next, examples of legislation pertaining to rent controls will be presented. Following these examples, the problems stemming from rent controls will be examined, along with an assessment of their effectiveness. Subsequently, ECtHR case law and constitutional court rulings will be scrutinized to ascertain the courts' positions in this debate. Finally, an analysis for balanced regulation of rent controls will be provided. Although rent control also concerns other rights such as freedom of contract, this paper will be limited to property rights.

2. EXPLORING THE OBJECTIVES BEHIND RENT CONTROLS

One-third of the population in the European Union resides in rented accommodation, with one in ten families allocating over 40% of their income to rent[2]. Fur-

[1] German Constitution Art.14 II [https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html], Accessed 17 March 2024; Turkish Constitution Art. 35 II [https://www.icisleri.gov.tr/kurumlar/icisleri.gov.tr/IcSite/illeridaresi/Mevzuat/Kanunlar/Anayasa.pdf], Accessed 17 March 2024.

[2] Cuerpo, C.; Kalantaryan, S.; Pontuch, P., *Economic and Financial Affairs Rental Market Regulation in the European Union*, Economic Papers 515, 2014; FEANTSA Legal Developments Rent Regulation In The European Union, [https://www.feantsa.org/public/user/Resources/reports/2021/CH4_Legal_EN.pdf], Accessed 17 March 2024, p. 2.

thermore, the share of the private sector in rental housing supply varies between 2% and 52% across European countries[3]. The main issue driving politicians to adopt rent control is the surge in rental prices, while the increase in the income of at least a portion of tenants does not correspond to that pace[4].

The fundamental and essential nature of housing needs, coupled with shortages in rental housing supply, doesn't always ensure accurate rent pricing through free market dynamics. Landlords, particularly in situations such as natural disasters, mass migration or other occasions where demand suddenly or continuously increases, may exploit the housing shortage in their favor, given their ability to control prices and generally stronger economic position compared to tenants[5]. Under typical circumstances, the supply of the essential commodity should rise to fulfill demand in such a scenario. However, due to the inelastic nature of housing supply, housing shortages will persist in the short term[6]. Therefore, there may be a need for occasional rent controls to meet the housing needs of low-income families[7].

The primary objective behind states implementing rent controls is to guarantee that individuals with modest incomes can access a housing at reasonable rates[8]. Given that housing is a fundamental necessity, this cause is justified. Additionally, states are tasked with the duty of safeguarding the right to housing[9].The right to housing is enshrined in Article 11, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights. According to this article, the States Parties recognize the right of everyone to an adequate standard of living for themselves and their families, including adequate housing, and will take appropriate steps to

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3 Kettunen, H.; Ruonavaara, H., *Rent regulation in 21st century Europe. Comparative perspectives,* Housing Studies, Vol. 36, No. 9, 2021, p.1450-1451.

4 In fact, to determine that the rent price increase is excessive, the increase in construction costs and the consumer price inflation rates should be evaluated together. Blankenagel, A.; Schröder, R.; Spoerr, W., *Verfassungsmäßigkeit des Instituts und der Ausgestaltung der sog. Mietpreisbremse auf Grundlage des MietNovGE*, NZM, 2015, p. 2.

5 Visser, C., *Rent Control*, Acta Juridica, 1985 p. 356; Maass, S., *Rent Control: A Comparative Analysis*, Potchefstroom Electronic Law Journal, Vol.15, No. 4, 2012, p. 87.

6 Lee, R. G., *Rent Control - The Economic Impact of Social Legislation*, Oxford Journal of Legal Studies, Vol. 12, No. 4, 1992, p. 544.

7 Baar, K., *Would the Abolition of Rent Controls Restore a Free Market,* Brooklyn Law Review, Vol. 54, No. 4, 1989, p. 1235; Kettunen, H.; Ruonavaara, H., *op. cit*., note 3, p. 1448; *Hutten-Czapska v Poland* (2006) ECtHR, par. 166.

8 *Kasmi v Albania* (2020) ECtHR, par.76; *Radovici and Stănescu v Romania,* par. 88.

9 Portugal, Spain, the Netherlands, Sweden, Poland, Finland, Greece, and Belgium are countries where national constitutions include housing clauses. Kolocek, M., *The Human Right to Housing in the 27 Member States of the European Union,* European Journal of Homelessness, Vol. 7, No. 1, 2013, p. 137.

ensure the realization of this right[10]. For the right to housing to be truly fulfilled, the budget allocated for housing should not jeopardize individuals' ability to meet their other expenses[11].

Sometimes the renovation of homes can be an indirect objective of rent controls due to the fact that rent controls are not applied, or are applied more restrictively, to renovated homes[12].

Moreover, at times of high inflation, rent controls are told to be introduced to curb rising inflation[13]. Combatting high inflation can serve as another justifiable cause, given its detrimental effects on various aspects of the economy and public life.

While these aims given can be seen as reasonable purposes for introducing rent controls, they should be questioned from two perspectives: Firstly, are the rent controls effective in achieving the stated objectives? Secondly, under what conditions can interference with freedom of contract and property rights of landlords be deemed legally acceptable to achieve this goal?

3. DIVERSE METHODS OF RENT CONTROL IN THE EU AND EU CANDIDATE COUNTRIES

Even though European housing systems have predominantly shifted towards deregulation and neoliberalization, it has been observed that rental controls exist in sixteen out of thirty-three European countries[14]. Consequently, the compatibility of these legislations with the European Convention on Human Rights (ECHR) and constitutional rights may vary depending on the specific rent control. To elucidate our analysis, we will first provide examples of rent control policies implemented in three different countries, each with distinct restrictions.

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10 Elements of the right to housing can be identified in various other international and regional human rights treaties, including Article 8 of the European Convention on Human Rights (ECHR), and Article 31 of the Revised European Social Charter (RESC).

11 General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), [https://www.refworld.org/legal/general/cescr/1991/en/53157], Accessed 1 March 2024

12 In § 559 BGB, there is a provision regarding this matter [https://www.gesetze-im-internet.de/bgb/__559.html]; Similarly, in the case of *Mellacher and Others v. Austria*, rent control imposes much less intervention on renovated homes. *Mellacher and Others v Austria* (1986) ECtHR, par. 157.

13 Altas, H., *Kira Parası Artışlarının Sınırlandırılması,* Ankara Üniversitesi Hukuk Fakültesi Dergisi , Vol. 49, No. 1, 2000, p. 107; Ruhi, M. E., *Gayrimenkul Kiralarının Sınırlandırılması Hakkındaki 4531 Sayılı Yasaya İlişkin Anayasa Mahkemesi Kararı Üzerine Bir Değerlendirme*, Ankara Üniversitesi Hukuk Fakültesi Dergisi , Vol. VII, No. 1-2, 2003, p. 218.

14 Kettunen, H.; Ruonavaara, H., *op. cit.,* note 3, p. 1461.

3.1. Germany

The regulations concerning the determination and increase of rent in Germany are in paragraphs 557-561 of the BGB[15]. According to these provisions, the parties to a lease agreement can either determine annually how much rent will be paid and when the increase will occur, or they can agree to base it on the price index determined by the consumer price index. Moreover, in accordance with these regulations, a rent increase cannot be requested before one year has passed. It is stipulated that the initial rent determined cannot exceed 20% of the comparable rent. In housing markets where demand is high, this limit is set at 10%. Rent increases to be made within three years cannot exceed a total of 20% and, in places experiencing housing shortages, cannot exceed 15% (BGB § 558). If the rent exceeds these limits, the tenant can request a refund for the past 30 months. An exception to rent increase limits is granted in cases of property renovation. The possibility of entering into a fixed-term lease agreement exists only in residential leases under the conditions specified in §575 (1) of the BGB[16].

The German system of rent control involves capped rent increases, which establish guidelines based on the local rental market. Landlords are prohibited from increasing rent beyond the limits set by the average comparable rent. With this intervention, rent increases are slowed down[17].

3.2. Croatia

Different forms of rent control exist in Croatia. According to the provisions of the Lease of Flats Act regarding rent, tenants can either pay protected rent or freely agreed rent (Art. 6). Protected rent is determined based on conditions and standards set by the Government of the Republic of Croatia (Art. 7)[18].

As per Article 8 of the Lease of Flats Act, protected rent applies to apartment users residing in apartments built with funds allocated for addressing housing needs

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15 BGB, [https://www.gesetze-im-internet.de/bgb/index.html#BJNR001950896BJNE000102377], Accessed 14 March 2024.

16 Fieldfisher A brief guide to rent controls in Europe, 11.3.2024, [https://www.fieldfisher.com/en/insights/a-brief-guide-to-rent-controls-in-europe], Accessed 16 March 2024.

17 A similar rent cap is also introduced in Austria. In the years 2025 and 2026, for reasons of social compatibility, the effects of rent increases will be capped at 5%. Parliament Austria [https://www.parlament.gv.at/aktuelles/pk/jahr_2023/pk1411]; Belgium, Luxemburg, Norway and Poland also have similar rent caps. Kettunen, H.; Ruonavaara, H., *op. cit.,* note 4, p. 1451.

18 EU-project: Support to the Judicial Academy: Developing a training system for future judges and prosecutors, [https://pak.hr/cke/propisi,%20zakoni/en/ApartmentLeaseAct/Apartement.pdf], Accessed 16 May 2024.

of financially vulnerable individuals, those using apartments in accordance with regulations concerning Croatian veterans' rights, or those designated by special regulation as holders of occupancy rights before the enactment of this Act[19].

In cases of freely agreed rents, the rent can be negotiated for a subsequent period up to 20% higher than the average freely agreed rent within the same settlement or county for a comparable apartment in terms of amenities and location (Art. 9). Should the proposed rent exceed this threshold, the lessee has the right to petition the court for a determination of the rent amount within 30 days of the proposal. During this period, the tenant pays an advance rent equivalent to the agreed amount (Art. 11).

In summary, there exists a general ceiling determined based on the average rent to prevent excessive rent increases in Croatia, akin to the German system. Additionally, there is a model that allows certain groups of tenants, deemed in need of protection, to rent at rates lower than the average.

3.3. Türkiye

In response to the increasing rental prices and high inflation in the housing market, a temporary provision was incorporated into the Turkish Code of Obligations on June 8, 2022. According to this regulation, the increase in ongoing rental contracts is limited to 25% until July 1, 2023. This period was later extended for another year. On the other hand, the Turkish Statistical Institute (TÜİK) announced inflation rates of 64.77% for 2023 and 64.3% for 2022. It is estimated that the actual inflation rates are much higher than officially announced.

In addition to the rent increase limitation, the right of termination of the lease by the lessor in residential leases has been already significantly restricted through legislation and lengthy legal proceedings.

Diverging from examples in other countries, the rent control model implemented in Turkey sets a significantly lower limit on rent increases for existing residential leases, well below inflation, without imposing an upper limit on the rent to be determined for new lease agreements. Additionally, all residential tenants party to an ongoing lease agreement are protected. This aspect makes the appropriateness of the regulation subject to questioning from various perspectives.

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[19] *Ibid*, It is also stated that public tenancy, offered by certain local authorities at various levels, targets specific protected groups such as young families who do not meet the eligibility criteria for social housing. Jakopic, A.; Žnidarec, M.; Mežnar, S.; Josipovic, T., *Tenancy Law and Housing Policy in Croatia,* ToKnowPress, 2015, p. 103.

4. NAVIGATING RENT CONTROL: ASSESSING EFFECTIVENESS AND ADDRESSING ASSOCIATED PROBLEMS

While rent controls are commonly employed by governments, there is ongoing debate regarding the efficacy of rent increase limitations and their actual impact on controlling rental prices[20]. Assessing the effectiveness of rent controls is pivotal in determining the compatibility of the intervention with the European Convention on Human Rights (ECHR) and constitutional rights. If it is determined that rent control measures fail to achieve their intended purpose, the restrictions they impose may be deemed unlawful. Furthermore, it is important to acknowledge that rent controls may also give rise to a range of social and economic challenges, which must be carefully considered when evaluating the efficiency of such restrictions.

Of course, the effectiveness of rent controls will vary depending on the specifics of the regulation and the economic and social conditions of the relevant country. Nonetheless, certain generalizations can still be made.

4.1. Drawbacks of Blanket Approach

Rent controls, if applied to all landlords or specific landlords in certain regions and cities, benefit all tenants without distinguishing between rich and poor, and without discriminating between rich and poor landlords. This blanket approach doesn't always make sure neediest tenants are placed in rent-controlled housings[21]. For example, in Turkey, all tenants, regardless of their economic situation, including those living in luxury accommodations, can benefit from the rent increase limit applied to existing contracts. However, a family with limited finances searching for new housing might encounter excessively high rental prices in new contracts. Likewise, in the *Amato Gauci v. Malta* case, the ECtHR also took note when a

[20] Lee, R. G., *op. cit,* note 6, pp. 543-557; 4.; Schmid C.; Dinse, J., *European Dimensions of Residential Tenancy Law,* European Review of Contract Law, Vol. 9, No. 3, 201, p. 201; Silvia, H.; Christiansen, L., *Web Of Interest: Reframing The Conversation Around Unaffordable Housing*, Corporate and Business Law Journal, Vol. 4, No. 1, 2023, p. 238; Der Bundesrat Das Portal der Schweizer Regierung, [https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-98836.html], Accessed 1 April 2034;
Buckley, J.; Gary N;. Conley, G., *Housing Market Operations and the Pennsylvania Rent Withholding Act - An Economic Analysis,* Villanova Law Review, Vol. 17, No. 5, 1972, pp. 886-927; Baar, K, *op.cit.,* note 7, pp. 1231-1238; Epstein, R. A., Rent Control Revisited: One Reply to Seven Critics, Brooklyn Law Review, Vol. 54, No. 4, 1989, pp. 1281-1304.

[21] Lee, R. G., *op. cit,* note 6, p.547; Wolfstädter, L.; Rump, C., *op. cit*., note 22, p. 843; Schultz, M.; Irrtum Mietpreisbremse, ZRP, 2014, p. 41; Critical of a legislation which doesn't make this distinction. *Hutten-Czapska v Poland* (2006) ECtHR, par. 174.

tenant, who was benefiting from controlled low rent, was renting out their own property[22]. It must be recognized that such rent controls operate with a significant efficiency gap. This would also weaken the social acceptance of the restrictions. In some countries, such as Switzerland, this efficiency gap is being addressed by not implementing rent controls, at least for luxury or properties with six or more rooms[23]. Croatia's system of listing tenants eligible to benefit from rent-controlled units can also considered a more efficient model.

4.2. Discouragement of Investing in Housing and Renting

Rent controls are criticized, particularly when the controlled rent is significantly lower than the market value, as critics argue that it leads to a decline in available rental housing[24]. When rent controls drive rental prices below market rates and make eviction more difficult for tenants, some landlords are inclined to keep their properties vacant, resort to short-term rentals, or find alternative ways to monetize their real estate, leading to a further shortage of rental housing[25]. It is evident that this does not serve the goal of providing accessible and reasonable housing[26]. For instance, in major tourist cities where rent controls are prevalent, it has been observed that landlords prefer short-term rentals through platforms like Airbnb rather than long-term leasing, resulting in significant reductions in rental housing supply that caters to long-term housing needs[27]. Studies point ot that the rent controls, which were in effect in Catalonia, Spain from 2020 for about one and a half years and later annulled by the Constitutional Court, led to a slight decrease in rental prices while causing a significant decrease in the supply of rental housing[28].

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22 *Amato Gauci v Malta* (2009) ECtHR, par. 61.

23 OR Art. 253b, [https://www.fedlex.admin.ch/eli/cc/27/317_321_377/de#a143], Accessed 29 March 2024.

24 Lee, R. G., *op. cit,* note 6, pp. 543/544,554; McKenzie, R.; Dwight R., *How Economists Understate the Damage from Rent Controls,* Regulation, Vol. 41, No. 4, 2018-2019, p. 22; Leuschner, L, *Die „Mietpreisbremse"– Unzweckmäßig und verfassungsrechtlichhöchst bedenklich*, NJW, 2014, 1931; Schultz, M., *op. cit.,* note 22, p. 37.

25 Visser, C., *op. cit.,* note 5, p. 360; Silvia, H.; Christiansen, L., *op. cit.,* note 21, p. 142; Cuerpo, C. *et. al, op. cit.,* note 2, pp. 10-11; Kettunen, H.; Ruonavaara, H., *op. cit.,* note 3, p.1449.

26 FEANTSA, *op. cit.,* note 8, p. 123.

27 Coupechoux, S.; Clark-Foulquier, C.; *The City Is Ours! How To Regulate Airbnb In The Face Of A Housing Crisis*, FEANTSA and the Foundation Abbé Pierre Report, 2020, [https://www.housing-solutions-platform.org/single-post/the-city-is-ours-how-to-regulate-airbnb-in-the-face-of-a-housing-crisis], Accessed 3 March 2024, p. 7; Maass, *op. cit.,* note 5, p. 88.

28 Vilchez, R.; Maria, J.; The Lessons Learnt by the First Academic Assessments of Rent Control in Catalonia, Revista Catalana de Dret Public (Catalan Journal of Public Law), Vol. 66, 2023, p. 87; Kholodilin, K.A.; López, F.A.; Blanco, D.R.; Arbues, P. G., *Lessons from an aborted second-generation rent control in Catalonia*, DIW Berlin, 2022.

Furthermore, low rental income discourages individuals from investing in housing, further limiting housing construction[29]. Sometimes, to combat this trend, new constructions are exempted from rent control regulations[30].

On the other hand, despite rent control, housing investment may still be attractive if the property's own value increase is sufficiently high[31]. However, as rental income decreases and eviction becomes more difficult, landlords may prefer to keep the property vacant. This is because both rent control and the difficulty of eviction can decrease the property's resale value significantly[32].

4.3. Fueling Disputes

If rent controls push the rent price significantly below the market rate, and landlords would benefit more if the tenants left, landlords may start to resort to legal measures to terminate the lease agreement. They might potentially exploit legal loopholes to circumvent the law, thereby exerting pressure on the judiciary[33].

If rent controls only intervene with rental prices increase in existing rent agreements, it means that rental prices can be freely determined for new leases, allowing for periodic adjustments to market rates. However, it has been observed that tensions between landlords and tenants increase in this model of restriction. This is because landlords prefer rent agreements to be as short as possible and to adjust rents to market rates. Consequently, landlords may seek ways to terminate the lease of existing tenants in order to adjust the rent to market rates. Additionally, in this case landlords often prefer tenants whom they anticipate will stay for a short period[34]. For example, the restriction of rent increases in continuing residential lease contracts in Turkey, visibly increases the number of disputes between tenants and landlords and brings courts to a standstill[35]. When combined with regulations allowing residential lease terms to extend up to ten years, rent increase limitations lead former tenants, who pay significantly below market rates, to prompt

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29 Silvia, H.; Christiansen, L., *op. cit.,* note 21, p. 139; Cuerpo, Carlos *et. al, op. cit.,* note 2, p.11; McKenzie, R.; Dwight R., *op. cit,* note 25, p. 22.; Epstein, R.A., "Rent Control and the Theory of Efficient Regulation, Brooklyn Law Review, Vol. 54, No. 3, 1988, p. 767; Leuschner, L, op. *cit.,* note 25, p. 1931; Schultz, M., *op. cit*., note 22, p. 41.

30 Epstein, R. A., *op. cit.,* note 21, p.1288.

31 Lee, R. G., *op. cit,* note 6, p. 553.

32 *Statileo v Croatia* (2014) ECtHR, par. 131.

33 Epstein, R.A., *op. cit.,* note 30, p. 764-765; McKenzie, R.; Dwight R., *op. cit,* note 25, p. 25; Epstein, R. A., *op. cit.,* note 21, s. 1287.

34 Vilchez, R.; Maria, J.; *op. cit.,* note 29, p. 99; Epstein, R.A., *op. cit.,* note 30 p. 763.

35 Dünya Gazetesi, 11.8.2023, [https://www.dunya.com/sektorler/emlak/kira-tahliye-davalari-patladi-haberi-701252], Accessed 14 May 2024.

landlords to sell their properties, initiate eviction lawsuits due to necessity, or file rent determination lawsuits if conditions permit. Undoubtedly, the increase in the number of lawsuits also places a burden and pressure on the judiciary system and carries an economic cost. These factors should be considered in evaluating the impact and effectiveness of rent controls.

4.4. Escalating Rents in Unregulated Agreements

Due to the ineffectiveness of rent controls in addressing the housing shortage issue, it is expected that rents for unregulated housing escalate, surpassing previous market rates[36]. Especially, if rent controls only limit rental prices increase in existing rent agreements, it is anticipated that landlords will set much higher new rent prices to offset the impact of the restriction[37]. Indeed, in Turkey, while the rent increase in existing contracts is limited to 25%, the absence of an upper limit for rent prices in new lease agreements has resulted in a significant gap between the rents paid by new and existing tenants in a short period of time. Landlords factoring in the cost of the 25% rent increase restriction from the outset by setting the initial rent high also contributes to this. As a result, limiting rent increases only in existing contracts has not been effective in curbing the rise in rent prices. Rent prices have increased sixfold in Turkey over the past four years[38].

4.5. No Solo Influence in the Fight Against Inflation

As mentioned above, rent controls are sometimes employed to mitigate inflation during periods of high inflation. However, it is widely recognized that rent controls alone cannot effectively reduce inflation when the underlying causes of inflation are not comprehensively addressed[39]. Furthermore, it is argued that rent controls, which set controlled rents below the market average, may increase purchasing power for goods and services beyond housing, potentially contributing to inflationary pressures[40]. Indeed, rent increase restrictions implemented in ongoing lease agreements in Turkey over the past two years have proven ineffective in con-

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36 Lee, R. G., *op. cit,* note 6, p. 546.

37 Vilchez, R.; Maria, J.; *op. cit.,* note 29, p. 98.

38 BBC Turkce, 5.6.2023, [https://www.bbc.com/turkce/articles/c3g0xylry03o#:~:text=Kiralar%20ise%20%C3%BClke%20genelinde%20son,ortalama%20art%C4%B1%C5%9F%20oran%C4%B1%20%697%20oldu.ard], Accessed 15 May 2024.

39 Visser, C., *op. cit.,* note 5, pp. 357-358.

40 Lee, R. G., *op. cit,* note 6, p. 547.

trolling high inflation; instead, they have become one of the categories experiencing the highest price increases[41].

4.6. Discouraging Renovation of the Rent-Controlled Houses

Continuous low level-rent control policies discourage landlords from renovating rent-controlled properties. Additionally, they diminish landlords' incentives to invest in property maintenance, which accelerates the deterioration of rental units[42]. Consequently, these circumstances may even result in shifts in the demographic profiles of tenants residing in rent-controlled areas[43].

4.7. Locking the tenant to the rent-controlled house

Rent controls, when offering housing well below market prices, may not actually provide the best housing option for tenants but still discourage them from vacating the premises. This hinders the mobility of former tenants and leads to potential lock-in effects, which can even influence workers' job preferences and labor mobility[44].

5. RENT CONTROLS: INSIGHTS FROM ECTHR PRECEDENTS AND DERIVED PRINCIPLES

As noted, rent controls are implemented in many European countries, and the compatibility of these controls with fundamental rights and freedoms, especially the right to property, freedom of contract, and the principle of equality, has been questioned. This questioning has also been brought before the European Court of Human Rights (ECtHR) on numerous occasions. The ECtHR examines the following criteria for the compatibility of rent controls with the convention a) Does the restriction have a legal basis? b) Does the regulation serve a legitimate aim? c) Is the intervention proportionate? Additionally, the following principles can be derived from ECtHR jurisprudence on the issue.

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41 TUIK, [https://data.tuik.gov.tr/Bulten/Index?p=Tuketici-Fiyat-Endeksi-Mart-2024-53613], Accessed 15 May 2024.

42 Olsen, E., *An Econometric Analysis of Rent Control*, Journal of Political Economy, Vol. 80, No. 6, 1972, p. 8; Lee, R. G., *op. cit.,* note 6, p. 546.; Sheldon, S., Rethinking Rent Control: An Analysis of Fair Return, Rutgers Law Journal, Vol.12, No. 3,1981, p. 650; McKenzie, R.; Dwight R., *op. cit,* note 25, p. 22; Epstein, R.A., *op. cit.,* note 30, p. 765; Leuschner, L, *op. cit.,* note 25, p. 1931.

43 Visser, C., *op. cit.,* note 5, p.360; Silvia, H.; Christiansen, L., *op. cit.,* note 21, *op. cit.,* note 10, p. 136; *Hutten-Czapska v Poland* (2006) ECtHR, par. 158.

44 Visser, C., *op. cit.,* note 5, p. 362; Silvia, H.; Christiansen, L., *op. cit.,* note 21, p. 141.

5.1. Legal basis

Article 1 of Protocol No. 1 allows for the deprivation of "possessions" under the conditions prescribed by law in the second sentence of the first paragraph. Regarding the legal basis of the intervention, the ECtHR does not make restrictive interpretations. Established ECtHR case law, secondary legal regulations, and even established judicial precedents can fulfil this condition[45].The principle of lawfulness also presumes that the relevant domestic legal provisions are sufficiently accessible, precise, and predictable in their application[46]. Therefore, rent control legislations are required not to be arbitrary and unpredictable[47]. This indicates that frequent and unexpected interventions with lease agreements will be more questionable before the ECtHR[48]. On the other hand, even if landlords are aware of the restrictions, the Court expresses a finding in favor of landlords, stating that they may not anticipate increases in rent and property prices[49].

5.2. Do rent controls serve a legitimate aim?

Governments argue that rent controls aim to meet the housing needs of the low income groups at an appropriate cost[50]. On the other hand, rent controls imposed on commercial leases are said to serve purposes such as ensuring business continuity, promoting economic initiatives, and preventing unemployment among workers in these establishments[51]. As presented below, the Court accepts these objectives as legitimate. Furthermore, the ECtHR considers the preservation of property rights of landlords as a legitimate aim if rent controls are lifted, thus returning to a regime without intervention in contractual freedom.

In *James and Others v. UK*, the UK granted tenants who are parties to long-term lease agreements the right to purchase the property or extend the lease under certain conditions. In this case, the applicants argued that interference with the right

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45 ECHR Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 25 [https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG] Accessed 13 May 2024.

46 *Ibid*, p. 25; *Hutten-Czapska v Poland* (2006) ECtHR, par 163.

47 Rent control provisions of domestic law should sufficiently accessible, precise and foreseeable in their application. *Kasmi v Albania* (2020) ECtHR, par. 73.

48 Uncertainty, whether legislative, administrative, or stemming from the practices of authorities, must be considered when evaluating the State's actions. When a matter of public interest is involved, it is the responsibility of public authorities to act promptly, appropriately, and consistently. *Hutten-Czapska v Poland* (2006) ECtHR, par. 168.

49 *Zammit and Attard Cassar v Malta* (2015), ECtHR par. 58.

50 *Op. cit.,* note *8.*

51 *Zammit and Attard Cassar v Malta* (2015), ECtHR par. 58.

to property would be lawful if it provided benefits to the general welfare of society. Consequently, they claimed that the condition of "general public interest" would not be met if property was transferred from one individual to another for private benefit. The Court accepted that interference with the right to property solely for the benefit of one person, without any other reason, could not be considered as serving the "general public interest." However, at the same time, the Court noted that the compulsory transfer of property from one person to another could serve the public interest depending on the circumstances and could be a legitimate means such as the housing needs of the population[52].

Similarly, the Court recognized the provision of affordable housing in society as a legitimate aim in the 2009 case of Amato Gauci v Malta and the 2020 case Kasmi v. Albania[53].

The 2015 case of *Zammit and Attard Cassar v Malta* concerns commercial lease agreements. The applicants argued that they could not terminate the lease agreement, that rent increases were limited, that they could not bring the rent in line with the market value, and therefore their property rights were violated. The ECtHR stated that restrictions aimed at protecting commercial tenants served the purpose of safeguarding commercial enterprises and their employees, which could be considered a legitimate aim. This decision demonstrates that rent limitations imposed on commercial leases are evaluated in a manner very similar to residential leases by the ECtHR.

In *Pařízek v the Czech Republic case*, the intervention in the rental agreement's specified rent was brought before the Court by the tenant this time. The tenant argued that local courts intervened in the rental agreement based on an assumption that the landlord was not making a profit or was incurring losses, whereas landlords acquired their property voluntarily with an awareness of the income to be obtained from rental agreements under rent control regulations[54]. The tenant alleged that the decisions of the Constitutional Court and other courts regarding rent limitations unjustly interfered with rental agreements, causing harm to tenants without compensation. The ECtHR determined that intervention through established judicial decisions could also be considered lawful and aimed at the legitimate purpose of removing regulations disadvantageous to certain landlords, allowing them to fully enjoy their property rights. Thus, the Court dismissed the application[55].

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52 *James v UK* (1986) ECtHR par 38-45.

53 *Amato Gauci v Malta* (2009) ECtHR, par.70; *Kasmi v Albania* (2020) ECtHR, par.76.

54 *Pařízek v the Czech Republic* (2023) ECtHR, par. 36-40.

55 *Ibid*, par. 58/59.

5.3. Proportionality of the Rent Controls

It should be emphasized that according to the Court, the mere fact that an interference with the right to property serves a legitimate aim is not sufficient for the interference to be lawful. There must also be a reasonable relationship of proportionality between the means employed and the aim pursued. This balance will not be found if the owner of the interfered with property bears an "individual and excessive burden"[56]. While it's important to conduct separate analyses of proportionality for each specific rent control legislation, certain conclusions can be derived from the jurisprudence of the European Court of Human Rights (ECtHR) regarding the proportionality test.

5.3.1. Broad Margin of Appreciation

The ECtHR recognizes governments' broad discretion in such social housing policy preferences. Court thinks decisions regarding whether and when to allow free-market forces to operate fully, or to subject them to state control, as well as the selection of measures to meet the community's housing needs and the timing of their implementation, inevitably involve complex social, economic, and political considerations[57].

For example, in *James and Others v. UK case,* the court noted that national authorities, being directly informed about their societies and needs, are in a better position than international judges to appreciate what constitutes the "general public interest". Therefore, they should have a broad margin of appreciation[58].

According to the Court, it is not necessary for interference with the right to property to be the only way to achieve the said legitimate aim. The availability of alternative solutions does not in itself render a rent reform law unjust; rather, it is one of the factors considered in determining whether the chosen methods are reasonable and conducive to achieving the intended legitimate aim, taking into account the need for a "fair balance". As long as the legislative body stays within these limits, the Court does not check whether the legislature represents the best solution to the problem or whether legislative discretion should be used differently[59].

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[56] *Radovici and Stănescu v Romania* (2007), par. 76; *Hutten-Czapska v Poland* (2006) ECtHR, par. 221-222.

[57] *Hutten-Czapska v Poland* (2006) ECtHR, par 166; *Lindheim and Others v Norway* (2012) ECtHR, par.96; *Kasmi v Albania* (2020) ECtHR, par.75.

[58] *James and Others v UK* (1986), par. 46-47.

[59] *Hutten-Czapska v Poland* (2006) ECtHR, par. 223; *Statileo v Croatia* (2014) ECtHR par. 140.

5.3.2. Examining Further Constraints and Safeguards in Rent Agreements

The ECtHR also evaluates the proportionality of rent controls in conjunction with other regulations related to the lease agreement. Especially when the landlord's right to unilaterally terminate the lease agreement is restricted for a long time, it is considered disproportionate for rent control to curb a rental price significantly below the market value[60]. For example, in *Zammit and Attard Cassar v Malta*, the court considered the inability to terminate the lease agreement and the fact that the rent received by the applicant remained significantly below the market value when combined with the limits on rent increases, and it ruled a violation[61].

The *Lindheim and Others v. Norway* judgement ruled that rent control disproportionate burden on the applicant lessors, because lease extensions were indefinite, with rent increases tied to the consumer price index rather than land value. Only lessees could terminate the lease, either by rescinding the contract or purchasing the land under preferential conditions[62].

The ECtHR holds that proportionate rent control restrictions should include adequate procedural safeguards to maintain a fair balance between the interests of protected lessees and landlords. This is particularly crucial when landlords face significant challenges in terminating rental agreements and obtaining fair rent. The Court's position suggests that the absence of these procedural safeguards could potentially lead to a finding of disproportionality[63]. *Amato Gauci v Malta* case, the Court found that the tenants were subletting their suitable housing to others and did not have a protected interest, concluding that the law did not establish procedural regulations that would ensure a fair balance between the landlord and the tenant[64].

5.3.3. Requirement of Fair Compensation

According to the Court, compensation is necessary to ensure that an interference with an individual's right to property is proportionate when it is deprived. However, full compensation for property damage may not necessarily mean full market value compensation within the framework of the purpose underlying the interference[65].

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60 *Statileo v Croatia* (2014) ECtHR, par, 156; *Zammit and Attard Cassar v Malta* (2015), ECtHR par. 58.

61 *Kasmi v Albania* (2020) ECtHR, par. 85.

62 *Lindheim and Others v Norway* (2012) ECtHR, par 134.

63 *Statileo v Croatia* (2014) ECtHR par. 128; *Zammit and Attard Cassar v Malta* (2015), ECtHR par. 58.

64 *Op. cit,* note 22.

65 *Portanier v. Malta* (2019), ECtHR, par. 63.

The Court seeks for the rental price to be sufficient to cover the landlord's taxes, expenses related to the property, and to obtain a reasonable profit. The Court accepts that the intervention is manifestly unreasonable when the income obtained as a result of rent control does not cover the expenses of the property and the lease agreement cannot be terminated for a long time[66].

In the 2020 *Aquilina v Malta* decision, the applicant argued that both the extension of the lease for an indefinite period and the significant limitation on rent increases during this period violated his right to property. According to the court, rent control should not lead to manifestly unreasonable consequences, such as rental amounts equivalent to 10% of the market value, as in the case at hand[67].

Similarly, the 2014 case of *Bittó and Others v Slovakia* concerns complaints from landlords in Slovakia during the transition from state-controlled rentals to negotiated lease contracts following the collapse of the communist regime and fundamental reforms. The court found that rent controls made it impossible for landlords to generate rental income or at least cover maintenance costs, thereby violating Article 1 of Protocol No. 1[68].

In the 2009 case of *Amato Gauci v Malta*, ECtHR evaluated the likelihood of the landlord regaining the right to use the property due to the possibility of indefinite extension of the lease and inheritance as low. Consequently, the Court ruled that in this case, the clear and significant disparity between the highest rent that the applicant could receive, and the long-standing undervaluation of the market price constituted a disproportionate interference[69].

According to the court, the protected group of tenants may indeed be socially vulnerable with low purchasing power, deserving of protection. However, in such cases, it is deemed contractually inappropriate for the financial burden of funding this group to be solely placed on one group of landlords[70]. Regardless of how vulnerable the protected tenant may be, providing the landlord with a minimum income opportunity is unacceptable[71].

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66 *Bittó and Others v Slovakia* (2014) ECtHR, par. 111-113.

67 *Aquilina v Malta* (2020) ECtHR, par. 29.

68 *Bittó and Others v Slovakia* (2014) ECtHR, par. 111-113; In the same line *Statileo v Croatia* (2014) ECtHR, par. 128; *Urbárska Obec Trenčianske Biskupice v Slovakia* (2023) ECtHR.

69 *Amato Gauci v Malta,* par. 63; In the same line *Hutten-Czapska v Poland* (2006) ECtHR, par. 202.

70 *Hutten-Czapska v Poland* (2006) ECtHR, par 225, *Statileo v Croatia* (2014) ECtHR par. 142; *Radovici and Stănescu v Romania* (2007) ECtHR, par. 88.

71 *Statileo v Croatia* (2014) ECtHR, par. 142.

6. SAMPLES FROM CONSTITUTIONAL COURTS ANALYSES

As explained above, it is also important to consider the underlying causes of the housing problem in the relevant country and whether the rent control legislation in question is effective in solving the problem when assessing its legality. The ECtHR leaves this assessment to the relevant government, conducting its evaluation within the aforementioned framework. National constitutional courts are closer to the field and thus better positioned to assess the effectiveness of rent control within the principle of proportionality.

In nearly every country where rent controls are examined, it is determined that rent control serves the public interest. The principle of proportionality of the intervention is the main subject of examination in the evaluations of the Constitutional Courts. In this assessment, the extent to which landlords can get rental income after the restriction is implemented is crucial. On the other hand, the efficiency and concrete effects of the relevant rent controls, availability of less intrusive methods are often not considered or superficially considered when evaluating the constitutionality of the law. In the author's opinion, constitutional courts should assess whether rent controls achieve their intended purpose. Additionally, problems caused by rent controls, such as an increase in rent disputes, should also be part of this examination. Furthermore, the duration of rent controls should be analyzed because if these controls cause rents to fall significantly below average market rents, they should be considered a temporary measure. Below, evaluations from two Constitutional Courts will be provided as examples.

6.1. Germany

The German Federal Constitutional Court has ruled on the constitutionality of the 10% rent cap stipulated in the German Civil Code on July 18, 2019. As mentioned above, the German Civil Code regulates that the rent may not exceed 20% in some areas and 10% in others of the benchmark rent. In this ruling, the court stated that property rights and freedom of contract can be limited in the public interest, emphasizing that property rights do not guarantee maximum profit. According to the court, the restrictions are not contrary to the principle of equality[72]. If the intervention is not disproportionate, it cannot be said that rent controls are unconstitutional. Preventing economically weak groups from leaving high-demand housing areas is important for the public interest. Therefore, rent caps are

[72] The German Constitutional Court has also previously issued a similar ruling. According to the guarantee of property, it is permissible for landlords of apartments to request a rent increase of up to 30 percent, but they cannot demand a higher comparable rent. BVerfG, Beschluß vom 04-12-1985 - 1 BvL 23/84 u. a. NJW 1986, p.1669.

necessary; there is no other equally effective short-term solution. The legislature aims to find a fair balance between the legitimate interests of property owners and the public interest. The effects of rent control on property are not a threat to the essence of property or the loss of the ability to use property, as it is based on average market prices. It may not be appropriate to impose a single rent level nationwide to establish sufficient connection to regional market rents. Therefore, it is appropriate to apply a special rate, especially in markets where the housing market is particularly tight. Treating individual landlords and corporate landlords the same under the rent caps does not violate the principle of equality. The aim of rent caps justifies applying the maximum rent regardless of the economic significance of rental income for the landlord[73].

In this decision, the court found the regulation appropriate to achieve its objective, as the legislature's aim with the rent ceiling was to prevent lower-income individuals from being forced out of highly sought-after residential areas due to excessive price increases. Scholars have made similar evaluation[74]. On the other hand, it is also argued that even after such interventions, landlords will still prefer tenants with better financial situations, and that such rent controls are not in accordance with the constitution[75].

6.2. Türkiye

The Turkish Constitutional Court has ruled on previous rent controls several times.

In 1963, the Constitutional Court questioned the constitutionality of rent freezing and determining rent by municipal authorities during a period of high inflation. In this decision, the Court stated that interventions in rent amounts were justified due to the potential threat to housing needs and entrepreneurial freedom if rents were allowed to rise unchecked. However, the Court ruled against the lack of criteria provided for price determination by municipal authorities, the minimal increase in rent compared to other sectors, the disadvantageous position of real estate investors compared to investors in other sectors, and the unequal treatment and disadvantage of landlords due to the inability to determine rent according to market conditions, ultimately leading to the decision of nullification[76]. The court

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73 Bundesverfassungsgericht, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/07/lk20190718_1bvl000118en.html], Accessed 12 March 2024.

74 Wolfstädter, L.; Rump, C., *op. cit.,* note 22, p. 843.

75 Leuschner, L, *op. cit.,* note 25, p. 1929; Schultz, M., *op. cit*., note 22, p. 41; Blankenagel, A.; Schröder, R.; Spoerr, W.; *op. cit,* note 4, p. 28.

76 AYM, KT. 26.3.1963; E:1963/3 K: 1963/67, RG.11416, 31.5.1963.

also stated that this law cause unrest among property-owning citizens and such unrest does not fail to affect other citizens, thus, it cannot be accepted that they serve the public interest anymore.

In a decision dated November 16, 2000, the Turkish Constitutional Court examined an mandatory regulation allowing a maximum of 25% increase in rent in 2000 and 10% increase in 2001. It was argued that this limitation infringed upon property rights and freedom of contract. In this decision, it was determined that in order to ensure the right to housing as a requirement of being a social state governed by the rule of law, if the state did not take precautions against housing shortages, rent prices could rise excessively. It was also noted that property rights could be restricted for the public interest and that freedom of contract could be limited for the purpose of ensuring the proper functioning of private enterprises in accordance with the requirements of the national economy and social goals, providing security and stability, ultimately leading to the rejection of the nullification application[77].

Following these decisions, inflation in Turkey was reported as 39.03% in 2000 and 68.53% in 2001. High inflation triggered new allegations of unconstitutionality regarding the same restrictions. Indeed, on July 19, 2001, the Constitutional Court re-evaluated the constitutionality of the same regulation. In this application, it was argued that limiting the increase to 10% in 2001 was unconstitutional. This time, the court ruled that the 10% rent limit in 2001 was an unreasonable intervention against landlords due to the significant increase in inflation[78].

7. ANALYSIS AND RECOMMENDATIONS FOR EFFECTIVE AND LAWFUL RENT CONTROL POLICIES

Since rent control interferes with fundamental rights, especially property rights, in an ideal legal system, the legislator should explain the specific problems necessitating rent control with data and demonstrate how and within what timeframe rent control will address these issues. The impact of the rent control measure should also be periodically evaluated with data. However, in many legal systems, the necessity and appropriateness of such interference are not adequately explained by the legislator, and the impact of the measure is not monitored. If less intrusive, more effective measures are available, that option should be chosen first.

Ensuring the right to housing is not an easy task, and planning for housing needs must be long-term, comprehensive, and multidimensional. Governments have var-

77 AYM, KT: 16.11.2000, E.2000/26, K.2000/48, RG: 24696, 15.3.2002.

78 AYM, KT: 19.7.2001, E.2001/303, K. 2001/333, RG: 24524, 15.9.2001.

ious methods at their disposal to ensure the right to housing. Among these options, rent controls implemented in the private sector are often the least costly and easiest for policymakers to adopt. Such rent controls attempt to address the multifaceted problem of accessible housing by imposing a financial burden on landlords. Nevertheless, the preference for rent controls mostly stems from their simplicity and ease of implementation as a policy response. Politicians may have low motivation to adopt more effective and costly public policy tools, such as increasing public leasing and social housing construction, even though they may yield more effective results in the long term[79]. However, to achieve an effective solution, factors such as the purchasing power of minimum wage, income inequality, housing demand and supply, lack of social housing and support must be considered together[80]. In most cases, without a multidimensional approach, relying solely on rent controls will not be effective. Studies indicate that the primary reason for the increase in rental prices is the shortage of housing supply, emphasizing that measures that do not address this issue will not be effective[81]. Similarly, on December 16, 2023, in an interview, the head of the Turkish Central Bank stated that rent prices are rising due to a shortage of social housing and that the way to stop increasing rent prices is by boosting the supply of social housing[82]. This indicates that the problem cannot be addressed through rent increase restrictions in existing lease agreements.

On the other hand, rent controls are popular among voters, and this does not discourage politicians from adopting this method[83]. For example, German politicians have recognized the popularity of rent controls, and therefore the introduction of a rent control measure was included in several election programs[84].

As a result, each rent control measure should be examined considering the specific conditions of the relevant country, the purpose of the rent control regulation, and its details. Nevertheless, the legality of rent controls can be analyzed with a dual distinction. Rent control that only prevents excessive rent increases by indexing the rent increase to the price of a similar average property can be seen as more acceptable. However, it still interferes with the rent that the landlord could freely obtain by renting out their property. Furthermore, the continuous implemen-

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79 Visser, C., *op. cit.,* note 5, p. 362.

80 Silvia, H.; Christiansen, L., *op. cit.,* note 21 pp. 126-127.

81 Vilchez, R.; Maria, J.; op. *cit.,* note 29, p. 98; Visser, C., *op. cit.,* note 5, p. 362; Wolfstädter, L.; Rump, C., *op. cit.,* note 22, p. 843; Leuschner, L, note 25, 1931; Buckley, J.; Conley, G., *op, cit*, note 21; p. 927; Lee, R. G., *op. cit.,* note 6, p. 557; Epstein, R.A., *op. cit.,* note 30, p. 746.

82 Hurriyet, [https://www.hurriyet.com.tr/yazarlar/ahmet-hakan/vatandasin-kemeri-zaten-siki-42376770], Accessed 19 May 2024.

83 Visser, C., *op. cit.,* note 5 pp. 349-368; Epstein, R.A., *op. cit.,* note 30, p. 768.

84 Blankenagel, A.; Schröder, R.; Spoerr, W.; *op. cit,* note 4, p. 3.

tation of this limit will increasingly distance the rent price from the intervention-free market value and the property's worth over time[85]. However, even in this scenario, the appropriateness of artificially limiting rent increases in preferred properties is being questioned too[86]. In this case, the measure does not function to meet the housing needs of low-income individuals at below-market rates. A limitation on rent increases for combating inflation will only serve its purpose if it is part of a comprehensive and effective economic program. Therefore, a proportionality analysis should begin by examining whether the intervention is suitable for achieving its aim. For example, the purpose of the German rent control regulation is to prevent low-income families from being displaced due to high rents in certain popular residential areas. The impact of this regulation on the trend of low-income individuals moving out of highly demanded residential areas should be examined[87]. Additionally, it should be assessed within the principle of proportionality whether the concrete impact produced and the income that landlords could have earned without the intervention are proportional.

At the same time, rent controls are also legislated to provide housing at below-market rents for low-income tenants. The European Court of Human Rights and Constitutional Courts have mostly questioned the constitutionality and conformity to conventions of this second type of rent limitations. Providing rental housing at below-market rates for low-income groups can be seen as serving the right to housing and thus a legitimate aim, but ensuring the right to housing is the duty of the state, and this legitimate aim alone is not sufficient for the intervention to be lawful. It is not acceptable for governments to continuously place the duty of providing housing for low-income individuals on certain landlords.

Setting rent below the market rate, imposing increases below inflation, and additionally restricting the termination of lease agreements should only be a short-term measures[88]. These short-term measures can be adopted to combat acute problems such as mass immigration or extraordinary decreases in housing supply due to a devastating earthquake. Long-term or permanent rent control should at least pro-

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85 Blankenagel, A.; Schröder, R.; Spoerr, W., *op. cit,* note 4, p. 27.

86 One concrete criticism to German rent cap argues that the rise in rents is a result of the state's policies, which almost completely withdraw from its decades-long intensive supply-oriented housing policy. Similarly, the government has also completely withdrawn from the indirect (tax) support of housing construction. Additionally, at the level of municipal land-use planning and other local policies, the designation of new development areas has been greatly neglected. Concurrently, the costs for planning new residential areas have been significantly increased by numerous intervention instruments, such as environmental protection regulations. Blankenagel, A.; Schröder, R.; Spoerr, W.; *op. cit*, note 4, p. 2; *Op, cit.* note. 75.

87 *Ibid,* p. 7.

88 FEANTSA, *op. cit.,* note 2, p. 136.

vide landlords with the opportunity to earn a reasonable income that approaches market value[89]. While meeting the housing needs of low-income individuals is a legitimate aim, the cost of this objective should not be borne solely by landlords but should be spread across society as a whole. If tenants are protected through a blanket approach, there should be procedural safeguards allowing landlords to demonstrate that the tenant does not need the protection or that the landlord has a greater need for the property and the income it generates. Rent controls that allow for reasonable adjustments in rent based on the average property price or inflation rate, or slightly above these rates, and provide for periodic updates proportional to the value of the property can be considered acceptable, because in this cases it can be accepted that landlords are fairly compensated.

8. CONCLUSION

Considering that providing housing and planning to meet this need is the duty of the state or government, not landlords, unless there is a market failure preventing the correct determination of rent, legislatively controlled rents below market levels transfer income from landlords to tenants, disrupting the housing market balance. Although this intervention might have a legitimate purpose, such as providing housing for low-income residents, it is still difficult to justify this transfer. This approach provides a tempting but superficial solution; it does not address the housing shortage itself. The only real solution lies in increasing the supply of social housing. Additionally, as explained above, such rent controls usually have serious efficiency problems and cause other social and economic challenges. However, rent control might offer a temporary solution while more lasting and less intrusive measures are pursued. To achieve an effective solution, factors such as income disparity, the purchasing power of the minimum wage, housing demand and supply, and the lack of social housing and support must be considered and planned together.

The ECtHR leaves the assessment of the necessity and effectiveness of rent regulations to the relevant national governments. However, in the proportionality assessment, whether the intervention serves its purpose, in other words, whether it is effective, is also important. Similarly, national courts tend to focus more on the financial loss suffered by the landlord, with the effectiveness of achieving the aim either not being evaluated or remaining superficial.

In evaluating rent controls, the assessment should not only consider the financial burden on the landlord and the extent to which the tenant deserves protection. It should also take into account whether the rent control regulation serves its purpose

[89] Sheldon, S., *op. cit.,* note 44, p. 650.

or how it might cause other problems, as part of evaluating the proportionality of the intervention. The existence of alternative solutions and their non-preference by governments should also be taken into account.

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Review article

PROTOCOL NO. 16 TO THE ECHR IN SERBIA? PRO ET CONTRA*

Two frogs dwelt in the neighborhood, one in a vast marsh, and the other by the roadside in a small pond. "Come to me," said the frog who lived in the marsh, "here you will live more safely and comfortably, and there is plenty of food". "No!" replied the other stubbornly. "I cannot leave the place to which I have become so accustomed." A few days later, a carriage ran over her in her pond.
(Aesop, *Two Neighbour-Frogs*)

Aleksa Nikolić, LLM, Lecturer
University of Belgrade Faculty of Law
Bulevar kralja Aleksandra 67, Belgrade, Serbia
aleksa.nikolic@ius.bg.ac.rs

ABSTRACT

Protocol No. 16. to the European Convention on Human Rights (ECHR) represents a new instrument in ECHR' toolkit. Entered into force on August 1, 2018 he allowed national high courts and tribunals including Constitutional Courts to request advisory opinions from the European Court of Human Rights (ECtHR) on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its protocols. Under Protocol No. 16 to the ECHR, highest national courts and tribunals may submit questions to the ECtHR on issues that are not covered by the ECtHR's existing case law or on which there is significant disagreement among the national courts of different countries. The advisory opinions of the ECtHR are not binding on the national courts but they can provide authoritative guidance on how to interpret and apply the ECHR's provisions in specific cases.

However, so far only 25 members of the Council of Europe signed and 22 members ratified them while only nine requests have been made in the four years of operation. Why? What are the advantages and disadvantages of Protocol No. 16 to the ECHR? The goal of this paper is to answer the aforementioned questions in order to answer the question of whether Serbia needs its adoption and implementation.

Keywords: *advisory opinion, ECHR, ECtHR, Protocol No. 16 to the ECHR, Serbia*

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1. INTRODUCTION TO THE PROTOCOL NO. 16 TO THE ECHR

The European system for the protection of human rights has undergone a far-reaching reform. The highest national courts and tribunals, including Constitutional Court(s), when encountering difficulties in applying the European Convention on Human Rights (hereafter: ECHR, European Convention), now have the ability to seek advisory opinions from the European Court of Human Rights in Strasbourg (hereafter: ECtHR, European Court in Strasbourg). This measure has the potential to significantly impact not only the functionality of the national legal systems of Council of Europe (hereafter: CE) member states but also the overall system itself - although its ultimate utility remains to be seen. In the end, there is also a shared objective - relieving the ECtHR or, in other words, prevention instead of intervention.

What happened? Protocol No. 16 to the ECHR (hereafter: P 16 ECHR or Protocol) was endorsed by the Committee of Ministers of the CE on 10 July 2013 and has been available for signing by the High Contracting Parties since 2 October 2013. By legal nature, this protocol is optional and becomes effective only for those parties that have ratified it, after ten ratifications have been completed[1]. The tenth ratification occurred recently, by France on 12 April 2018. As per its article 8, the P 16 ECHR came into force for the concerned states on 1 August 2018. Until now, the P 16 ECHR has been ratified by (only) 22 of the 46 member states of the CE and 2 out 5 members of region of Western Balkans.[2]

As early as 2006, the possibility of expanding the restricted jurisdiction of the Court in advisory matters was mentioned in the so-called Wise Persons' Report.[3] The determination of the highest officials of the Council of Europe to implement such a reform was reiterated in Interlaken in 2010, Izmir in 2011 and then confirmed in Brighton in 2012 at three conferences dedicated to the future of the ECtHR.[4] The impetus behind the reforms, initiated over a decade ago, pri-

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1 According to art. 8 of P 16 ECHR, the Protocol would enter into force the first day of the month following the expiration of three months after the date on which ten states have expressed their consent to be bound by it.

2 In the Western Balkans, Protocol has been ratified by Montenegro and Bosnia and Herzegovina. Complete list of all CE member states that have ratified P 16 ECHR available at: Council of Europe, Protocol No 16, 2024, [https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214], Accessed 9 March 2024.

3 Council of Europe, *Report of the Group of Wise Persons to the Committee of Ministers*, [https://rm.coe.int/16805d6a73], Accessed 9 March 2024.

4 Lemmens, K., *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?,* European Constitutional Law Review Vol. 15, No, 4, 2018, pp. 693-694. For more details about those

marily stemmed from the European Court of Human Rights' burdened caseload and, consequently, the prolonged average duration for processing applications, along with the significant volume of applications addressing systemic violations.[5] In Zampetti's words, "the aim of the protocol is to avoid future violations of the ECtHR (and thereby cases before the European Court of Human Rights – A.N.) through preventive intervention."[6] It is evident from this that P 16 ECHR serves not only a practical but also a substantive purpose, namely, to alleviate the substantial backlog of applications and to enhance and fortify the dialogue between superior national courts and the ECtHR, as stated by Žuber and Lovšin.[7] This substantive aim is further underscored in the preamble of the Protocol, which asserts that "the expansion of the Court's competence to provide advisory opinions will further promote the interaction between the ECtHR and national authorities and thus bolster the implementation of the ECHR, in line with the principle of subsidiarity."

This paper will focus on attempting to identify some weaknesses and strengths of this document in light of its main goals, which place it among efforts aimed at enhancing the long-term effectiveness and efficiency of the human rights protection system in Strasbourg. In this regard, in a brief introduction, we have first acquainted ourselves with some basic information about the development of the protocol, and we will then (to a reasonable extent) address the legal nature of P 16 ECHR, in order to assess whether the adoption of this document would be desirable (and even possible) in Serbia.

2. BRIEF LEGAL ANALYSIS OF THE PROTOCOL NO. 16 TO THE ECHR

2.1. Procedure

In this chapter of the paper, we will address several important procedural questions. Firstly - who can request an advisory opinion from the ECtHR, secondly - who makes the decision, and finally - why is it an advisory (rather than binding) opinion?

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three conferences see: Krstić, I.; Marinković, T., *Evropsko pravo ljudskih prava*, Savet Evrope, Strazbur, 2022, pp. 102-104.

5 Žuber, B.; Lovšin, Š., *Judical Dialogue in the light of Protocol No. 16. to the European Convention of Human Rights*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 2, 2019, p. 901.

6 Zampetti, G., *The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection*, [https://www.econstor.eu/bitstream/10419/185058/1/1040654460.pdf], Accessed 10 March 2024.

7 Žuber, B., Lovšin, Š., *op. cit.*, note 5, p. 901.

Art. 1, para. 1 of the Protocol provides that highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Simultaneously, Art. 10 of the Protocol specifies that each High Contracting Party to the European Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance, or approval, by means of a declaration addressed to the Secretary-General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Art. 1, para. 1, of this Protocol. This declaration may be modified at any later date and in the same manner. In this regard, it is necessary to highlight two important points. Firstly, "the drafters wanted to respect the particularities of each national legal order,"[8] as they left the possibility for the signatory states of the Protocol to choose (and later modify) the courts empowered to address the ECtHR. In other words, "this leaves the parties to the Protocol with discretion in choosing between their main courts and tribunals – determining which of them is, or which of them are the most appropriate for such a role."[9] However, "the Protocol does not specify whether there is any control by the European Court over the choice made by a State", as noted by William Schabas.[10] Secondly, "the creators of the Protocol insisted that these should be (the) highest courts in the country," aiming to avoid overburdening the ECtHR, as one of the goals of Protocol 16 is precisely to increase the efficiency of the ECtHR.[11] In other words, the aim of the creators of the Protocol was to prevent the proliferation of requests, which is consistent with the idea of exhaustion of domestic remedies.

Art. 2, para. 1-2 of the P 16 ECHR provide that a panel of five judges from the Grand Chamber will decide whether to accept the request for an advisory opinion, taking into account Article 1 of the P 16 ECHR. The Grand Chamber is defined in article 26 of the European Convention.[12] The panel must provide reasons for

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8 Lemmens, K., *op. cit.,* note 4, p. 696.

9 Jóźwicki, W., *Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?,* Kużelewska, E.; Kloza, D.; Kraśnicka, I.; Strzyczkowski, F. (eds.), European Judicial Systems as a Challenge for Democracy, European Integration and Democracy Series, Antwerp, 2015, p. 188.

10 Schabas, W., *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford, 2015, p. 1215.

11 See. Explanatory Report to Protocol No. 16. to the ECHR, para. 8, pp. 2-3.

12 "To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time […] There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party

any refusal to accept the request. The advisory opinion demand a majority vote of the members of the Grand Chamber. According to Art. 4 of P 16 ECHR, in the absence of unanimity, a judge may issue a separate opinion.[13] The Court is obliged to deliver the advisory opinion not only to the court which has submitted the request, but also to the State Party whose national authority has submitted the request. Here, two potential issues arise - the undefined timeframe within which the ECtHR should make a decision and consequently, the delay in proceedings before domestic courts. The ECtHR has adopted a legal standard whereby requests for advisory opinions will be treated as a priority, meaning decisions will be made within the shortest possible timeframe.[14] At the end, Art. 2, Para. 3 of the P 16 ECHR provides that the panel and the Grand Chamber shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge. "The intent of the drafters was that the procedure be identical to what already exists under Art. 26. Para. 4. of the ECHR, and that the list of candidates be the same," states Schabas.[15]

At the conclusion of these brief procedural debates, Art. 5 of the P 16 ECHR succinctly emphasizes that the opinion of the ECtHR is not binding. Although advisory opinions would not have a direct impact on future applications, they would constitute part of the Court's jurisprudence, alongside its judgments and decisions. This implies that it would be reasonable to expect that the interpretation of the ECHR and its protocols would have a similar effect in advisory opinions as interpretative elements established by the Court in its judgments and decisions.[16] At first glance, "The Protocol appears concise or perhaps even silent regarding the effects of the opinions. The actual direct and indirect effects of advisory opinions will likely only be observable and assessable after some practice has developed," notes Jóźwicki.[17] After all, the aim of non-binding opinions is to strengthen domestic implementation of the ECHR, that is, to harmonize interpretation between the ECtHR and domestic courts and tribunals.

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concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge."

13 For more details see. Đorđević, S., *Protocol 16 to the European Convention on Human Rights and Freedoms*, Facta Universitatis: Series Law and Politics, Vol. 12, No, 2, 2014. p. 108.

14 Guidelines on the Implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the ECHR, para. 29, p. 9.

15 Schabas, W., *op. cit.*, note 10, p. 1221.

16 See Explanatory Report to Protocol No. 16. to the ECHR, para. 26-27, pp. 6-7.

17 Jóźwicki, W., *op. cit.*, note 9, p. 190.

2.2. Recent case-law

In this chapter, we will first briefly outline all the previous cases related to Protocol 16 that have come before the European Court of Human Rights in Strasbourg, and then we will provide a brief overview of the first case of an advisory opinion from 2019.

Through an examination of the ECtHR database, it has been determined that in the previous practice of the court concerning the provision of advisory opinions related to the interpretation and application of the ECHR, as established by P 16 ECHR, seven advisory opinions have been issued by the highest courts and tribunals of France, Armenia, Lithuania, Finland, and Belgium.[18] Additionally, there have been two instances where requests for advisory opinions were rejected – in 2019 (in the case of the Slovakia Supreme Court) and in 2024 (by a panel of the Criminal Chamber of the Supreme Court of Estonia).[19]

On April 10, 2019, the ECtHR in Strasbourg issued its inaugural advisory opinion on a substantive matter within the framework of the European Convention on Human Rights (ECHR). This authority was granted to the Court through Protocol 16 to the Convention. The opinion was provided in response to a request from the French Court of Cassation and pertained to a highly specific issue in family law: the acknowledgment in national law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother.

The French Court of Cassation sent its request for an advisory opinion to the ECtHR, posing two questions: first, whether the refusal by the French authorities, in the specific circumstances of the case, constitutes a violation of France's "margin of appreciation" under Article 8 ECHR, and whether the legal status of a child conceived using the eggs of the "intended mother" holds legal significance. The second question, contingent upon an affirmative response to the first question, concerns whether adoption could serve as an alternative means of complying with Article 8. In its response to the first question, the ECtHR, taking into

[18] Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR; Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR; Advisory Opinion Requested by Lithuanian Supreme Administrative Court 016-202-002 ECtHR; Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR; Advisory Opinion Requested by French Conseil d'Etat P16-2021-002 ECtHR; Advisory Opinion Requested by the Supreme Court of Finland P16-2022-001 ECtHR; Advisory Opinion Requested by Conseil d'Etat of Belgium P16-2023-001 ECtHR.

[19] Decision Requested by Supreme Court of the Slovak Republic P16-2020-001 ECtHR; Decision Requested by Supreme Court of Estonia P16-2023-002 ECtHR.

consideration the best interests of the child, examined the margin of appreciation. Regarding the first factor, it noted that the lack of recognition of the legal relationship between mother and child has a negative impact on various aspects of the child's life. The absolute impossibility of registration, as in the case of France, prevented the consideration of the situation "in light of the specific circumstances of the case".[20] Concerning the margin of appreciation, the Court observed that, from a comparative law perspective, there is no consensus, which typically leads to a wide margin of appreciation for states. However, the fact that particularly important aspects of the right to respect for private life were at stake reduced the margin of appreciation. The Court concluded at this point that "the child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law enable the recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother,'" and that this would apply "even more strongly"[21] in cases where the child was conceived using the eggs of the 'intended mother'. In response to the second question posed by the French Court of Cassation, the ECtHR concluded that alternative methods of registration in birth registers, such as adoption, may be utilized. "The child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law enable the recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'."[22] Specifically, the European Court held that the recognition of the relationship (between children and intended mother), if legally established abroad, should be possible at the latest when the relationship becomes a practical reality.[23] This should be feasible in accordance with procedures prescribed by national laws, and the implementation of such alternatives should be swift and efficient. It is then up to domestic courts to determine whether these requirements are met in a particular context.

What can we conclude from this case? In terms of the procedural aspect and its duration, the European Court of Human Rights (ECtHR) responded expeditiously, providing its advisory opinion within the shortest possible timeframe.

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20 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para. 42.

21 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para 47.

22 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para 53.

23 "The ECtHR, however, explicitly distinguished situations in which children born through surrogacy lack a biological connection to either of the intended parents, thus leaving room for future jurisprudential developments in this area," stated Draškić. See. Draškić, M., *Ugovor o surogat materinstvu: između punovažnosti i ništavosti*, in: Zbornik treće regionalne konferencije o obaveznom pravu, Baretić, M; Nikšić, S. (eds.), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2022, p. 364, fn 52. See also. Barać, I, *Surrogacy – A Biomedical Mechanism in the Fight against Infertility*, Annals of the Faculty of Law in Belgrade – Belgrade Law Review, Vol. 71, No. 2, p. 273, fn. 45.

Specifically, it took only six months from the submission of the question to the response by the Grand Chamber of the ECtHR, which is noteworthy considering that most judgments of the Court typically take much longer.[24] Although one may note that by now the twin girls, born in October 2000, are now 18 year-olds – that is how long legal battles may take – on October 4, 2019, the French Court of Cassation finally ruled for the complete transcription of the Mennesson children's foreign birth certificates into French law.[25] While such an approach to recognizing the mother-child relationship may not be necessary in every instance, the Court of Cassation deemed the transcription of birth certificates more appropriate than adoption in this particular case due to the extended duration of the Mennessons' pursuit of family recognition.

Although non-binding on the Court of Cassation according to Article 5 of P16 ECHR, the advisory opinion nonetheless established a *modus operandi* for future cases before the Court, thereby exerting significant influence on French law.[26] "The response of other countries to the advisory opinion, if any, and its broader impact on cross-border surrogacy in Europe remain to be seen", states Lydia Bracken.[27]

When it comes to the character of the decision, there are authors who criticize the advisory opinion of the ECtHR. Tiffany Conein argues that in the mentioned case, "the ECtHR behaved as if it were dealing with an individual case, 'shifting from principles to facts, or solving rather than interpreting'."[28] However, wasn't this precisely the hidden motive of The French Court of Cassation? It seems to be the case. Lize Glas and Jasper Krommendijk argue that „the French court employed the *hot potato strategy*, seeking assistance from the ECtHR to address delicate and sensitive political issues in the country, thus maintaining a 'clean reputation' and avoiding conflict with political actors in the country."[29] Therefore, it appears that in this case, one of the primary objectives of the P 16 ECHR - dialogue and cooperation between the highest national courts and the ECtHR - was not achieved, as the burden of 'decision-making' was entirely shifted to the ECtHR.

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24 See, *Analysis: The Strasbourg Court's First Advisory Opinion under Protocol 16* [https://www.echrblog.com/2019/05/the-european-courts-first-advisory.html], Accessed 17 March 2024.

25 Judgement, French Court of Cassation, No. 648 4-10-2019.

26 Bracken, L., *The ECtHR first advisory opinion: Implications for cross-border surrogacy involving male intended parents*, Medical Law International, Vol. 21, No. 1, 2021. p. 8.

27 *Ibid*.

28 Conein, T, *Le protocole No 16 vu par la Convention européenne des droits de l'Homme et la Cour de Cassation*, in: Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droits de l'Homme, Strasbourg, 2019, pp. 20, 28.

29 Glas, L.; Krommendijk, J., *A Strasbourg Story of Swords and Shields: National Courts' Motives to Request an Advisory Opinion from the ECtHR Under Protocol 16*, European Convention on Human Rights Law Review, Vol. 3, No. 3, 2022, p. 334.

3. *PRO ET CONTRA* (OR *CONTRA ET PRO*) FOR THE PROTOCOL NO. 16 TO THE ECHR

In this chapter, we will explore all the arguments against and for signing and ratifying P 16 ECHR. To that end, we will examine the perspectives of leading scholars and researchers worldwide. As fundamental criteria for evaluating the (in)validity of Protocol 16, we will analyze two key dilemmas – the increase or decrease in the number of cases before the ECtHR (as set forth at the Izmir conference) and the colonization or decolonization of domestic courts and tribunals by the ECtHR.

3.1. Expansion/Reduction of cases before the ECtHR

One of the main arguments against P 16 ECHR is the potential increase in the workload of the ECtHR. The Protocol aims "to prevent future violations (and consequently cases in Strasbourg) through preventive intervention".[30] However, there is a legitimate concern that the formulation "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Art. 1, Para. 1, P 16 ECHR) could lead to the future expansion of the workload of the ECtHR, especially if it is assumed at one point that the (vast) majority of CE member states will ratify P 16 ECHR. This would disrupt not only the effective implementation of P 16 ECHR but also the ECHR itself, resulting in slowdowns and disruptions in the ECtHR's operations, which would have significant repercussions on the European human rights architecture in practice. Consequently, this would substantially impact the legal systems of states that have requested an advisory opinion at that time, as their highest courts and tribunals would be unable to proceed further. In other words, potential delays in domestic proceedings would be inevitable.

These arguments can currently be countered. Namely, the previous practice of the ECtHR did not encounter issues with an increase in the workload of the European Court in Strasbourg. The reason for this is the (still) relatively small number of signatory states to the Protocol as well as states that have ratified the Protocol. Furthermore, earlier we observed in the Guidelines on the Implementation of the advisory-opinion procedure introduced by P 16 ECHR that the ECtHR has established a legal precedent whereby requests for advisory opinions will be given priority treatment, ensuring that decisions are rendered within the shortest feasible timeframe. These Guidelines have been fully complied with so far, as the waiting time for each previous advisory opinion has been less than a year. This demonstrates that the ECtHR has proven to be a highly efficient body that has

[30] Zampetti, G., *op. cit.*, note 6, p. 10.

not compromised the issue of the speed of proceedings before domestic courts and tribunals.

3.2. Colonization/Decolonization by the external Court31

Another common argument that can be found in scholarly literature is that P 16 ECHR undermines the sovereignty of states and the independence of the domestic judiciary. Some authors argue that advisory opinions from the ECtHR pose a "risk of erosion to both the highest courts and tribunals in the country", as well as to "the fundamental constitutional principles and principles of states that have ratified Protocol 16 to the ECHR".[32] In other words, there is a colonization of the legal order of a country by the ECtHR and its vision of law.

On the contrary, "from the sovereignist' own perspective, adherence to Protocol no. 16 might even improve the position by guaranteeing greater room from manoeuvre […] and above all greater scope for negatiations with Strasbourg", states Lamarque.[33] In other words, in any proceeding related to the ECtHR, domestic courts (parties) can clearly and unequivocally express their stance. Furthermore, advisory opinions are still advisory only, meaning that they do not bind domestic courts and tribunals, and therefore "cannot jeopardize either the sovereignty of the States nor judicial discretion."[34]

Nevertheless, the fact that advisory opinions are non-binding can be used to argue that their existence is unnecessary, as they may only further burden the already overstretched ECtHR in Strasbourg, consequently delaying the proceedings before domestic courts and tribunals. In other words, advisory opinions are not only non-binding but also time-consuming, rendering them unnecessary. Furthermore, Lemmens suggests that "it is conceivable that the Strasbourg Court will have to

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31 The idea for such a subtitle arises from Lamarque's analysis of the substantive arguments against the sovereignty narrative (associated with Protocol 16). See. Lamarque, E., *The Failure by Italy to Ratify Protocol no. 16 to the ECHR. Left behind but not lost*. The Italian Review of International and Comparative Law, Vol. 1, No. 1, 2021, pp. 163-168.

32 *Ibid*., 164. For example, David Milner states that the ECtHR, on the one hand, plays an increasing role as a constitutional instrument of European public order, but that its practice in this regard leads to debates on the boundaries of the role of an international mechanism in relation to the democratic institutions of a sovereign state. See also. Milner, D., *Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road*, ZeuS, Vol. 17, No. 1, 2014, p. 50.

33 Lamarque, E., *op. cit.*, note 31, p. 164.

34 Speech by Enrico Albanesi at the ECtHR [https://www.echr.coe.int/documents/d/echr/summary-20231013-albanesi-conference-p16-eng], Accessed 20 March 2024.

consider applications related to cases for which it has previously provided advisory opinions."[35] A party involved in domestic proceedings may express dissatisfaction with how domestic courts have incorporated the opinion of the Strasbourg Court. This, we must acknowledge, does not diminish the potential tension between the highest domestic courts and tribunals and the ECtHR.

However, advisory opinions, although non-binding, bind everyone. Namely, this interesting and seemingly contradictory assertion is grounded in the fact that rejecting the interpretation of the ECtHR could amount to a failure to comply with the obligation to respect the ECHR. Specifically, "advisory opinions form part of the case-law of the Court, alongside its judgments and decisions, and in the light of which the interpretation of the ECHR and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions."[36] "Therefore, advisory opinions of the ECtHR under Protocol No. 16, although non-legally binding, legally affect all Contracting States to the ECHR, including those which have not ratified the Protocol, because they form part of the case-law of the Court, alongside its judgments and decisions, and because the case-law of the Court legally affect all the Contracting States to the ECHR," concludes Albanesi.[37] In other words, it can be said that advisory opinions achieve the effect of constitutional radiation, meaning that they are transmitted (bind) to all member states of the CE.

4. WHAT ABOUT SERBIA?

Serbia (then in a state union with Montenegro) became a member of the CE in 2004. Being one of the youngest parties to the ECHR, it came under the jurisdiction of the ECtHR at the moment when its legal and political authority had already been well established.[38] A few years later, in 2006, Serbia reclaimed its independence and adopted the current Constitution of the Republic of Serbia, incorporating all the principles of the European human rights protection framework.[39] "In the first place, it established a rich catalogue of human and minority rights and provided for the direct effect of human rights, guaranteed not only by the Constitution itself, but also by the ratified international treaties and the case

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35 Lemmens, K., *op. cit.*, note 4, p. 613.

36 Albanesi refers to this effect as the horizontal legal effect of advisory opinions under P 16 ECHR. See. Albansesi, E., *The European Court of Human Rights' Advisory Opinions Legally Affect Non-ratifying States: A Good Reason (From the Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR*, European Public Law, Vol. 21, No. 1, 2022, p. 8.

37 *Ibid.*, p. 9.

38 Marinković, T., *Serbia - Constitutional Law*, Wolters Kluwer, Alphen aan den Rijn, 2019, p. 191.

39 See. Art. 16. para. 2. of the Constitution of the Republic of Serbia.

law of international institutions which supervise their implementation", states Marinković.[40] Additionally, the confirmation of the constitutional appeal institution, previously perceived as a "constitutional ornament in Serbia"[41]. Citizens of Serbia (individuals, groups of individuals, or NGOs) have the right to protection before the ECtHR. Specifically, when all available domestic legal remedies have been exhausted, they may address the ECtHR by submitting an application for the protection of fundamental human rights if they believe they are victims of violations of rights established by the ECHR and its protocols.

For a period, Serbia was among the states with the highest number of cases before the European Court in Strasbourg, but this number has decreased in recent years.[42] According to statistics published in the Annual Report of the ECtHR for the year 2022, 3,289 applications were registered and referred to a decision-making chamber and the European Court in Strasbourg rendered 12 judgments, finding at least one violation of rights guaranteed by the Convention in 10 cases, determining no violation in one case, and reaching a settlement in one case. In 2023, the ECtHR dealt with 1,925 applications concerning Serbia, of which 1,910 were declared inadmissible or struck out. It delivered 9 judgments (relating to 15 applications), in which at least one violation of the European Convention on Human Rights was found.[43]

Regardless of the declining trend in activity before the ECtHR, the burden of the 1990s, including wars, economic sanctions, and isolation, influenced increased activity in the Constitutional Court of Serbia regarding constitutional complaints[44], all of which also affected the relationship between the Constitutional Court of Serbia and the ECtHR. Although invoking the Constitutional Court in reference to the ECHR is "considerably more frequent and satisfactory, this cannot be said for the practice of other courts in Serbia," emphasizes Plavšić.[45] However, Tanasije Marinković observes that "Serbian courts increasingly refer to the jurisprudence

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40 Marinković, T., *op. cit*., p. 192.

41 See. Nenadić, B., *O nekim aspektima odnosa ustavnih i redovnih sudova*, in: Nenadić, B. (ed.), Uloga i značaj Ustavnog suda i očuvanje vladavine prava, Ustavni sud, Beograd, 2013, p. 87.

42 Pokuševski, D. (ed.), *Ljudska prava u Srbiji*, Beogradski centar za ljudska prava, Beograd, 2023, p. 42.

43 *ECtHR Country Profile – Serbia* [https://www.echr.coe.int/documents/d/echr/cp_serbia_eng], Accessed 21 March 2024.

44 For example, the Constitutional Court of Serbia received a total of 16,075 constitutional complaints in 2022 alone, constituting 98.88% of all cases. See. *Pregled rada Ustavnog suda Srbije u 2022. godini* [https://www.ustavni.sud.rs/upload/document/pregled_2022_(1)_20230522_090003.pdf], Accessed 21. March 2024.

45 Plavšić, N., *Primena prakse Evropskog suda za ljudska prava od strane Ustavnog suda u postupcima po ustavnim* žalbama, in: Ustavna žalba u pravnom sistemu Srbije, Šarčević, E.; Simović, D., (eds.), Centar za javno pravo, Sarajevo, 2019, pp. 259-260.

of the European Court, indicating at least a formal shift of legal practice towards European values and standards embodied in the ECHR."[46] In this regard, it seems that Serbia would benefit far more from P 16 ECHR than suffer any harm. Namely, the only potential danger could be the objective impossibility for the European Court to provide advisory opinions promptly due to a significant influx of signing and ratification of Protocol 16 by other European states. Consequently, domestic courts would be unable to proceed further, with the Constitutional Court of Serbia bearing the brunt, already burdened excessively. However, considering that the number of signatories is still relatively small, and the ECtHR prioritizes advisory opinions, the Constitutional Court of Serbia would have the most benefits from ratifying P 16 ECHR, at least concerning (future) constitutional complaints or the relationship with human rights guaranteed by the ECHR. Since Serbia has committed to respecting the ECHR through its Constitution, signing the Protocol would nurture a dialogue between the highest courts in Serbia (including the Constitutional Court) and the ECtHR, with justified expectations that the European Court of Human Rights in Strasbourg would accept some arguments from our courts, thereby exerting a certain influence on our jurisprudence at the ECtHR. This would improve the quality of decision-making in our courts and enhance their reputation in Europe. Consequently, it could also lead to strengthening public trust in the activities of the Constitutional Court of Serbia, demonstrating its commitment to respecting and enforcing human rights for all. Ultimately, whether we sign and ratify Protocol 16 or not, it indirectly binds us through the ECtHR's practice.[47]. In other words, "ECtHR exercises substantial influence on the national legal systems of the States and has therefore evolved into an important promoter of common human rights standards", state Žuber and Lovšin.[48]

5. CONCLUSION

P 16 ECHR represents the product of multi-decade reforms of the European Court of Human Rights in Strasbourg. It introduces a significant novelty to European human rights law - the advisory opinion, aimed at reducing the burden

[46] Marinković, T., *Analiza uticaja odluka Evropskog suda za ljudska prava na rad Ustavnog suda Srbije*, in: Odnos Ustavnog suda i sudske vlasti – stanje i perspektive, Beljanski, S; Pajvančić, M; Marinković, T; Valić Nedeljković D. (eds.), CEPRIS, Beograd, 2019, p. 51.

[47] However, there are authors who hold a different view. Dzehtsiarou argues that advisory opinions limit the discretion of national courts, leaving difficult questions to be addressed by the European Court of Human Rights in Strasbourg. Dzehstiarou, K., Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court [https://verfassungsblog.de/advisory-opinions-more-cases-for-the-already-overburdened-strasbourg-court/], Accessed 23 March 2024.

[48] Žuber, B.; Lovšin, Š., *op. cit*., note 5, p. 909.

on the European Court in Strasbourg on one hand, and enhancing interaction, dialogue, and cooperation between national courts and tribunals and the ECtHR on the other.

Member states of the Council of Europe have largely hesitated when it comes to signing and ratifying Protocol 16. Namely, they perceive more drawbacks than benefits in it. These arguments can be divided into two groups - the first, directed towards European human rights law, suggesting that P 16 ECHR will further burden the already overloaded ECtHR with advisory opinions, and the second, focused on national law, indicating that it may further endanger the independence of the judiciary of CE member states, and slow down proceedings before domestic courts and tribunals.

However, considering the role and importance of the ECtHR in promoting human rights in Europe, it seems that the reasons for signing and ratifying Protocol 16 outweigh the drawbacks. Namely, "The European Court in Strasbourg increasingly resembles a supranational constitutional court, with a firmer anchor in the domestic legal systems of member states and general acceptance of its authority as the ultimate arbiter in disputes over human rights in Europe."[49] Therefore, Protocol 16 is a brilliant tool for further enhancing cooperation between Council of Europe member states and the ECtHR. This is also a reason to argue that advisory opinions are binding on all Council of Europe members because they can be found in the ECtHR's judgments and decisions, which are binding on all Council of Europe members (so called effect of constitutional radiation – A.N.). Finally, the existing (albeit still modest) practice has convinced us that the European Court in Strasbourg treats these issues as primary, ensuring that decisions are rendered with the shortest feasible timeframe, without jeopardizing its own or the work of national courts and tribunals. All these reasons are sufficient for us to consider that all Council of Europe member states, including of course Serbia, should sign and ratify Protocol 16 to the ECHR.

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[49] Marinković, T., *Granice slobode političkog udruživanja. Uporednopravna studija*, Dosije, Beograd, 2014, p. 89.

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Review article

LEGAL DYNAMICS IN EU-UKRAINE RELATIONS: STRENGTHENED SUPPORT ON THE JOURNEY FROM THE EASTERN PARTNERSHIP COUNTRY TO THE EU CANDIDATE COUNTRY IN THE CONTEXT OF RUSSIAN INVASION

Ana Jović-Lazić, PhD, Senior Research Fellow
Institute of International Politics and Economics
Makedonska 25, Belgrade, Serbia
anajovic@diplomacy.bg.ac.rs

ABSTRACT

The article examines the changing relations between Ukraine and the European Union in light of the increased EU backing of Ukraine after the Russian invasion. It argues that Ukraine's steadfast pro-EU stance has intensified in response to many challenges caused by Russian actions in that country, resulting in a noteworthy increase in legal backing from the EU. The qualitative research method is used to explore the EU-Ukraine relationship through historical context, official documents, and expert analysis. It starts by setting the historical background of Ukraine's ties with the EU, highlighting the key documents and events, and tracking the advancement of Ukraine's pro-European stance. The main emphasis is on how the Russian actions in Ukraine, starting with the annexation of Crimea, backing of separatists in eastern Ukraine, and finally, the invasion, changed relations between the EU and Ukraine. This entails estimating how Ukraine's adherence to EU values and legal standards has changed in response to Russia's gradually intensifying actions in Ukraine. Also, it involves an analysis of varied aspects of the EU's assistance mechanisms and tools used by the EU to strengthen its backing for Ukraine, emphasising the reciprocal nature of their legal dynamics. The article concludes by examining Ukraine's path towards EU membership and the criteria and legal requirements that Ukraine has to meet. This provides insights into the legal dynamics shaping EU-Ukraine relations in the context of intense external pressures.

Keywords*: EU-Ukraine Relations, Eastern Partnership, EU Candidate State Status, EU sanctions, Legal Dynamics, Russian Invasion*

1. INTRODUCTION

In the early 1990s, following the disintegration of the Soviet Union and the declaration of independence, Ukraine aimed to enhance ties with the European Union while also preserving friendly relations with Russia. In response, the EU signed the Partnership and Cooperation Agreement (PCA) in 1994 and ratified it in 1998. After its enlargement in the 2000s, the EU aimed to emphasise its commitment to strengthening relations with its new neighbouring countries. Therefore, in 2004, the EU included Ukraine in the European Neighbourhood Policy (ENP), establishing a new framework for cooperation. In 2009, the EU created the Eastern Partnership (EaP), especially for cooperation with its eastern neighbours, including Ukraine. The EaP was established within the ENP framework, further enhancing EU-Ukraine relations, anticipating deeper integration with the neighbours, and, in that context, signing the Association Agreement. Ukraine's determination to continue developing relations with the EU despite Russian obstructions caused a sharp reaction from Russia. In 2014, Russia annexed Crimea and backed separatist groups in Eastern Ukraine. These actions not only violated Ukraine's territorial integrity but also caused destabilisation in the region, raising serious concerns about regional security. The European Union decided to respond by imposing the sanctions on Russia. At the same time, the EU increased its backing for Ukraine, showing strong dedication to protecting the country's sovereignty and stability. The EU-Ukraine Association Agreement, within the framework of the Eastern Partnership, was signed in 2014. The European Union had envisioned a comprehensive partnership with Ukraine and the creation of a free trade zone as a cornerstone of their cooperation. However, after Russia's invasion, Ukraine wanted to pursue EU candidate status. This development prompted the European Union to reassess its enlargement and regional strategy approaches. Recognising the need to counter Russian influence and safeguard European security, the EU granted Ukraine candidate country status. This decision was widely seen by member states as crucial to halting further Russian encroachment and preserving stability across Europe. In this light, the issue of enlargement becomes more significant, serving as a key tool in Western efforts to resist Russian dominance and uphold democratic values and sovereignty.

The article examines the relationship between historical events and the EU's responses, focusing on Ukraine-EU ties in regional geopolitics. It seeks to reveal the lasting effects of these events on European security and integration, exploring how historical contexts, EU reactions to Russian actions, and legal changes in EU-Ukraine relations intersect. The goal is to offer a detailed understanding of the legal foundations of EU-Ukraine relations amid shifting geopolitical landscapes. It uses a qualitative method, including historical analysis, document review, and academic literature. The EU and Ukraine legal documents and official EU an-

nouncements are used as primary data sources for the article. The central hypothesis suggests that Russia's harsh actions in Ukraine, which began in 2014 with the annexation of Crimea and culminated in 2022 with its invasion of this country, brought about significant changes in relations between the EU and Ukraine. Even though these events brought new difficulties and complexities, they also increased cooperation and opened the door to the EU's complete integration of Ukraine.

To validate this hypothesis, the article commences by examining pivotal historical events and their repercussions on Ukraine-EU dynamics, including Ukraine's declaration of independence, the Orange Revolution, and the Euromaidan protests. Subsequently, it scrutinises the legal frameworks supporting bilateral relations between the EU and Ukraine, dissecting existing agreements and cooperation mechanisms. Following this analysis, the article delves into the EU's response to the Russian invasion, discussing implemented measures and policies along with their implications for the broader scope of EU-Ukraine relations. The Russian invasion prompted discernible shifts and adaptations, exemplified by Ukraine's notable achievement of EU candidate status, which received special attention.

2. UKRAINE-EU RELATIONS: FROM INDEPENDENCE TO THE RUSSIAN INVASION

Following Ukraine's independence, it maintained a solid political and economic connection with Russia, reflecting historical ties and a sizable population of ethnic Russians within Ukraine. However, despite this close relationship, Ukraine pursued broader international cooperation. In the early 1990s, following Ukraine's independence from the Soviet Union, the European Union proposed new agreements to replace the Trade and Cooperation Agreement with the Soviet Union. Ukraine signed the Partnership and Cooperation Agreement in 1994 to support economic reforms and sustainable development. This agreement encompassed specific provisions on trade, science, technology, and nuclear energy, along with plans to harmonize Ukraine's legislation with the single market and World Trade Organization. In the meantime, Russia continued to question Ukraine's sovereignty, leading to its isolation and pressure to surrender nuclear weapons. In 1994, a Budapest agreement allowed Ukraine to denuclearise in exchange for recognition of its sovereignty, which also led to its inclusion in NATO's Partnership for Peace Programme. [1] During that period, Ukraine pursued a multi-vector foreign policy, which was demonstrated by signing the Agreement on Friendship and Cooperation with Russia in 1997. Six years later, Ukraine furthered this approach by joining Russia, Belarus, and Kazakhstan in an agreement for a single economic space.

[1] D'Anieri, P., *Ukrainian Foreign Policy from Independence to Inertia*, Communist and Post-Communist Studies, Vol. 45, No. 3-4, 2012, p. 448.

The Ukrainian Prime Minister, V. Yanukovych, saw alignment with Russia as a winning strategy for the 2004 presidential election. However, due to accusations of falsification of the results of the presidential elections, the Orange Revolution occurred, which marked significant changes in the country's internal and foreign policy. [2] Russia immediately showed distrust towards the direction of Ukraine's further development. At the same time, the EU supported the Orange Revolution as an expression of fundamental European values and an opportunity to become a democratic and market-oriented country. The Union, however, did not show readiness to see this country as a potential member state but believed that the European Neighbourhood Policy was a sufficient framework for cooperation with Ukraine.[3] The EU considered the EU-Ukraine Action Plan of 2005 under the ENP as a foundational document for future cooperation. It emphasised Ukraine's recognition as a market economy, included discussions on free trade, and deliberated on visa liberalisation. The overarching objective was to stimulate economic growth by fostering increased commerce and attracting international investments. The cooperation within the ENP also envisioned the negotiation between the EU and Ukraine about a new agreement that would replace the old Partnership and Cooperation Agreement. In line with the EU-Ukraine Action Plan, negotiations for signing the Association Agreement, including the Deep and Comprehensive Free Trade Area (DCFTA), commenced in March 2007.

Due to the different expectations and perceptions of the countries included in the ENP, experts and politicians have proposed that this policy, to be as effective as possible, be further elaborated to adapt to the specifics of the eastern and southern neighbours. During the French presidency of the Union in 2008, within the EPS, the Mediterranean Union was created as a framework for closer cooperation with its southern neighbourhood. Another factor that encouraged the EU to launch the Eastern Partnership was the Russian-Georgian armed conflict in 2008, which pointed to significant security issues and risks in the region. The introduction of the Eastern Partnership was accelerated by disputes between Russia and Ukraine over gas, negatively affecting the European Union. A year later, at the summit in Prague, the Eastern Partnership was formulated as an integral part of the ENP, which established the basis for stronger cooperation with the neighbours of Eastern Europe and the South Caucasus.[4] Today's neighbours of the EU in Eastern Europe and the

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2 Kubicek, P., *Ukraine and the European Neighborhood Policy: Can the EU Help the Orange Revolution Bear Fruit?*, East European Quarterly, Vol. 41, No. 1, 2007, pp. 3-5.

3 Dannreuther, R., *Developing the Alternative to Enlargement: The European Neighbourhood Policy*, European Foreign Affairs Review, Vol. 11, No. 2, 2006, p. 185.

4 Jović-Lazić, A., *The European Union Initiative for Cooperation with Neighbours in Eastern Europe and the South Caucasus: Objectives, Limitations and Challenges of Integration without Membership*, International Problems, Vol. 72, No. 2, 2020, pp. 404–426.

South Caucasus, although very different, are interconnected economically, politically, and socially and have similar problems because they were part of the USSR for half a century. The Eastern Partnership envisaged that the Union should provide neighbouring countries with the necessary financial and technical assistance, as well as, after applying political, economic, and institutional reforms and harmonising legislation with the EU legal system, provide them with the opportunity to participate in the single European market. Delcour summarises the offer of the Eastern Partnership through the so-called four pillars: association agreements, free trade zone, visa liberalisation, and intensification of sectoral cooperation, one of the most significant of which is in the field of energy. Cooperation with the EU depends on respect for European values, market economy principles, and legislation harmonisation with the EU legal framework, i.e., the interest and ability of each neighbour to engage.[5] Unlike the candidate countries, the countries of the Eastern Partnership are not required to comply fully with EU law. However, the EU envisages providing more political, financial, and technical support to those neighbours who implement the reform commitments to a greater extent. Therefore, it also contains elements of the conditionality policy, which should influence these states to fulfil the agreed obligations. The realisation of this initiative's goals requires numerous activities, both within the framework of policies that are under the exclusive competence of the EU and those that are still under the competence of the member states. So, it is a concept that seeks to engage various norms and instruments of the European Union to achieve security, stability, and prosperity in the neighbourhood.[6]

Pro-Russian candidate V. Yanukovych again secured the presidential mandate in 2010. At that time, Ukraine wanted to maintain good relations with both the Union and Russia. This complex diplomatic endeavour aimed to create the conditions for reform and stable economic development. Consequently, the election campaign of V. Yanukovych was focused on advocating for closer cooperation with the EU and the normalisation of relations with Russia. However, Ukrainian foreign policy took an unexpected turn after the new government's election. It became clear that Ukraine is moving towards an increasingly pronounced alignment with Russia's interests. Not long after the change of government, Ukraine concluded agreements that met Russia's interests. The Law on Basic Principles of internal and external policies from July 2010 abandoned the policy of NATO membership and declared the non-bloc status of the country.[7] During that period, President V. Yanukovych underscored

5 Delcour, L., *The EU and Russia in Their "Contested Neighbourhood"*, Routledge, 2016, pp. 38–46.

6 Van Vooren, B., *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, London, New York, Routledge, 2012, p. 73.

7 Zakon Ukrayiny, Pro zasady vnutrishn'oyi i zovnishn'oyi polityky (Vidomosti Verkhovnoyi Rady Ukrayiny (VVR), 2010, № 40, st.527)/The Law of Ukraine, About the Principles of Domestic and

that Ukraine's foreign policy objectives, including EU integration and the policy of balancing relations between the East and the West, remained unchanged. However, there was a discernible shift in foreign policy towards Russia. Ukraine's negotiations with the EU concerning the Association Agreement persisted despite this political shift. Following negotiations, in December 2012, the EU's Foreign Affairs Council approved signing the agreement with Ukraine after fulfilling specific requirements. In its intention to distance Ukraine from the EU, Moscow begins to openly offer significant economic and political incentives to Kyiv while at the same time using blackmail tactics. In November 2013, President Yanukovych faced a pivotal decision: signing the EU association agreement or strengthening Ukraine's relationship with Russia. Russia provided a loan and reduced gas prices as a reward for rejecting the agreement with the EU. In the end, Yanukovych decided to agree to Russia's proposal, which triggered several months of demonstrations in Maidan Square in Kyiv. In February 2014, following the outbreak of intense confrontations between demonstrators and police, Yanukovych left Ukraine.[8]

In 2014, Ukraine's new pro-Western government signed the Association Agreement with the EU. Prime Minister Yatseniuk signed the political section in March, President Poroshenko signed the economic component in June, and the entire agreement received approval in September, indicating a clear shift in geopolitical stance from neutrality to a firm, pro-Western orientation. On this change, Putin responded by annexation of Crimea in March 2014. As a direct response to the illegal takeover of Crimea and Sevastopol and deliberate attempts to destabilise Ukraine, the European Union began imposing sanctions against Russia. The leaders of the EU have also strongly condemned Russia's unlawful actions, pushing the European Commission to assess the legal consequences and propose implementing economic, commercial, and financial measures against Russia.[9] Moreover, they stressed that any additional attempts by Russia to undermine the stability of Ukraine could result in more substantial repercussions for their relationship. Despite the EU diplomatic effort, pro-Russian factions took over government facili-

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Foreign Policy (Information of the Verkhovna Rada of Ukraine (VVR), 2010, No. 40, Article 527), available at: [https://zakon.rada.gov.ua/laws/show/2411-17#top].

8 Jović-Lazić, A.; Lađevac, I., *Ukrainian Crisis as a Security Challenge of the Contemporary World*, In Social and Economic Problems and Challenges in the Contemporary World, Đorđević B.; Tsukimura, T. (eds.), Global Resource Management, Doshisha University, Institute of International Politics and Economics, Kyoto, Belgrade, 2017, p. 117.

9 European Council, Statement of the Heads of State or Government on Ukraine Brussels, 6 March 2014, Brussels,
[https://www.consilium.europa.eu/media/29285/141372.pdf]. Council of the European Union, Press Release, 3304th Council meeting Foreign Affairs, Brussels, 17 March 2014, 7764/14, [https://www.consilium.europa.eu/media/28722/141614.pdf], European Council, Conclusions, Brussels, 21 March 2014,
[https://www.consilium.europa.eu/media/29198/141749.pdf].

ties in eastern Ukraine. In May 2014, referendums were conducted with evident backing from Russia, leading to the establishment of the Donetsk and Lugansk People's Republics. The Ukrainian government's military effort against secessionist rebels, intended to regain control in the region, ultimately worsened the conflict. Following the MH17 plane crash in July 2014, the EU imposed a wide range of sanctions, including asset freezes and travel restrictions on certain political and military officials linked to the annexation of Crimea and conflict in eastern Ukraine. Economic sanctions targeted Russian state banks' access to EU capital markets, imposed an import embargo on weapons and dual-use goods, limited economic cooperation with Crimea and Sevastopol, and restricted investments in key sectors of the Russian economy. These sanctions, while targeted, held significant weight, intending to convey a resolute message against breaches of international norms, apply pressure on Russia, and show solidarity with Ukraine without causing extensive economic or political harm.[10] In December 2014, the European Union established the EU Advisory Mission to Ukraine (EUAM Ukraine) as an advisory mission to provide additional support to Ukraine. This mission is focused on assisting Ukrainian officials in restructuring the civilian security sector and harmonising its activities with EU standards and international principles. The main goals of this initiative are to offer strategic guidance, support implementation efforts, and promote cooperation among Ukrainian and international stakeholders from different organizations, all to improve the Ukrainian civilian security sector. Nevertheless, the implementation of EUAM was also perceived as a strategy to balance Russia's actions in Ukraine and demonstrate political support.[11]

The EU was willing to lift sanctions and improve relations with Russia if it actively helped find a solution to the Ukrainian crisis. In 2016, the EU outlined five principles for future relations with Russia, with the first principle connecting the duration of sanctions to progress in implementing the Minsk Agreement for resolving the conflict in eastern Ukraine.[12] Chancellor Angela Merkel of Germany and President François Hollande of France supported this agreement, which outlined conditions for a ceasefire in eastern Ukraine, restored Ukrainian control over borders, planned local elections in separatist-held areas, and advocated for constitutional changes providing more autonomy to eastern regions. However, EU and Western sanctions against Russia have had a limited impact on its actions

[10] Natorski, M.; Pomorska, K., *Trust and Decision-Making in Times of Crisis: The EU's Response to the Events in Ukraine*, Journal of Common Market Studies, Vol. 55, No. 1, 2016, p. 63.

[11] Nováky, N, I.M., *Why so Soft? The European Union in Ukraine*, Contemporary Security Policy, Vol. 36, No. 2, 2015, pp. 244–266.

[12] Jović-Lazić, A.; Lađevac I, *Redefining Russia-European Union Relations – Is It Possible to Overcome a Deep Crisis?*, in: Europe in Changes: The Old Continent at a New Crossroads, Zakić, K.; Demirtaş, B. (eds.), Institute of International Politics and Economics, Belgrade 2021, p. 227.

in Ukraine, and deep-seated mistrust among parties has hindered progress towards lasting peace. Violence had persisted at a reduced level, making it challenging to achieve a sustained ceasefire and remove heavy weaponry.[13]

3. FROM THE EU-UKRAINE PARTNERSHIP AND COOPERATION AGREEMENT TO THE EU-UKRAINE ASSOCIATION AGREEMENT

The first basic agreement between the European Union and Ukraine was the EU-Ukraine Partnership and Cooperation Agreement, signed on June 14, 1994. This agreement, which replaced the previous Trade and Cooperation Agreement with the former Soviet Union in 1989, was important as it formalised their bilateral relationship. It established core principles of cooperation focused on democratic governance, protecting human rights, and establishing a market-driven economy, with the overall objective of encouraging closer cooperation and economic integration between the European Union and Ukraine. It covered various areas such as trade in goods, labour conditions, company operations, services, maritime transport, payments, competition, intellectual property, and economic cooperation. The EU also offered technical assistance through the TACIS programme to support economic cooperation in mining, science and technology, agriculture, energy, and more industries. This agreement aimed to enhance cooperation in various sectors, including regional development, small and medium-sized enterprises, and information and communication.[14]

Negotiations for a new enhanced agreement to replace the previous PCA started in March 2007, as outlined in the EU-Ukraine Action Plan. At the EU-Ukraine Summit in September 2008 in Paris, it was agreed that the new, improved agreement would be named the Association Agreement. In February 2008, Ukraine joined the World Trade Organization (WTO), which prompted discussions to expand and develop the Deep and Comprehensive Free Trade Area (DCFTA) to enhance economic ties. Negotiations between Ukraine and the European Union to establish the EU-Ukraine Association Agreement lasted nearly six years. During that time, there were twenty-one negotiation rounds for the Association Agreement. Eighteen negotiation sessions were dedicated to discussing the DCFTA chapter.

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13 Wittke, C., *The Minsk Agreements – More than 'Scraps of Paper*, East European Politics, Vol. 35, No. 3, 2019, pp. 264–290.

14 Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine - Protocol on mutual assistance between authorities in customs matters - Final Act - Joint Declarations - Exchange of Letters in relation to the establishment of companies - Declaration of the French Government. [1998] OJ L49/3.

The EU-Ukraine Cooperation Council recommended implementing the Association Agenda to speed up the entry into force of the new Association Agreement, replacing the current Action Plan, on November 23, 2009.[15] In December 2012, the European Council linked signing the Association Agreement with Ukraine to meeting three conditions: electoral practice standards, ending selective justice, and implementing agreed reforms. Progress was monitored by the High Representative and the Commission, with the Council staying informed during preparations for the June 2013 EU-Ukraine Cooperation Council and the November 2013 Eastern Partnership Summit in Vilnius. [16] Bearing in mind that, as previously written, the EU and Ukraine did not sign the AA at the Vilnius summit, it was signed during two European Union summits held on March 21 and June 27, 2014.[17] After receiving approval from the Ukrainian Parliament on September 16, a gradual approach to implementation was adopted. The relevant provisions were provisionally applied starting on November 1, 2014, and the complete implementation of the DCFTA began on January 1, 2016. [18] With its extensive content spanning 2,140 pages, 46 annexes, three protocols, and a joint declaration, this agreement sets a new benchmark for cooperation with non-member states.[19]

The agreement between Ukraine and the EU aims to deepen political association and economic integration, offering a comprehensive framework for cooperation. It encompasses various aspects, including the establishment of a DCFTA, cooperation on foreign and security policy, and the promotion of reforms in areas such as the rule of law, democracy, and human rights. Detailed provisions in economic collaboration, foreign policy, and justice are provided to facilitate this cooperation. Contrasting with the previous PCA agreement, the Association Agreement,

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15 Recommendation No 1/2009 of the EU-Ukraine Cooperation Council of 23 November 2009 on the implementation of the EU-Ukraine Association Agenda. [2010] OJ L111/31.

16 Council of the EU, Council conclusions on Ukraine, Brussels, 10 December 2012, [https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/134136.pdf].

17 Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols [2014] OJ L278/1; Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, [2014] OJ L161/1.

18 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, [2014] OJ L161/3.

19 Van der Loo, G., *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*, Brill, 2016.

with its comprehensive scope, outlines specific EU laws that Ukraine must adopt. The obligations, which include adhering strictly to specified deadlines and implementing best efforts clauses, are intended to enhance the political and economic relations between Ukraine and the EU by establishing institutional frameworks and implementing regulatory measures.

In the Preamble, Ukraine and the EU recognise their historical ties and aim to strengthen relations based on shared values such as democracy, a free market economy, and human rights. It recognises that Ukraine, as a European country, is dedicated to promoting these values, and the EU supports its European aspirations. Both parties stress that progress in political, economic, and legal areas is vital for Ukraine's integration with the EU. They are committed to implementing principles from international organizations like the UN, OSCE, and Council of Europe to promote peace and security through multilateralism. They aim for effective cooperation within these organizations by prioritising independence, sovereignty, and territorial integrity. Seeking closer alignment on various issues, they uphold shared values and goals in line with the EU's Common Foreign and Security Policy. They pledge to meet international obligations, combat weapons of mass destruction, advance reform in Ukraine, support economic integration, and strengthen political ties. Energy cooperation, security, environmental protection, and sustainable development are priorities. The parties aim to align Ukraine's legislation with the EU and effectively implement their agreement, with room for future developments in their relationship.[20] The I chapter of the AA further states its objectives to promote closer relations between the parties based on common values and ties, increase Ukraine's links with EU policies and programmes, improve political dialogue about questions of common interest, maintain regional and international peace in accordance with international principles, and support the economic integration of Ukraine into the EU internal market. The goal is also to improve cooperation in the areas of justice, freedom, and security to strengthen the rule of law and human rights. As further stated, these efforts seek to support Ukraine's transition to a market economy and establish its strong partnership with the European Union.[21] The basic principles of the Association Agreement are outlined in Title I. Both the EU and Ukraine pledge to uphold human rights, democratic principles, and fundamental freedoms as laid out in different international agreements and conventions. At the core of these principles lies the significance of the rule of law. Also, the parties promise to uphold principles like autonomy, sovereignty, and the prevention of the proliferation of weapons of mass destruction. They also acknowledge the importance of supporting

[20] Preamble, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (AA), *op. cit.*, note 18.

[21] Article 1, Objectives, AA, *op. cit.*, note 18.

a free market system, encouraging effective governance, fighting against corruption and organised crime, and promoting sustainable development. These principles are crucial components of the Agreement that shape the way the EU and Ukraine work within its framework. [22] Title II of the agreement is focused on enhancing political dialogue, cooperation, and alignment in foreign and security policy to strengthen Ukraine's engagement in European security. The objectives include deepening political association, increasing convergence in security policy, promoting international stability, and enhancing cooperation on security and crisis management. The agreement establishes a platform for political dialogue and commits to cooperation on domestic reform, peace promotion, and regional stability. Parties aim to intensify discussions on conflict prevention, crisis management, and arms control, focusing on independence, sovereignty, and territorial integrity principles. Cooperation involves cooperation on defence policy, crisis management, military technology, preventing the spread of weapons of mass destruction, disarmament, arms control, regulation of arms exports, combating illegal arms trade, counterterrorism, and enhancing military capabilities through the European Defence Agency. The agreement highlights the importance of joint efforts to prevent weapons proliferation, promote peace, and enhance security.[23] Within the framework of cooperation in the areas of justice, freedom, and security from Title III, the parties undertake to strengthen the rule of law, institutions, and the judiciary, fight against corruption, and respect human rights. They will cooperate to protect personal data and implement migration control measures, including the fight against illegal migration and integrating migrants into national development strategies. Dialogue and cooperation are based on solidarity, trust, and partnership, including exchanging information and experts. The focus is on the effective implementation of border management measures, the improvement of document security, and migrant policy. The mobility of workers should be maintained and improved in accordance with EU laws and national legislation. The ultimate goal is to improve the rights of movement of citizens and workers between the EU and Ukraine. Cooperation between the parties in the fight against organised crime includes trafficking in people, arms, drugs, and corruption. Cooperation aims to reduce the supply and demand of drugs and prevent the abuse of chemical precursors. Measures for training, protection of witnesses and victims, and implementing relevant UN conventions and instruments were agreed upon. Cooperation in the fight against terrorism includes the exchange of information about terrorist groups and trends in terrorism, in accordance with the law. The cooperation aims to develop judicial cooperation in civil and criminal matters and facili-

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22 Title I, General Principes, AA, *op. cit.*, note 18.

23 Title II, Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy, AA, *op. cit.*, note 18.

tate cooperation between the EU and Ukraine. Cooperation in criminal matters will also be improved through legal aid, extradition, and cooperation with Eurojust.[24]

Title IV of the agreement focuses on trade and trade-related matters, emphasising national treatment and market access for goods. It lays the groundwork for the DCFTA, aiming to align key sectors of the Ukrainian economy with EU standards by gradually reducing customs tariffs and quotas and harmonising laws and regulations. The main components include market access for goods, trade issue resolution, technical standards, food safety measures, customs procedures, service trading, financial transactions, and government procurement. The agreement eliminates customs duties on imports and exports, with specified timelines for certain products and agricultural goods to receive duty-free tariff rate quotas. It addresses non-tariff barriers, technical regulations, and WTO trade defence tools. The DCFTA also facilitates collaboration on customs issues, capital movement rules, public procurement laws, and mutual administrative assistance. Overall, the agreement strengthens economic ties between the EU and Ukraine, promoting growth and competitiveness across various sectors. The parties commit to implementing international intellectual property agreements, covering copyrights, patents, trademarks, and more, and ensuring fair competition through antitrust and merger regulations. The parties emphasize the importance of free market competition for trade and implement measures to prevent distortions. Competition rules must be applied transparently, with enforcement authorities upholding fairness and the right to defence. Ukraine aligns with EU competition standards, particularly regarding vertical and horizontal agreements. Energy regulations include defining products, setting domestic prices, and restricting dual pricing, tariffs, and quotas unless it is in the public interest or security. Cooperation on infrastructure aims to ease gas trade, reduce traffic interruptions, and manage energy passage, with exceptions for disruptions from third countries. The energy trade rules in the agreement consider Ukraine's involvement in the Energy Charter Treaty. It further promotes cooperation and the application of transparency standards in international trade. The main objective is to establish a regulatory environment that encourages business entities, with an emphasis on small businesses, to provide legal certainty. The parties are committed to transparency, consultation, and the management of measures according to the WTO Agreement. The provisions aim to improve stakeholder involvement, information sharing, and problem-solving through consistent, fair, and proportionate administrative procedures. The parties undertake to promote international trade in a way that contributes to achieving the goal of sustainable development. They recognise the right to establish environmental and labour protection standards and implement sustainable development policies according to international principles. Also, they undertake to

[24] Title III, Justice, Freedom and Security, AA, *op. cit.*, note 18.

promote full employment, dignified work for all, and respect for fundamental labour norms. Furthermore, they encourage the prudent use of natural resources, trade in sustainable products, and cooperation to protect the environment and workers. They also foresee a mediation and dispute resolution mechanism, facilitating swift resolution of trade issues without raising legal concerns. Counselling is used to resolve disputes stemming from the agreement's implementation. If counselling fails, parties can opt for arbitration. The Arbitration Council provides a temporary report within 90 days outlining the situation, provisions, and recommendations. Parties can request a review within 14 days. Urgent cases have expedited processes. Energy disputes may skip interim reports. The Council can amend reports after objections before making a final decision. If the dispute is connected with the termination of energy trade between Ukraine and the EU, parties can seek conciliation from the Council President. If no agreement is reached within 15 days, the President will make a recommendation for resolution that must be followed.[25]

Title V of the agreement focuses on economic and sectoral cooperation in different areas. It covers areas such as energy, macro-economic policies, public finances, taxation, statistics, environmental, transport, space exploration, science, technology, industrial policies, financial services regulations, corporate governance, information society, audio-visual policy, tourism, agriculture, rural development, fisheries, maritime policies, consumer protection, employment cooperation, social policy, equal opportunities, public health, education, training, youth empowerment, culture, sport, civil society engagement, cross-border cooperation, and participation in European agencies and programs. These initiatives also aim to align with the EU acquis and international norms and standards. [26] Title VI of the EU agreement focuses on financial cooperation with anti-fraud provisions. According to the Agreement's principles, Ukraine will receive financial assistance through EU funding mechanisms. The assistance will support the Agreement's goals and will be provided based on EU Financial Instrument Regulations. Indicative programs reflecting policy priorities will outline priority areas for assistance, considering Ukraine's needs and reform progress. Assistance will be coordinated with other donor countries and institutions to maximise resources and effectiveness. Separate agreements will establish the legal and technical bases for assistance. The Association Council will receive information about the progress and impact of financial assistance, with ongoing monitoring and evaluation to ensure its effectiveness in achieving the Agreement's objectives. Parties must follow strong financial management principles and work together to protect the EU and Ukraine's financial interests. This involves implementing actions to combat fraud, corruption, and illegal activities through mutual administrative

[25] Title IV, Trade and Trade-Related Matters, AA, *op. cit.*, note 18.

[26] Title V, Economic and Sector Cooperation, AA, *op. cit.*, note 18.

and legal assistance.[27] Title VII covers the agreement's institutional, general, and final provisions. The Association Council oversees the Agreement's implementation through annual meetings and, when needed, in various configurations. It consists of members from the EU Council, European Commission, and Ukrainian Government, who make binding decisions, update the Annexes, and ensure that laws align with EU standards. An Association Committee supports the Council by addressing trade issues, while sub-committees monitor economic cooperation. A Parliamentary Association Committee allows for exchanges between EU and Ukrainian lawmakers, and a civil society platform promotes dialogue. Provisions include equal access to courts, non-discrimination, legislation alignment with EU law, and monitoring implementation. Disputes are resolved by the Association Council. Trade disputes follow the Agreement's Dispute Settlement section, with good-faith consultations necessary for resolution. Unresolved matters are discussed until a decision is reached, with confidentiality maintained in all discussions. Compliance with obligations is mandatory, with non-compliance addressed through special processes.[28]

The EU-Ukraine Association Agreement is comprehensive and demanding, necessitating significant domestic reforms in Ukraine. Despite initial challenges and a lack of EU membership prospects, Kyiv worked towards meeting the agreement's standards. The Ukrainian crisis of 2014 further motivated both parties to work together, resulting in adjustments to negotiation terms. The EU's goal to uphold Ukraine's stability and pro-European stance guided their approach and responses to Ukrainian requests during the agreement's implementation.[29] In 2019, amendments to the Ukrainian Constitution formally highlighted the importance of affirming Ukraine's European identity and commitment to Euro-Atlantic integration. The Verkhovna Rada was tasked with establishing principles for domestic and foreign policies to achieve full EU and NATO membership. The President is responsible for implementing Ukraine's strategic plan for joining the EU and NATO, while the Cabinet of Ministers is responsible for facilitating integration.[30] This shift marked a significant departure from Ukraine's previous ambivalence

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27 Title VI Financial Cooperation, with Anti-Fraud Provisions, AA, *op. cit.*, note 18.

28 Title VII Institutional, General and Final Provisions, AA, *op. cit.*, note 18.

29 Rabinovych, M.; Pintsch, A., *Compliance Negotiations in EU External Relations: The Case of the EU-Ukraine Association Agreement*, Journal of European Integration, Vol 46, No. 2, 2024, pp. 261–262.

30 Zakon Ukrayiny, Pro vnesennya zmin do Konstytutsiyi Ukrayiny (shchodo stratehichnoho kursu derzhavy na nabuttya povnopravnoho chlenstva Ukrayiny v Yevropeys'komu Soyuzi ta v Orhanizatsiyi Pivnichnoatlantychnoho dohovoru) (Vidomosti Verkhovnoyi Rady (VVR), 2019, № 9, st.50)/The Law of Ukraine, On making changes to the Constitution of Ukraine (regarding the state's strategic course towards full membership of Ukraine in the European Union and the North Atlantic Treaty Organization) (Information of the Verkhovna Rada (VVR), 2019, No. 9, Article 50, available at: [https://zakon.rada.gov.ua/laws/show/2680-19#n2].

towards Western integration. External threats, such as Russia's annexation of Crimea and the significant change in the political landscape following the Party of Regions' division, influenced this shift. The departure of their loyal supporters resulted in a lasting change in Ukraine's internal political equilibrium.[31]

4. THE EUROPEAN UNION'S SUPPORT FOR UKRAINE: CONFRONTING THE RUSSIAN INVASION

The European Union responded swiftly and decisively to Russia's invasion of Ukraine, recognising the significant military threat it posed and its broader implications for European security. In light of escalating tensions, the EU transitioned its previous diplomatic appeasement strategy towards Russia to a more assertive approach. This shift was influenced by criticism from member countries such as Poland and the Baltic states, which emphasised the need for a stronger stance against Russian aggression. The EU's new strategy prioritises support for Ukraine while upholding EU values and legal norms. This included implementing harsh sanctions and providing financial aid packages and military assistance to bolster Ukraine's capacity to defend itself. Despite varying perspectives among member states, the EU enforced economic requirements to ensure unanimous consensus on key decisions and prevent individual member states, such as Hungary, from leveraging their veto power. This demonstrated the EU's commitment to unity and solidarity in the face of external threats.[32]

4.1. The EU's support for Ukraine through enforcing sanctions on Russia

The EU took different measures to address threats to Ukraine's sovereignty and independence. On February 23, 2022, the EU imposed sanctions on Russia for recognising Donetsk and Luhansk as separate entities and deploying troops there. These sanctions, known as the first packet of sanctions, include targeting 351 Russian State Duma members and 27 others, limiting economic ties with the areas, and restricting Russia's access to the EU's financial markets.[33] On February 25, the EU implemented

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31 Per, E., *Painful Moments and Realignment: Explaining Ukraine's Foreign Policy, 2014–2022*, Problems of Post-Communism, September 13, 2023, pp. 1–13.

32 Bosse, G., *The EU's Response to the Russian Invasion of Ukraine: Invoking Norms and Values in Times of Fundamental Rupture*, Journal of Common Market Studies, December 14, 2023, pp. 1-17. Heidi, M.; Whitman, R. G.; Wright, N., *The EU and the Invasion of Ukraine: A Collective Responsibility to Act?*, International Affairs, Vol. 99, No. 1, 2023, p. 219.

33 Council Regulation (EU) 2022/259 of 23 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L42/1. Council Implementing Regulation (EU) 2022/260 of 23 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive

a second packet of sanctions in reaction to Russia's invasion of Ukraine. The EU has frozen the assets of Vladimir Putin and Sergey Lavrov and imposed restrictive measures on members of the Russian National Security Council and State Duma who backed the recognition of Donetsk and Luhansk. Due to Russia's military aggression against Ukraine, we have approved additional individual and economic sanctions targeting the finance, energy, transport, and technology sectors, as well as changes to visa policies.[34] The EU implemented a third package of sanctions on February 28 and March 2, 2022. The EU prohibits Russian air carriers, Russian-registered aircraft, and aircraft controlled by Russian entities from landing, taking off, or flying over EU territory. The measures include two assistance packages under the European Peace Facil-

measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L42/3. Council Implementing Regulation (EU) 2022/261 of 23 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L42/15. Council Regulation (EU) 2022/262 of 23 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L42/74. Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas [2022] OJ L42/77. Council Decision (CFSP) 2022/264 of 23 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L42/95. Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L42/98. Council Decision (CFSP) 2022/266 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas [2022] OJ L42/109. Council Decision (CFSP) 2022/267 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L42/114.

[34] Council Decision (CFSP) 2022/327 of 25 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L48/1. Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L49/1. Council Decision (CFSP) 2022/329 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L50/1. Council Regulation (EU) 2022/330 of 25 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L51/1. Council Decision (CFSP) 2022/331 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L52/1. Council Implementing Regulation (EU) 2022/332 of 25 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L53/1. Council Decision (EU) 2022/333 of 25 February 2022 on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation [2022] OJ L54/1.

ity to strengthen the Ukrainian Armed Forces and help protect the country's territorial integrity and civilian population. The assistance, totaling EUR 500 million, provided the Ukrainian Armed Forces with equipment and supplies, including lethal equipment. Also, an additional 26 individuals and one organization faced new sanctions.[35] The EU Council also imposed stricter sanctions against Belarusian individuals, including trade and export restrictions, to address its involvement in the conflict and uphold international law.[36] Additionally, the EU has extended its measures targeting individuals from Belarus.[37] To address hybrid threats, the EU Council has also decided to impose sanctions on Russian media outlets such as Russia Today and Sputnik for disseminating propaganda within the EU.[38] The Council has introduced restrictions that aim to prevent investment in projects linked to the Russian Direct Investment Fund, prohibit the provision of financial services to certain Russian entities, strengthen export controls, and reduce support to entities related to the Fund. In addition, the Council prohibited the sale, supply, transfer, or export of euro-denominated banknotes to Russia or any entity in Russia, including the government and the Central Bank of Russia. Seven Russian banks also faced a ban on SWIFT.[39] On March 15, 2022, the EU introduced a fourth round of sanctions, which targeted Russian oligarchs like Abramovich, Khan, Rashnikov, and others who profit from actions in Crimea and Ukraine, influence Russian politics and the economy, benefit from connections to Putin, and contribute to government revenue. These sanctions prohibit transactions with state-owned enterprises, credit-rating services for Russians, new in-

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35 Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L57/1. Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L57/4. Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force [2022] OJ L 60/1. Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces [2022] OJ L 61/1.

36 Council Decision (CFSP) 2022/356 of 2 March 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2022] OJ L67/103.

37 Council Decision (CFSP) 2022/354 of 2 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L66/14.

38 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L65/1; Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L65/5.

39 Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 63/1. Council Decision (CFSP) 2022/346 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 63/5.

vestments in Russian energy, luxury goods exports to Russia, and imports of iron and steel from Russia. The sanctions also apply to the supply, sale, export, or transfer of technology and goods in the energy sector to Russia. Prohibitions include technical assistance, brokering services, financing for such goods, transport of fossil fuels, creation of new joint ventures, investment services, transactions with Russian entities, and selling luxury goods. The sanctions also involve banning all transactions with specific state-owned enterprises, prohibiting the import of iron and steel from Russia to the EU, and banning the provision of credit-rating services to any Russian individual or organization.[40] The EU imposed a fifth round of sanctions on Russia on April 8, 2022, including a coal ban on all Russian coal imports, financial measures such as transaction bans on Russian banks and restrictions on crypto-asset and trust services, transport bans on Russian and Belarusian freight road operators, targeted export bans on certain technologies and products, extended import bans on various goods, including spirits and seafood, exclusion of Russia from public contracts and European funding opportunities, legal clarifications on currency exports and securities sales to Russian entities, and asset freezes on additional individuals and organizations. These measures aim to put pressure on Russia and its supporters in response to ongoing conflicts and violations. On June 3, 2022, the EU imposed a sixth round of sanctions on Russia, including oil import restrictions and financial sanctions, to limit Russia's ability to export oil and reduce Putin's financial resources for further aggression. These measures include an embargo on Russian oil, exemptions for certain member states with pipeline dependencies, and temporary derogations for Bulgaria and Croatia. European Union operators are prohibited from providing insurance and financing services for the transportation of oil to countries outside the EU. Additionally, certain banks from Russia and Belarus have been excluded from the SWIFT system. Trust measures have been adjusted with exceptions for humanitarian purposes and civil society. Business services like accounting and tax consulting are prohibited for the Russian government and entities. The suspension of Russian state media broadcasting and expanded export restrictions on chemicals and military-related entities aim to further isolate Russia economically. The EU, the US, the UK, and the Republic of Korea have aligned on export restrictions, with Belarusian organiza-

[40] Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ LI 87/1. Council Regulation (EU) 2022/428 of 15 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ LI 87/13. Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ LI 87/44. Council Decision (CFSP) 2022/430 of 15 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ LI 87/56.

tions facing additional limitations.[41] The Council of the European Union implemented a comprehensive package of additional measures named - Maintenance and Alignment on July 21, 2022. These measures include a ban on importing gold from Russia, strengthened reporting requirements for sanctioned individuals to declare their assets, targeted export bans on dual-use and advanced technology items, a ban on Russian-flagged vessels accessing certain ports, extended financial sanctions on deposits from Russian-owned entities, exemptions for food and energy transactions, medical and pharmaceutical exemptions, and clarifications on existing measures such as public procurement and asset freezes. The sanctions list also included the addition of 54 individuals and ten organizations. These measures aim to further align EU policies with those of the international community in response to Russia's actions.[42]

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41 Council Implementing Regulation (EU) 2022/876 of 3 June 2022 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L 153/1. Council Regulation (EU) 2022/877 of 3 June 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L 153/11. Council Implementing Regulation (EU) 2022/878 of 3 June 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 153/15. Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 153/53 Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. [2022] OJ L 153/75. Council Implementing Decision (CFSP) 2022/881 of 3 June 2022 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L 153/77. Council Decision (CFSP) 2022/882 of 3 June 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L 153/88. Council Decision (CFSP) 2022/883 of 3 June 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 153/92. Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 153/128. Council Decision (CFSP) 2022/885 of 3 June 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 153/139.

42 Council Regulation (EU) 2022/1269 of 21 July 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 193/1. Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 193/133. Council Decision (CFSP) 2022/1271 of 21 July 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 193/196. Council Decision (CFSP) 2022/1272 of 21 July 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 193/218.

The European Council has imposed an eighth package of sanctions on individuals and entities involved in Russia's occupation of several Ukrainian regions, as well as those spreading disinformation, on October 5, 2022. Targets include decision-makers, oligarchs, military officials, and propagandists undermining Ukraine's sovereignty. The measures now cover all non-government-controlled areas in specific regions, with new export restrictions on military and industrial items. Import restrictions worth nearly €7 billion have been enforced, focusing on Russian steel, machinery, plastics, vehicles, textiles, and other goods. The EU is implementing a G7 oil price cap to reduce Russia's revenue and stabilise global energy markets. Additionally, restrictions on EU nationals in state-owned enterprises and banning transactions with the Russian Maritime Register are in place. Further measures include tightening restrictions on crypto assets, prohibiting certain services to the Russian government, and introducing a criterion to sanction individuals aiding in sanctions circumvention. These efforts are intended to pressure Russia and limit its access to critical services, deterring individuals from bypassing sanctions.[43] A nine-package package of sanctions was imposed on December 16, 2022, by the Council of the European Union. Additional measures in response to Russia's aggressive actions include listing almost 200 individuals and organizations for asset freezes, such as Russian armed forces, political figures, and companies involved in attacks against civilians and theft of Ukrainian resources. The EU has also imposed new export restrictions on dual-use technologies and military equipment that enhance Russia's military capabilities. Severe export restrictions have targeted one hundred sixty-eight more Russian organizations, limiting their access to sensitive technology items. Additionally, the EU has introduced new bans on industrial goods, technology, business services, and media outlets. The EU has sanctioned four Russian media channels and imposed transaction bans on three Russian banks. The EU has restricted the export of drone engines to Russia and imposed economic measures against the Russian energy and mining sectors. These measures were made in collaboration with international partners to significantly increase pressure on Russia in response to its hostile actions.[44] The EU

[43] EU Council Regulation 2022/1903 modifies sanctions related to Donetsk and Luhansk oblasts and Russian troop deployment. Regulation 2022/1904 changes Regulation 833/2014 due to Russia's actions destabilizing Ukraine. Regulation 2022/1905 amends Regulation 269/2014 on Ukraine's territorial integrity. Council Regulation 2022/1906 implements measures against threats to Ukraine. Decision 2022/1907 modifies Decision 2014/145/CFSP on Ukraine's sovereignty. CFSP Decision 2022/1908 amends measures regarding Donetsk and Luhansk due to Russian involvement. Decision 2022/1909 modifies sanctions on Russia for actions in Ukraine. Official Journal of the European Union, L 259I, Volume 65, 6 October 2022.

[44] Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 332/1. Council Regulation (EU) 2022/2475 of 16 December 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 332/315. Council Implementing Regu-

adopted the tenth package of sanctions against Russia, targeting individuals and entities involved in the war against Ukraine, spreading disinformation, and supporting information warfare on 27 February 2023. Export bans on advanced technologies used in weapons systems have been implemented, along with restrictions on goods that could aid Russia's military efforts. The EU is coordinating with international partners to strengthen the impact of these actions, aiming to deter Russian aggression and support Ukraine's defence. The total value of EU export bans to Russia now amounts to EUR 11.4 billion, with additional sanctions on Russian banks and restrictions on critical infrastructure and gas storage capacity. Enforcement measures include reporting on frozen assets and prohibiting the transit of dual-use goods. The EU is working with third countries to enforce sanctions effectively, including banning Russian media outlets and making technical amendments to improve maritime safety services. These measures seek to enhance enforcement efforts and prevent the circumvention of sanctions against Russia.[45] In the eleventh sanction package imposed on June 23, 2023, the EU has implemented various trade and transport measures to strengthen existing restrictions. Trade measures include a new anti-circumvention tool, extended transit prohibitions, and the addition of entities supporting Russia's military complex to the restrictions list. Tighter export restrictions on certain items,

lation (EU) 2022/2476 of 16 December 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 332/318. Council Decision (CFSP) 2022/2477 of 16 December 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 332/466. Council Decision (CFSP) 2022/2478 of 16 December 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 332/614. Council Decision (CFSP) 2022/2479 of 16 December 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 332/687.

45 Council Regulation (EU) 2023/426 of 25 February 2023 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 59/1. Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ LI 59/6. Council Implementing Regulation (EU) 2023/429 of 25 February 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 59/278. Council Implementing Regulation (EU) 2023/430 of 25 February 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses. [2023] OJ LI 59/423. Council Decision (CFSP) 2023/432 of 25 February 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 59/427. Council Decision (CFSP) 2023/433 of 25 February 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2023] OJ LI 59/583. Council Decision (CFSP) 2023/434 of 25 February 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ LI 59/593.

prohibitions on luxury cars and intellectual property rights, and simplified classification in the industrial goods annex have been put in place. Regarding transport measures, bans have been imposed on certain trucks and vessels to prevent the circumvention of sanctions. Energy measures include prohibiting vessels from manipulating their navigation systems while transporting Russian oil and restricting oil imports from Russia through pipelines. Asset freezes have been imposed on over 100 individuals and entities, with revised listing criteria and derogations for certain transactions. The media ban has been extended, and information exchange and reporting provisions have been introduced.[46] On August 3, 2023, the EU implemented new measures in response to the situation in Belarus. The updates aim to align sanctions on Russia and Belarus to prevent evasion through Belarus. The changes include expanding the export ban to Belarus, particularly for military and technological items. Additional bans were placed on firearms, ammunition, and aviation and space goods. These urgent measures combat the evasion of sensitive goods and technologies.[47] On December 18, 2023, the EU adopted a twelfth packet of measures against actors in the Russian military, defence, and IT sectors and those involved in illegal activities in Ukraine. Trade measures include importing bans on Russian diamonds and raw materials for steel production and export restrictions on dual-use and advanced technological goods. The EU has also introduced export controls on dual-use and advanced technology to weaken Russia's military capabilities. The EU has added 29 entities related to Russia's military-industrial complex to a list, including those in Uzbekistan and Singapore. The EU has imposed prohibitions on the supply of certain software to the Russian government or companies. These measures aim to impede Russia's industrial and military capabilities. The EU has worked with partners like the US and the UK to ensure the effectiveness of these measures within the G7. The EU has approved stricter asset freeze obligations aimed at those who profit from forced transfers

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46 Council Regulation (EU) 2023/1214 of 23 June 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ LI 159/1. Council Regulation (EU) 2023/1215 of 23 June 2023 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/330. Council Implementing Regulation (EU) 2023/1216 of 23 June 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/335. Council Decision (CFSP) 2023/1217 of 23 June 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ LI 159/451. Council Decision (CFSP) 2023/1218 of 23 June 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/526.

47 Council Implementing Regulation (EU) 2023/1591 of 3 August 2023 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2023] OJ L 195I.

of Russian subsidiaries of EU companies. Additional measures include tightening the G7+ oil price cap, placing an import ban on LPG, and implementing stronger anti-circumvention measures. Member States are required to trace the assets of listed individuals to prevent breaches. These measures aim to strengthen sanctions against Russia and prevent the circumvention of restrictions.[48]

On February 23, 2024, the European Union adopted the thirteen packages of sanctions. It imposes 194 additional measures, including 106 against individuals and 88 against entities, targeting Russia's military and defence sector, partners in the war effort, circumvention tactics, temporary occupation of Ukraine, and violations of children's rights. The new listings aim to stop Russia from acquiring sensitive Western technologies for its military, mainly focusing on unmanned aerial vehicles. Trade measures include export restrictions on 27 Russian and third-country companies associated with Russia's military-industrial complex and adding 17 Russian companies involved in electronic components for drones. To further weaken Russia's military capabilities, the package also expands the list of advanced technology items that could enhance Russia's defence and security sectors. This comprehensive approach strongly signals against Russia's actions and aims to disrupt its military advancements.[49]

4.2. The EU's Financial and Military Aid for Ukraine

Financial aid and assistance from the European Union, its member states, and financial institutions have been crucial for Ukraine during the Russian invasion. In 2022, the EU promised €43.3 billion in aid, with €11.5 billion coming directly from the EU budget for Ukraine. The focus was on strengthening Ukraine's resilience and stability. In 2023, an additional €18 billion in EU financial aid was allocated for favourable loans to support economic growth. Member countries also contributed €12.2 billion, showing solidarity and commitment to helping Ukraine overcome challenges.

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48 Council Regulation (EU) 2023/2878 of 18 December 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L.

49 Council Regulation (EU) 2024/745 of 23 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. [2024] OJ L. Council Decision (CFSP) 2024/746 of 23 February 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. [2024] OJ L.Council Implementing Regulation (EU) 2024/753 of 23 February 2024 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. [2024] OJ L. Council Decision (CFSP) 2024/747 of 23 February 2024 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. [2024] OJ L.

In February 2024, the EU established the Ukraine Facility for 2024–2027, which authorised an extra €50 billion in financial aid for the 2024–2027 timeframe. This aid package consisted of €33 billion in loans and €17 billion in grants. It aims to support Ukraine through financial assistance, investments, and technical assistance to implement the Ukraine Plan and maintain macro-financial stability. It consists of three pillars: financial support for reforms and investments, an investment framework, and technical assistance for accession-related reforms. The overarching goals of the Facility are to address Russia's aggression consequences, promote recovery, enhance cohesion with Union standards, and align with Union values for potential membership. It aims to achieve stability, security, peace, prosperity, and sustainability through various areas such as infrastructure rebuilding, demining, social and health challenges, security against hybrid threats, economic transition, market integration, and more. The Facility also focuses on strengthening media, civil society involvement, gender equality, anti-corruption efforts, environmental protection, digital transformation, decentralisation, and local development. It promotes cross-border cooperation, development effectiveness principles, ownership of priorities by Ukraine, inclusive partnerships, transparency, and mutual accountability while ensuring a balanced allocation of resources and alignment with international laws. [50] Besides to providing financial aid, the EU has also managed the distribution of essential emergency supplies to Ukraine, meeting urgent humanitarian requirements. Additionally, the EU has implemented measures to allow the use of funds obtained from frozen Russian assets to support the reconstruction efforts in Ukraine.[51]

The EU created the Military Assistance Mission for Ukraine (EUMAM) on October 17, 2022, to support Ukraine's response to the Russian invasion. EUMAM works with the EU delegation and EUAM Ukraine civilian mission to strengthen Ukraine's Armed Forces by providing training, enhancing military capacities, and safeguarding borders. Over 40,000 Ukrainian soldiers have received training through EUMAM, improving the Armed Forces' effectiveness. [52] The EU also adopted the Act in Support of Ammunition Production (ASAP) in July 2023 to boost ammunition production and ensure the timely delivery of defence products. [53] Financial assistance of €33 billion, including €11.1 billion from the European Peace Facility (EPF), has been allocated to support Ukraine's military capabilities.

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50 Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility [2024] OJ L.

51 Archick, K., *Russia's War Against Ukraine: European Union Responses and US-EU Relations*, US Government, Congressional Research Service, 27 March 2024, pp. 1–3.

52 Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine) [2022] OJ L270/85.

53 Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP) [2023] OJ LI 185/7.

The EU provides an additional €5 billion in support starting March 18, 2024, demonstrating a long-term commitment to Ukraine's security. The EPF has a maximum budget of €17 billion for 2021–2027 to further support the region's security.[54] Overall, this EU military aid to Ukraine underscores its commitment to supporting Ukraine's security and defence needs. Through means of immediate assistance, joint procurement efforts, and long-term investments in production capacity, the EU aims to bolster Ukraine's resilience in the face of external threats while enhancing the collective defence capabilities of its member states.

At the same time, Russia's invasion of Ukraine has heightened security concerns throughout EU member states, prompting a significant increase in focus on defence and security measures. Germany's commitment to defence, evidenced by an additional €100 billion investment, aligns with projections indicating an increase in defence spending across EU member states over the next three years, intending to move closer to NATO's target of allocating 2% of GDP for defence purposes. Simultaneously, efforts are underway to bolster Europe's defence industry and ensure a consistent supply of military aid. Strategies include joint purchasing and restocking to address shortfalls in defence production. [55] However, despite these initiatives, concerns are mounting over the growing reliance on US military aid and equipment. As European countries face dwindling inventories and increased demand for weapons supplies, there's a notable trend towards seeking replacements from US sources, indicating a shift away from strategic military independence towards greater dependence on US defence capabilities during times of conflict. While the EU continues to enhance its defence capabilities and provide aid to Ukraine, the rising reliance on US military aid poses a challenge to achieving long-term strategic autonomy. This underscores the importance of ongoing initiatives to strengthen European defence capabilities and foster increased self-sufficiency in defence affairs.[56]

4.3. The European Union's Support for Ukraine's EU Candidacy Post-Russian Invasion

Amidst the backdrop of Russia's invasion, Ukraine's ambition to join the European Union represented a notable departure from previous discussions within the Eastern Partnership program. Before the invasion in February 2022, Ukraine's path to

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54 Council Decision (CFSP) 2024/890 of 18 March 2024 amending Decision (CFSP) 2021/509 establishing a European Peace Facility [2024] OJ L.

55 Besch, S.; Ciaramella, E., *Ukraine's Accession Poses a Unique Conundrum for the EU*, [https://carnegieendowment.org/2023/10/24/ukraine-s-accession-poses-unique-conundrum-for-eu-pub-90838], Carnegie Endowment for International Peace, 24 October 2023.

56 Tocci, N., *Europe and Russia's Invasion of Ukraine: Where Does the EU Stand?,* LSE Public Policy Review, Vol. 3, No. 1, 2023, pp. 1–7.

EU membership seemed obstructed, primarily due to the territorial dispute with Russia. This conflict saw the annexation of Crimea and Russia's indirect control over parts of the Donbas region. Ukraine also grappled with internal challenges, particularly in combating corruption and ineffective administration.[57]

Just four days after the invasion started, on February 28, 2022, Ukraine officially submitted its application to join the European Union. As the Russian invasion intensified, the European Union faced a pivotal moment, prompting a reassessment of its stance on potential member states. Ukraine's plight fueled its desire for closer integration with the EU, causing significant shifts in Europe's geopolitical landscape. On June 17, 2022, the European Commission recommended granting Ukraine candidate status, outlining seven steps for Ukraine to fulfil and signalling a significant change in the EU's perspective.[58] The European Parliament echoed this sentiment on June 23, 2022, endorsing Ukraine's application, leading to the European Council granting Ukraine candidate status on the same day. [59] By February 2023, the Commission had concluded its evaluation of Ukraine's application. The Commission introduced a proposal for a new Ukraine facility to aid recovery efforts, setting a target completion date of June 2023. Additionally, the Commission report proposed initiating accession negotiations with Ukraine by November 2023, with ongoing progress monitoring in various areas. The document underscored Ukraine's dedication to democratic and legal reforms in the wake of the Russian invasion, while acknowledging the challenges of safeguarding the rights of minorities and vulnerable groups, fighting crime and corruption, and tackling the impact of the invasion on economic growth. In December 2023, despite internal disagreements, the European Council took a crucial step by starting formal talks about Ukraine joining the European Union.[60]

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57 Sapir, A., *Ukraine and the EU: Enlargement at a New Crossroads*, Intereconomics, Vol. 57, No. 4, 2022, pp. 213–217.

58 Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's application for membership of the European Union, Brussels, 17.6.2022 COM(2022) 407 final, [https://neighbourhood-enlargement.ec.europa.eu/document/download/c8316380-6cb6-4ffd-8a84-d2874003b288_en?filename=Ukraine%20Opinion%20and%20Annex.pdf].

59 European Parliament resolution of 23 June 2022 on the candidate status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)) [2022] OJ C 32 OJ/2. European Council, European Council conclusions, 23-24 June 2022, [https://www.consilium.europa.eu/en/press/press-releases/2022/06/24/european-council-conclusions-23-24-june-2022/].

60 European Council. European Council conclusions on Ukraine, enlargement and reforms, 14 December 2023, [https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/european-council-conclusions-on-ukraine-enlargement-and-reforms/].

The nomination by the EU carries significant symbolic weight, representing its unwavering commitment to upholding core values despite encountering geopolitical challenges. The European Union has historically pursued an enlargement policy towards non-EU nations, providing a transparent path to accession, promoting reforms, and advocating for the adoption of EU standards. Central to this approach is political conditionality, which rewards progress in reforms with positive integration status. The effectiveness of this policy hinges on the EU's attractiveness and credibility as a guiding political force in the region.

Against Russia's invasion, Ukraine's pursuit of candidate EU status underscores its steadfast dedication to embracing EU values, norms, and legal standards despite formidable obstacles. However, there is no expedited accession process; it is merit-based and requires meeting EU criteria through substantive reforms and aligning national laws with EU legislation. To strengthen legal ties with the EU amidst the conflict, Ukraine must adapt its legal frameworks to foster deeper cooperation, thereby contributing to ongoing governance improvements. Ukraine's preparation for EU membership is crucial to its adherence to EU market principles and legal statutes. Extensive reforms, including judicial system enhancements, media independence, anti-corruption measures, security sector restructuring, and robust institutional establishment, are imperative to fortify Ukraine's resilience against Russian influence. Furthermore, integrating into European energy networks and supply chains and bolstering resilience in the cyber and digital sectors are vital for Ukraine's future. This endeavour extends beyond administrative procedures and has profound implications for Ukrainian society, economy, and political landscape, particularly considering the ongoing Russian invasion. If Ukraine wins the war and regains its internationally recognised borders, its chances of joining the EU will greatly improve. This isn't solely due to the restoration of territorial integrity; it also entails the complete reconstruction of the country.[61] Also, Ukraine's candidature for EU membership holds significant geopolitical importance. Making sure Ukraine remains strong is crucial, as is getting ready to protect a possible new external border from Russian aggression—a matter of equal significance for the EU and its member countries. The EU's previous hesitations about countries involved in significant interstate conflicts, particularly without NATO security assurances, could result in reevaluating the EU's security role and potential actions towards establishing a defence alliance. As a result, negotiations and strategic partnerships are crucial in navigating Ukraine's journey towards EU accession and managing regional geopolitical issues simultaneously. [62]

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61 Sapir, A., *Ukraine and the EU: Enlargement at a New Crossroads*, *op. cit.*, note 57.

62 Besch, S.; Eric C., *Ukraine's Accession Poses a Unique Conundrum for the EU*, [https://carnegieendowment.org/2023/10/24/ukraine-s-accession-poses-unique-conundrum-for-eu-pub-90838].

5. CONCLUSION REMARKS

The relationship between the EU and Ukraine has evolved due to critical events, agreements, and the repercussions of Russian actions within the country. Significant occurrences such as achieving independence, the Orange Revolution, and the Euromaidan protests underscored Ukraine's dedication to enhancing collaboration with the EU, resulting in stronger ties between the two entities. Simultaneously, the EU's dedication to enhancing connections was evident in its cooperation with Ukraine via the ENP and Eastern Partnership, the penalties imposed on Russia following its capture of Crimea, and the backing of separatists in eastern Ukraine. The Accord signed post-Maidan uprising in 2014 laid the groundwork for legal and economic collaboration, aiding Ukraine in aligning with EU standards. However, the EU realised that its diplomatic approach was inadequate to maintain peace in Ukraine following the Russian invasion, prompting a shift in strategy towards Russia, imposing unprecedented sanctions, and providing clear military support for Ukraine. The EU's response to the invasion displayed its strong support for democratic values and commitment to upholding stability in the region, as evidenced by providing financial aid and engaging in political cooperation. The invasion led to lasting alterations in EU-Ukraine relations due to heightened geopolitical tensions.

Nevertheless, Ukraine is ramping up efforts to join the EU, and the EU's choice to grant its candidate country status is a strategic move to combat Russian influence and safeguard European security. In the future, following EU regulations and receiving consistent assistance will lead to favourable chances for greater harmonisation. Nonetheless, navigating geopolitical complexities, economic constraints, and internal governance issues is essential. Ukraine must adapt its legal systems with the EU and develop strong cooperation mechanisms with NATO to effectively manage internal stability, shifting geopolitical landscapes, and external influences.

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Chapter 3

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Review article

MARKET INTEGRATION AND COMPETITION AS A WAY TO STRENGTHEN THE RULE OF LAW AND DEMOCRACY IN THE ENLARGED EUROPEAN UNION

Andrea Piletta Massaro, PhD, Research Fellow and Adjunct Professor
University of Bologna, Department of Sociology and Business Law
Via Zamboni, 33 – 40126 Bologna, Italy
andrea.piletta@unibo.it

ABSTRACT

The European Union has guaranteed peace and economic advancement for a long period since its creation. Nevertheless, the European project – in particular in 2024, year in which the European Parliament and the European Commission will be renewed – appears at the crossroad, threatened by the complex global geopolitical situation, the emergence of strong industrial players, the rise of populist parties, and an economic downturn which lowered the 'social safety net' which has always characterised the EU area. The correlation between the 'health' of the common market and its implications on the social and political level, with particular reference to democracy and the rule of law, have not been at the forefront of the political and legal debate and, especially, solutions have not been proposed in a satisfactory and effective manner. This paper aims at analysing the correlation between the state of the European market and its impact on democracy and the rule of law through the lens of competition law, in order to establish a link between the competitiveness of the European market and better social conditions for European citizens. This analysis will follow as lodestar the programmatic description of the 'social market economy' contained in Article 3, paragraph 3, of the Treaty on the European Union. The paper sustains that exactly a revamped version of the social market economy model – with its Ordoliberal roots – represents the key in order to boost the European economy and to restore a proper level of social protection in the European Union, being this a driver also towards a healthily democratic society. Furthermore, only by sticking to the core values permeating its market and its society, the EU could fight in the Global scenario, cause its model, differently from others, still represents the most mature sublimation of concepts such as democracy, rule of law, social wellness and inclusion. Therefore, the EU can regain its propulsive and attractive force – especially in light of the awaited expansion in the Western Balkans region – only by turning back to the Treaties and the political roots which were at the basis of the EU project, with particular reference to a healthy and workable competition in the market. Only this approach is deemed to provide the EU with the essential tools in order to find a proper role in the international scenario in light of challenges such as digitalisation (and the advent of AI), the

green transition, and the complex political scenario. This paper, in conclusion, will therefore provide a framework which explains how the European competitive market model is to be regarded as a 'guardian' of values such as democracy and the rule of law and how the EU can keep its leadership in the promotion and maintenance of these values through a renewed version of the 'social market economy' concept.

***Keywords**: Competition Law, development, European Union, enlargement, Western Balkans*

1. COMPETITION, DEMOCRACY, AND RULE OF LAW

The European Union market model is based on the concept of *social market economy*, which comes from the conceptualisations advanced by the Ordoliberal thinkers.[1] In particular, according to Article 3, paragraph 3, of the Treaty on the European Union (TEU), where this concept is outlined, such a market structure is characterised by the fact of being "highly competitive and aimed at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall also promote scientific and technological advance". Moreover, the internal market as such conceptualised, ought to "work for the sustainable development of Europe based on balanced economic growth and price stability".

This conception of the market's functioning can be viewed as a *metriotes* between a totally liberalised economy, where regulation is left at the minimum level and market forces are called to shape the structure of the market, and a planned economy, where the State is the master of the market and the private initiative is almost totally stifled by the plan. The European Union's system represents a point of equilibrium between these two extremes because it tries to temperate the excesses characterising both of them. In particular, there is no doubt that the European Union's internal market is based upon the market economy system, along liberal lines, but with the room for wide regulatory intervention where it is needed.[2] This structure and conceptualisation represented for sure some of the elements that built the success of the European model and that made it particularly attractive for Countries which, during the time, joined the Union or requested to be part of it.

However, the system briefly introduced in the previous paragraph is founded on some pillars, devoted to bringing the outcomes enucleated in Article 3, paragraph 3, TEU, among which sustainable (and therefore inclusive) development plays a

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1 Gerber D.J., *Law and Competition in Twentieth Century Europe*, Oxford, 1998, pp. 238-241; Osti C., *Antitrust: a Heimlich manoeuvre*, European Competition Journal, 11, 1, 2015, pp. 228; Piletta Massaro, A., Antitrust Political Side, Opinio Iuris in Comparatione, 2023, 1, pp. 373-379; Hildebrand D., *The equality and social fairness objectives in EU competition law: The European school of thought*, Concurrences, 1, 2017, pp. 1-6.

2 About the link between economic development and social cohesion in the internal market, see Craig P. And de Búrca G., *EU Law*, Oxford, 2020, p. 668.

pivotal role. These pillars are competition in the market (not casually it is defined as *highly competitive*) and the respect of the *rule of law* (as provided for by Article 2 TEU). The latter concept, which is declined in various linguistic forms across the Member States, represents a pillar of every democratic society, as it provides that all public powers *act within the constraints set out by law*.[3] Subordinated declinations of this principle are functioning and healthy democratic institutions (across all the sphere of Montesquieu's division of powers[4]), inclusive living conditions and equality. The latter has been noteworthily conceptualised by the academician and former President of the Italian Republic Luigi Einaudi, in the concept of *equality of the starting points* ('uguaglianza dei punti di partenza').[5] Although not officially part of the Ordoliberal movement developed in Germany with the so-called Freiburg School, Einaudi was close to Ordoliberals' conceptualisations, and it is precisely in this realm that is necessary to find the link between rule of law, democracy and competition.

Competition is a concept typically pertaining to the features of liberal economies. It is intended as a process where *two or more economic agents engaged in strategic interaction and pursuing individual gain*[6] or *when anybody who wants to buy or sell has a choice of possible suppliers or customers*.[7] In general terms, competition should be the means through which the Smithian *invisible hand*[8] which governs the market selects the most efficient firms and delivers to the consumers the best products at the lowest price, thus reaching a sort of Pareto optimal situation.[9] However, this is only an ideal model, defined as perfect competition. The reality is much more complex and the benchmark that has been taken as a reference is that of workable competition.[10]Although not delivering a utopian situation, this concept implies that the competition on the market is effective, and this brings anyway beneficial effects to the market and the consumers, in terms of better busi-

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3 European Council, Rule of law, [https://www.consilium.europa.eu/en/policies/rule-of-law/], Accessed 8 April 2024. As part of the definition, it is also specified that *the notion of the rule of law includes a transparent, accountable, democratic and pluralistic law-making process, effective judicial protection, including access to justice, by independent and impartial courts and separation of powers. The rule of law requires that everyone enjoys equal protection under the law and prevents the arbitrary use of power by governments. It ensures that basic political and civil rights, as well as civil liberties, are protected and upheld.*

4 De S. Montesquieu, C.-L., *De l'esprit des lois*, in *Oeuvres complètes de Montesquieu*, Paris, 1859.

5 Einaudi L., *Lezioni di Politica Sociale*, Torino, 1949, pp. 169-246.

6 *Oxford Dictionary of Economics*, 5th edition, Oxford, 2017.

7 *Ibid*.

8 Smith, A., *An inquiry into the nature and causes of the wealth of nations*, Chicago, 1952.

9 According to the *Oxford Dictionary of Business and Management*, 6th edition, Oxford, 2016, *an alteration in the allocation of resources is said to be Pareto efficient when it leaves at least one person better off and nobody worse off. A state of Pareto optimality occurs when no further Pareto-efficient changes can be made*. See also Jones A., Sufrin B., Dunne N., *Jones & Sufrin's EU Competition Law*, Oxford, 2023, p. 12.

10 Jones A., Sufrin B., Dunne N., *op. cit.*, p. 29.

ness opportunities for the firms and better prices and quality for the consumers.[11] However, the concept of competition has also a sort of 'dark side', that is intrinsic in the rivalry among firms characterising it. In fact, the theoretical model based on competition provides that inefficient (or however not successful in the market) companies must leave the market, without taking into account the social losses linked to it. The overall system of competition rules does not allow, for instance, state aid of an inefficient firm, notwithstanding the fact that this could save a lot of workplaces or that the firm concerned constitutes an essential asset of a Country (the case of the former Italian flagship airline, Alitalia, is telling in this sense[12]). Side considerations might be considered in the assessment of cases (e.g., a merger), but they would never be the reason for allowing a restriction of competition in the market. Therefore, competition, when brought to the edge, to the limit, can also turn into something 'toxic', the market can experience, in the words of Professors Ezrachi and Stucke, an 'overdose' of competition, which determines negative consequences for the society in general.[13] An example brought by the two mentioned Authors is that of private health systems, which toxically compete with the public health service (which will cover also the non-remunerative operations, which are not carried out by private actors), with the consequence of creating a sort of 'privileged' track for people who can afford it and a deterioration of the performances of the national health service, with negative conditions on people who cannot access the private one.[14] This constitutes, in a broader sense, a *vulnus* to democracy, given that the right to health is a fundamental right, which should be guaranteed to every citizen in the same manner.[15] This shows how competition in itself can bring also negative by-products and that is why a *social market economy* is needed, where competition constitutes the main pillar of the 'economic constitution', but it is kept under control by a strong state who supervise the market and intervenes when market forces cannot regulate it properly by themselves[16] (a clear example for this purpose is the enactment of the Digital Markets Act, DMA, Regulation, aimed at putting some rules for the 'game' of competition in digital markets, where competition by itself just lead to the tipping of the market

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11 *Ibid*.

12 See, *inter alia*, *ITA takes off, ending Alitalia's turbulent life*, Reuters, 15 October 2021, [https://www.reuters.com/business/aerospace-defense/alitalia-dies-after-75-turbulent-years-hands-over-ita-2021-10-14/], accessed 12 April 2024.

13 Stucke, M. E. and Ezrachi A., *Competition Overdose. How the Free Market Mythology Transformed Us From Citizen Kings to Market Servants*, New York, 2020, pp. 255-292.

14 *Ibid.*, pp. 162-191.

15 This fundamental right is guaranteed, *inter alia*, by Article 35 of the Charter of Fundamental Rights of the European Union and by Articles 11 and 13 of the European Social Charter.

16 Gerber D. J., *op. cit.*, pp. 249-250. See also Bonefeld W., *Freedom and the Strong State: On German Ordoliberalism*, New Political Economy, 2012, 17, 5, p. 633.

in favour of a dominant firm[17]). However, the possibility of these drawbacks and the need to 'supervise' competition in particular sectors or markets does not connote it as a negative policy, and it cannot serve as a justification for a more active role of the State in the economy. Contrariwise, competition law, when supervised and brought – through the right policy choices and enforcement paths – towards what has been defined as 'noble competition'[18] is the only force that can reconcile market and societal issues and problems and guaranteeing increased wellness to society. In fact, apart from its 'rivalrous' side, competition law means plurality and deconcentrated economic power, which is a form of power which can easily turn into political power (e.g., by controlling the media, influencing citizens' choices, also policies, by imposing certain low working conditions in order to invest, even to governments). Plurality and dispersion of power, as the Ordoliberal school also thought, represent some of the main prerequisite for a democratic society which respects the rule of law's requirements.[19] It is exactly in this connection that lies the link between the three concepts which are at the basis of this paragraph and, more in general, of this reflection.

The concepts just expressed, as we saw, are a key element of the European Union's institutional and juridical architecture, and their respect and performance are essential in order to be part of the Union. In fact, apart from the aspect more related to fundamental institutional requirements, if new Countries enter the internal market they must have sound competition also in their internal market, as this is the rule governing the 'level playing field' constituted, in fact, by the single market. Therefore, a functioning competition regime is needed both in order to allow other Member States' firms to operate and invest in these national markets within the single one, and to face the competitive pressure brought by the integration in a system composed of various and heterogeneous national markets. In addition, in order to allow a regular conduct of business in the competitive environment so described, the respect of the rule of law and the presence of healthy democratic

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17 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), published on the OJ of the EU 12 October 2022, L 265/1.

18 Stucke M. E. and Ezrachi, A., *op. cit.*, pp. 255-292.

19 In the words of Franz Böhm, Ordoliberals were interested in the issue of private power in a free society. Böhm F., Die *Forschungs und Lehrgemeinschaft zwischen Juristen und Volkswirten an der Universität Freiburg in den dreissiger und vierziger Jahren des 20. Jahrhunderts*, in Mestmäcker E. (ed.), *Franz Böhm – Reden und Schriften*, Heidelberg, 1960, p. 162, quoted by Gerber D. J., *op, cit*, p. 235. See also Gerber D. J., Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe, The American Journal of Comparative Law, 1994, 42, 1, pp. 29-30.

institutions is viewed as an essential prerequisite, thus underlining again the inextricable nexus between these concepts and competition.[20]

On the other side of the medal, a functioning market, based upon the game of competition – a 'supervised' noble competition – is essential to improve the economic and social indicators of a Country, thus benefitting all the citizens with more choice, quality, and competitive prices. In order to do this, it is necessary, especially in Countries where the State represented the main player on the market, to liberalise these markets, in order to gain quotas in terms of efficiency and productivity.

In the end of this introduction, aimed at establishing the given connection between all the elements that constitutes the concept of social market economy, it is natural – especially in light of the planned enlargement of the European Union[21] – to decline the discourse on the Countries which are willing to join the EU, and in particular to the West Balkans Countries. The history – and legal history – that characterised the development of this area is very complex, and, apart from what is necessary for our analysis, falls outside the scope of the present work. However, the common denominator of this area, both from the legal and economic standpoint, was the presence of socialist systems, characterised by a highly centralised role of the State both concerning the area of legislative production and having regard to economic planning. Therefore, by considering the EU's social market economy – and consequently competition law – as a model to be transplanted in this area according to the legal transplants theory,[22] it can be seen as consequential a certain difficulty for these systems in interiorising the European market model, which anyway constitutes an essential part of the *acquis communautaire*, therefore essential to join the Union.[23] Indeed, as philosophy of law teaches,[24] from the mere formal enactment of certain provisions – such as, for our purposes, competition law ones

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20 Marković Bajalović D., *Competition Enforcement Models in the Western Balkans Countries – The Rule of Law Still Terra Incognita?*, Yearbook of Antitrust and Regulatory Studies, 22, 2020, pp. 29-31.

21 See [https://european-union.europa.eu/principles-countries-history/eu-enlargement_en], Accessed 12 April 2024.

22 See, *inter alia*, Ajani G., *Trapianto di norme "informato" e globalizzazione: alcune considerazioni*, in Ajani G. *et al.* (eds.), *Studi in onore di Aldo Frignani. Nuovi orizzonti del diritto comparato europeo e transnazionale*, Napoli, 2011, pp. 3-15. With regard to the relationship between legal transplants and economic performances, with specific regard to Eastern Europe, see Ajani G., *Legal Change and Economic Performance*, Global Jurist, 2001, 1, 1, pp. 1-12.

23 Benacchio G. A., *National Courts and Comparative Law – The States of Former Yugoslavia (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Macedonia and Montenegro*, in Ferrari G. F. (ed.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Leiden/Boston, 2020, p. 759. To get a wider overview about the Western Balkans legal systems, refer, *inter alia*, to Benacchio G. A., *La circolazione dei modelli giuridici tra gli Slavi del sud*, Padova, 1995; Benacchio G. A., *Jugoslavia: evoluzione e crollo di un modello*, Rivista di diritto civile, 1991, I, pp. 361-382.

24 Bobbio N., *Teoria generale del diritto*, Torino, 1993, pp. 23-31.

– does not automatically derive the effectiveness of these provisions. In fact, if there is not social acceptance of these rules, they remain just *law in the books*, without providing all the beneficial effects that they should bring, and by giving only the illusion of compliance with the *acquis*, with all the negative consequences that this can imply for the Country in question, but also for the whole internal market.

Therefore, and in light of the above, this paper aims at scrutinising the current state of competition law in the Western Balkans area, with particular reference to the systems of Slovenia, Croatia and Serbia. The choice is not casual, since they represent the three major economies that emerged from the dissolution of the former Yugoslavia and they also portrait three different stages in the process of integration with the European Union, since Slovenia joined in 2004, Croatia in 2013, and Serbia, in its status of candidate Country, wishes to be soon part of the EU. As a consequential step, by applying the theory of formants advanced by Professor Sacco and his School, this work aims at underlining how competition law can improve the economic and social conditions of the Countries pertaining to the analysed area, and which reforms could be suggested in order to properly implement in this context a functioning competition law regime, which should bring beneficial effects to the market of the concerned Countries, the social conditions therein, and, lastly, to the whole European internal market.

2. THE LEGAL CONTEXT CHARACTERISING THE WESTERN BALKANS COUNTRIES

The peculiarities characterising the various territorial legal traditions in the Balkans region gain interest for the purposes of this analysis since 1918, when the abovementioned territories were reunited by King Karadjordjevic into what in 1929 was officially named the Kingdom of Yugoslavia. The cultural pluralism of the territory thus united is evident from the diversity of religions, languages and even alphabets (both the Latin and Cyrillic alphabets are used). Various legal systems were in force in those territories: In Croatia there was the coexistence, depending on the subject, of the Austrian model with the Hungarian one; in Slovenia and in some Croatian regions the Austrian system was in full force; in Serbia there was the coexistence of Serbian law (in some regions) with the Hungarian model, and an informal system based on precedents in other territories, such as Vojvodina; Serbian law was also applied in Macedonia, whilst in Montenegro an autochthonous system was applied and in Bosnia-Herzegovina reference was made to a plurality of sources, including the Austrian ABGB, the Turkish *Megelle* and even the Sharia for Muslim citizens. In such a context, it is clear that a 'Yugoslavization' of the law belonging to the various systems was necessary, in order to harmonize the rules applied within the newly

established Kingdom. In this regard, the comparison was conducted both through studies of the main Western systems, namely the French, German and Austrian ones – which constituted the basis of the various regional systems – and through the comparison of the latter, but in a perspective of abandoning local peculiarities in favour of a unified approach. However, this evolution occurred almost exclusively in the doctrinal debate, while the jurisprudential formant, due to various factors, remained static on a more territorial character.

The subsequent historical point of demarcation is represented by the advent of the socialist Federal People's Republic of Yugoslavia in 1946. As a consequence, a formal repeal of the pre-existing laws was performed, but, in the absence of a complete substitute legal system, the previous legislation continued to apply, in the form of non-binding principles.[25] Also in this context, comparative law played a fundamental role, as it was essential to know the various territorial regulations in order to reach the most suitable solution. Subsequently, once the most disruptive effects of socialism had disappeared, solutions from the main Western legal systems also found space and it became possible for judges to refer to foreign or pre-existing regulations.[26] The importance of the role played by comparative law in the context of the former Yugoslavia is also evident from the fact that the first institute of comparative law founded in a socialist state was the *Institut za uporedno pravo* in Belgrade, dating back to 1955.[27]

Following the dissolution of the former Yugoslavia, six original independent states were gradually re-created: Bosnia-Herzegovina, Croatia, North Macedonia, Montenegro, Serbia, Slovenia. The key to understanding this new historical phase in the context of the Balkan legal systems is the reference to the 'classic' systems of continental law and the rapprochement (more or less marked between the various states) to the law of the European Union. In fact, among the newly established states, first Slovenia (2004) and then Croatia (2013) joined the Union, while the other Countries began the process of joining the EU.[28] The perspective to join the EU led to the need for reforms (which are still ongoing in the candidate Countries) aimed at integrating the *acquis communautaire* into the concerned legal systems. In particular, it is necessary to align the various systems with the dictates of the rule of law, as well as to prepare the relevant economies for entry into the single

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25 Benacchio G. A., *National Courts and Comparative Law*, *op. cit.,* pp. 751-752.

26 *Ibid.*, p. 753.

27 *Ibidd*, p. 754. More information about the Institute is available at [https://iup.rs/en/], Accessed 12 April 2024.

28 Having regard with Bosnia and Herzegovina the European Council decided on 21 March 2024 to open accession negotiations with Bosnia and Herzegovina. See [https://www.europarl.europa.eu/thinktank/it/document/EPRS_ATA(2024)760409], Accessed 12 April 2024.

market, with the consequent rules on competition, state aid, consumer protection, etc. These innovations were also stimulated by external entities, such as the World Bank or the International Monetary Fund, in order to provide both training and financial assistance in the transitional phase of the Countries concerned.[29] It is clear that comparative law has played a role of considerable importance in providing the appropriate tools for this purpose, especially through the analysis of the solutions – both legislative and judicial – adopted in the systems of the States that are part of the EU.[30] In fact, with particular reference to the judiciary, the judges of the Balkans States often refer, both (more rarely) expressly and (mostly) indirectly, to interpretative solutions adopted in the systems of other continental States.[31]

However, being the aim of this paper that of showing how a competitive market – along the lines of the EU's *acquis* – could stimulate competitiveness in the Western Balkans area, it is necessary not to limit this analysis to the legal features, but to also provide an overview of the area's economic landscape, based upon data collected and elaborated at the international level with regard to some key economic indicators.

3. THE ECONOMIC LANDSCAPE OF THE WESTERN BALKAN COUNTRIES

The dataset that we took into consideration for the analysis carried out in this paragraph is based upon some of the main indicators registered by the economic development datasets elaborated by the World Bank. The first parameter that we want to outline is the one regarding the analysed Countries' adjusted national income per capita. As the Image below (Image 1)[32] shows there is a marked difference in the result among the three Balkans Countries considered, with Slovenia registering an important increase in the datum after the entrance in the EU. Also Croatia registers – notwithstanding the concurrent impact of the financial crisis – an overall positive trend in respect of Serbia. Moreover, although on different levels of the graph, the two Countries part of the single market follow the shape of the datum registered for the three major EU economies, Germany, France and Italy, taken as a benchmark. Serbia, contrariwise, notwithstanding a slight increase, follow an average more stagnant line with regard to this parameter.

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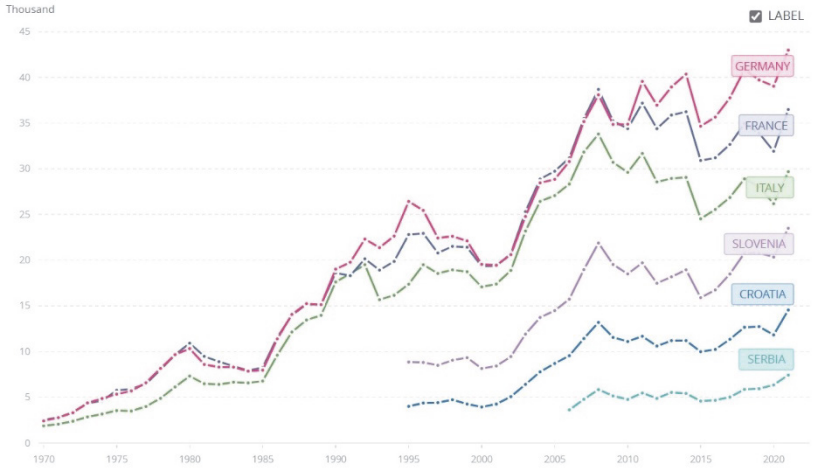
29 Ajani G., *Il modello post-socialista*, Torino, 2008, pp. 59, 125.

30 Ferreri S. and Piletta Massaro, A., *Casi di diritto comparato*, Milano, 2024, pp. 18-22.

31 Benacchio G. A., *National Courts and Comparative Law*, cit., pp. 751-753.

32 Image 1: Adjusted net national income per capita (current US$) – Croatia, Italy, France, Germany, Serbia, Slovenia, The World Bank, [https://data.worldbank.org/indicator/NY.ADJ.NNTY.PC.CD?end=2021&locations=HR-IT-FR-DE-RS-SI&start=1970&view=chart], accessed 10 April 2024.



Having regard to other indicators that can be of interest in the context of the current analysis, a mention is for sure deserved by some trade-relevant parameters such as control of corruption,[33] government effectiveness,[34] and the rule of law.[35] These factors have been defined as trade related since they involve almost all the macro-features required for the establishment of the proper level playing field needed for fostering trade and investments. In fact, reliance on a legal system anchored on a high level of compliance with the rule of law is necessary for investors to provide their funds, and the same can be said for the presence of a government which can pursue an effective progressive agenda and tries to eradicate corruption, which is one of the principal enemies of competition, and, more in general, of trust for trading and investing in a given Country.[36] Data show as control of corruption registers a particularly high datum in France and Germany, and a datum with tendency to alignment to these two benchmark economies is recorded in

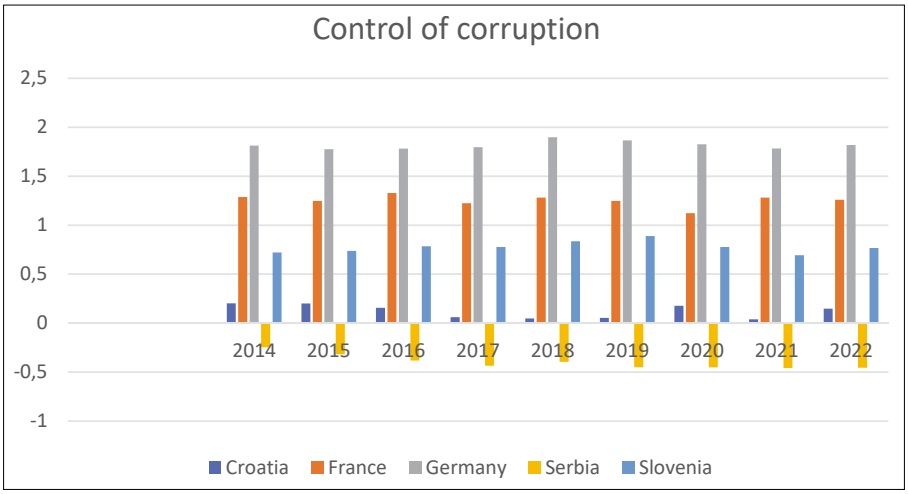
[33] According to the World Bank, the 'Control of Corruption: Estimate' indicator (CC.EST) *captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests*. See [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

[34] According to the World Bank, the 'Government Effectiveness: Estimate' indicator (GE.EST) *captures perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies*. See [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

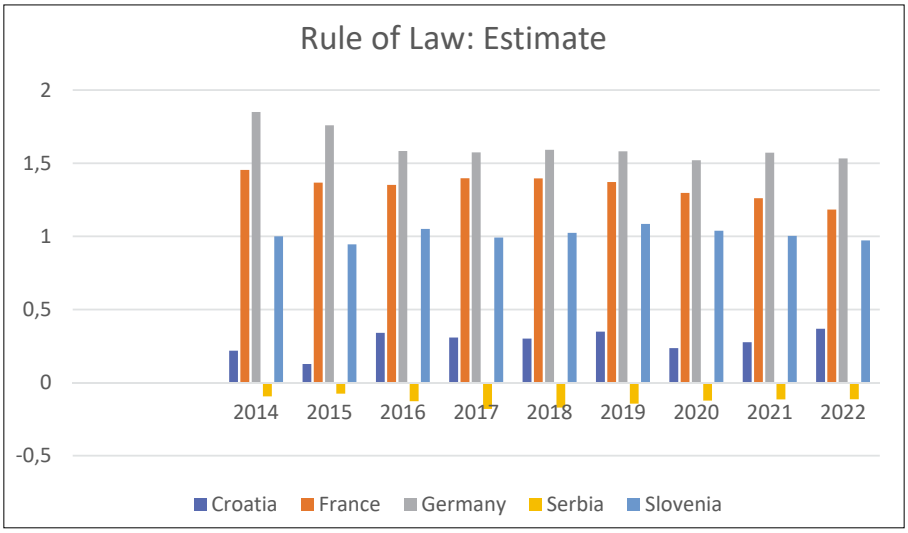
[35] According to the World Bank the 'Rule of Law: Estimate' indicator (RL.EST) *captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence*. See [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

[36] OECD, Croatia Country Profile, 2022, p. 20.

Slovenia, in lower but improving value in Croatia and a very low level in Serbia (image 2[37]):



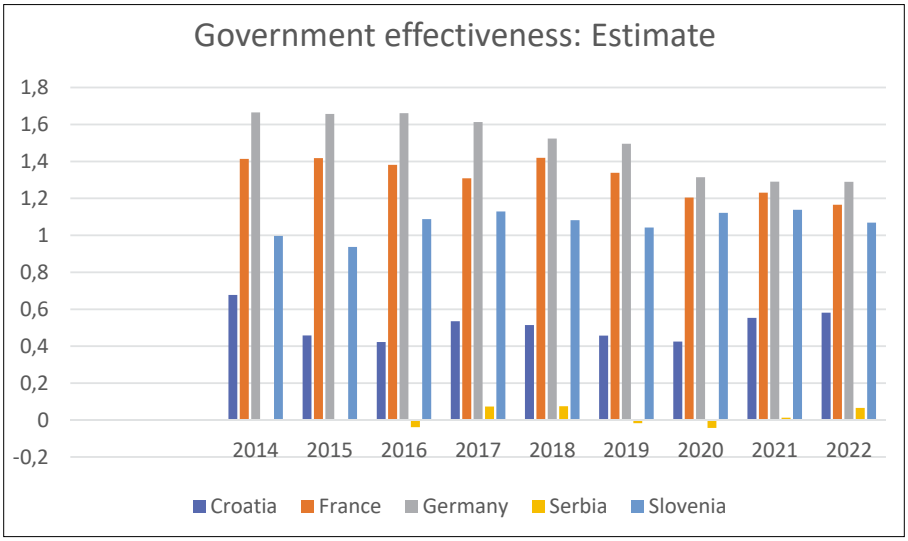
The same path is illustrated with regard to the estimate of the rule of law compliance and on the effectiveness of the government action (image 3[38] and 4[39]):



[37] Image 2: Control of corruption, 2014-2022, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], Accessed 10 April 2024.

[38] Image 3: Rule of Law: Estimate, 2014-2022, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], Accessed 10 April 2024.

[39] Image 4: Government effectiveness: Estimate, 2014-2022, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], Accessed 10 April 2024.



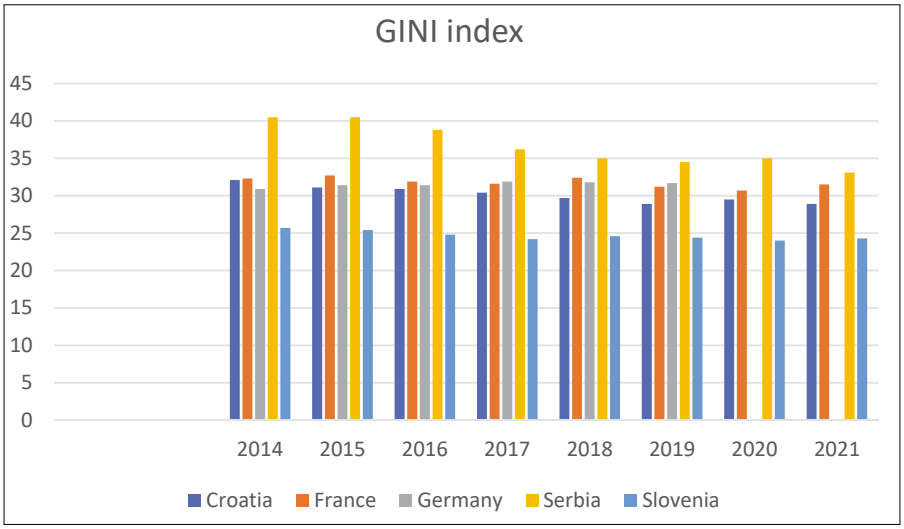
After having analysed these datasets, that we can define as 'preparatory' for doing business, as they represent the conditions in which firms would operate and investment may occur, it is now worth analysing some other indicators, which show a sort of outcome of the performance of these Countries' economies in various areas, that we consider key in order to delineate a picture of a competitive developed, inclusive and sustainable economy.

First, it is worth considering how a competitive economy should certainly increase the wealth of certain firms or subjects, but, generally, it is a mean that should disperse economic power and therefore it could have also a distributive impact,[40] through – among others – the already mentioned better services, opportunities, and prices. Therefore, a developed and competitive economy, in line with the social market economy model, should register lower levels of income inequality. The analysis of the data through the comparison among Countries that we performed confirms this affirmation, thus showing the beneficial effects of a dynamic and competitive economy, and the need to increase these performances in the Western Balkans area, with the exception – not casual – of Slovenia, which registers one of the lower levels of income inequality in the EU area.[41] This parameter can be

[40] For an overview about the link between competition law and distribution of wealth, see, *inter alia*, Ezrachi A., Zac A., Decker C., *The effects of competition law on inequality – an incidental by-product or a path for societal change?*, Journal of Antitrust Enforcement, 2023, 11, for pp. 1-27; Stiglitz J., *The Price of Inequality*, New York, 2014, p. 104.

[41] OECD, Government at a Glance 2021, Country Fact Sheet, Slovenia, 2021, [https://www.oecd.org/gov/gov-at-a-glance-2021-slovenia.pdf], Accessed 12 April 2024; Eurostat, Living conditions in Europe - income distribution and income inequality, [https://ec.europa.eu/eurostat/statistics-explained/

analysed through three datasets, which are the GINI index,[42] the percentage of income held by the top 10% of the population in comparison with the one held by the bottom 20%[43] (image 5[44], 6[45] and 7[46]):



index.php?title=Living_conditions_in_Europe_-_income_distribution_and_income_inequality&stable=1#Income_inequality], Accessed 12 April 2024; Filipovič Hrast M.; Ignjatović M., *Slovenia: An Equal Society Despite the Transition*, in Nolan B. *et al.* (eds.), *Changing Inequalities and Societal Impacts in Rich Countries: Thirty Countries' Experiences*, Oxford, 2014, pp. 593-615.

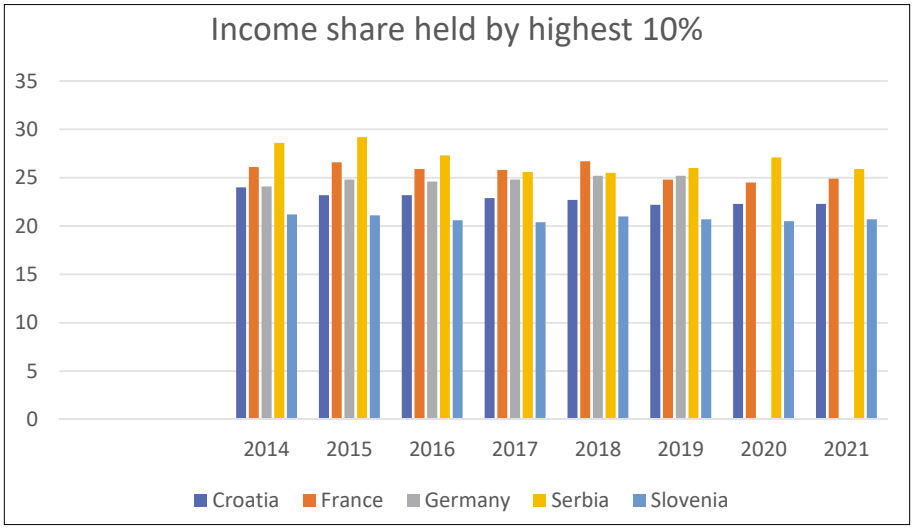
42 The GINI index for the representation of inequality has been introduced at the beginning of XX Century by the Italian economist Corrado Gini. It is based on values from 0 to 1: 0 represents a total equality scenario, where every society's member has the same income, whilst 1 represents a total inequality scenario, where one individual holds the total income. The values between 0 and 1 represents various among total equality and total inequality. Often, and for practical reasons, values between 0 and 1 are multiplied in order to express a range between 0 and 100. See B. Keeley, Income Inequality: The Gap between Rich and Poor, OECD Publishing, 2015, p. 22. See also the item 'Gini coefficient' in the *Oxford Dictionary of Economics*, Oxford, 2009.

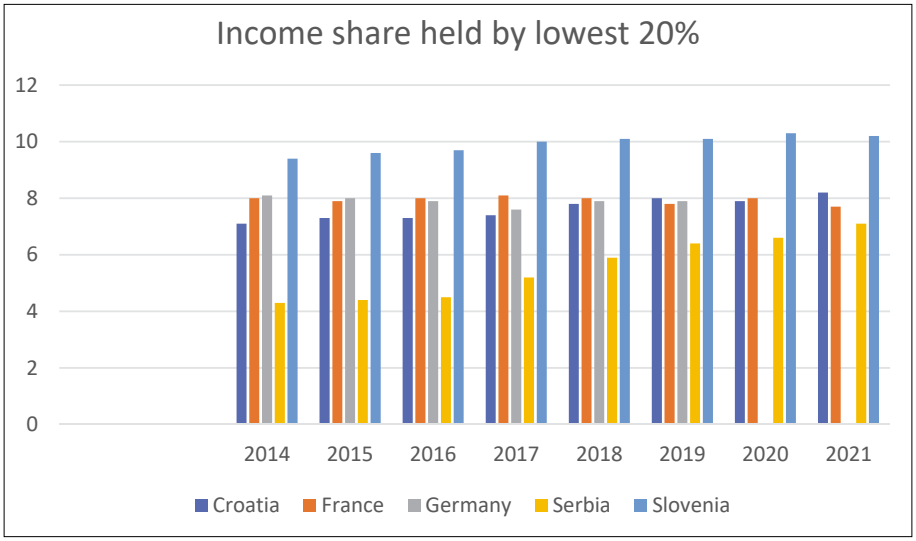
43 According to the World Bank, the percentage share of income or consumption *is the share that accrues to subgroups of population indicated by deciles or quintiles*,

44 Image 5: GINI index, 2014-2021, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

45 Image 6: Income share held by highest 10%, 2014-2021, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

46 Image 7: Income share held by lowest 20%, 2014-2021, Croatia, France Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024.

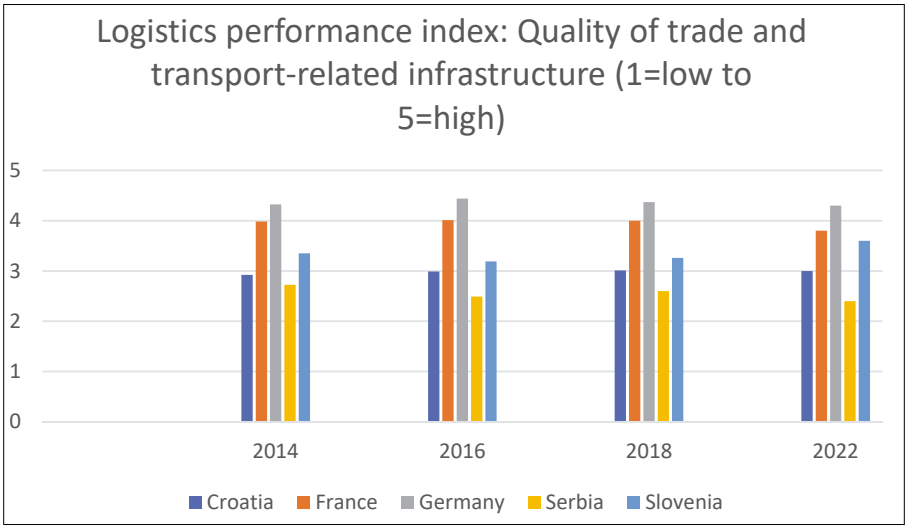




Another telling and important factor for the competitiveness of an economy is represented by the logistics performances, since this result essential in for the purpose of moving goods and materials (image 8[47]). In this sense the action of

[47] Image 8: Logistics performance index: Quality of trade and transport-related infrastructure, 2014, 2016, 2018, 2022, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], Accessed 10 April 2024. According to the World Bank, the 'Logistics performance index: Quality of trade and transport-related infrastructure (1=low to 5=high)' indicator (LP.LPI.INFR.XQ) represents *logistics professionals' perception of country's quality of trade and transport related infrastructure (e.g. ports, railroads, roads, information technology), on a rating ranging from 1 (very low) to 5 (very high)*.

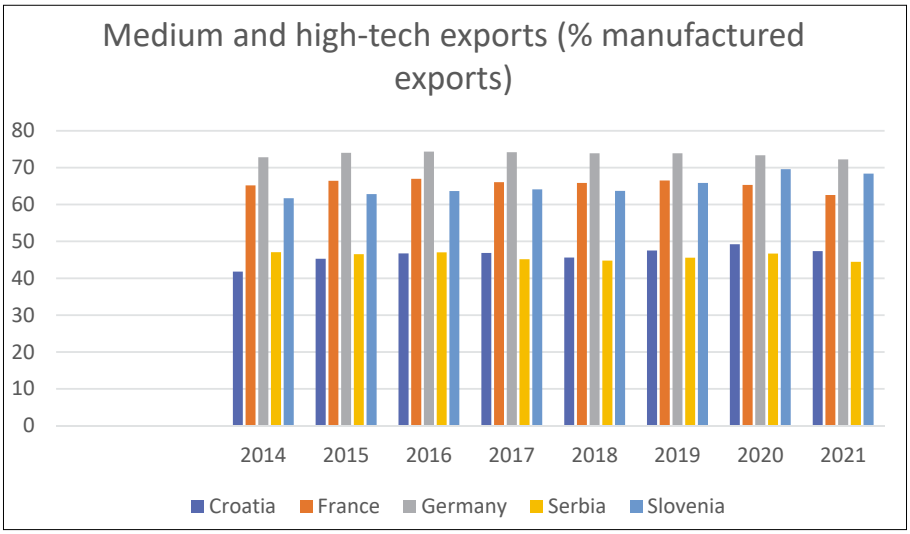
competition can be twofold: It can be viewed both as competition to improve infrastructures, and as an important prerequisite for stimulating investments and consequently more competition on other markets. Of course, with regard to the former, it is inextricably linked to public procurement, and corruption in this sector can therefore stifle competition and the overall economic performance. Also in this case data are telling, and they show how the passage from a centralised planned economy to a competitive market economy leads, over the years, to an improvement of the related indicators:



Going more in detail, but on the same trail of parameters more related to production and productivity, an essential aspect related to competition is innovation.[48] Innovation should be a natural positive by-product of competition, since the rivalry among firms for the market leadership should stimulate investments and research in new and innovative products, with the societal beneficial effect of leading the advancement of society through the natural dynamics of the market. Moreover, one particular and specific declination of innovation can be the research and introduction of more efficient and environmental friendly products and processes, which can lead to less energy consumption, and therefore less Co2 emissions and lower energy costs – which means also more competitiveness – on the economic side, but also improved health conditions on the social side. Also in this case,

[48] On the relationship between competition and innovation see, *inter alia*, Ezrachi A. and Stucke M E., Digitalisation and its impact on innovation, Report for the European Commission, 24 August 2020, [https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11eaad25-01aa75ed71a1/language-en], accessed 12 April 2024; Robertson V. H.S.E., *Competition Law's Innovation Factor. The Relevant Market in Dynamics Context in the EU and the US*, Hart Publishing, 2020; Gilbert R. J., *Innovation Matters: Competition Policy for the High-Technology Economy*, The MIT Press, 2020.

the analysed data show how more developed markets have better performances in terms of innovation. For the sake of this analysis we took into examination the datasets related to medium and high-tech exports (image 9[49]) and the overall emissions of Co2 (image 10[50]), being the latter the example of innovation applied in a specific and crucial aspect of our societies' future.[51] Moreover, it is worth underlining how the implementation of the green agenda adopted by the European Union is an essential task required to candidate Countries, such as Serbia, in order to align their system to the EU requirements.[52]

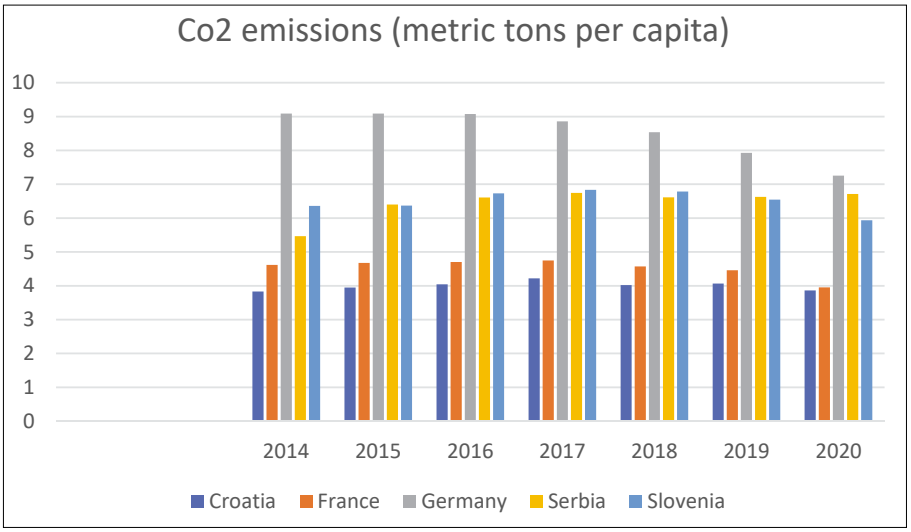


[49] Image 9: Medium and high-tech exports (% manufactured exports), 2014-2021, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], accessed 10 April 2024. According to the World Bank, the 'Medium and high-tech exports (% manufactured exports)' indicator (TX.MNF.TECH.ZS.UN) represents *the share of medium and high-tech manufactured exports in total manufactured exports*.

[50] Image 10: Co2 emissions (metric tons per capita), 2014-2020, Croatia, France, Germany, Serbia, Slovenia, [https://databank.worldbank.org/reports.aspx?source=World-Development-Indicators], Accessed 10 April 2024. According to the World Bank, the 'CO2 emissions (metric tons per capita)' indicator (EN.ATM.CO2E.PC) shows *the Carbon dioxide emissions are those stemming from the burning of fossil fuels and the manufacture of cement. They include carbon dioxide produced during consumption of solid, liquid, and gas fuels and gas flaring*.

[51] It is worth specifying here that the datasets show the two benchmark Countries, France and Germany, as having the highest amount of Co2 emissions. However, this datum has to be parametrised to the extension and especially the economic and industrial development of these two Countries. The telling datum, in reality, is that Serbia registers almost the same emissions of France or Germany, but with a completely different size and scale of business. Therefore, this shows a great underdevelopment in the innovations related to Co2 emissions' reduction.

[52] See, *inter alia*, Article 111 of the Stabilisation and Association Agreement between the EU and the Republic of Serbia, published on the Official Journal of the EU 18 October 2013, L278.



4. COMPETITION POLICY IN THE WESTERN BALKANS

Competition law has been formally enacted in all the Western Balkans Countries object of the present analysis, as part of the necessary alignment of national systems with the *acquis communautaire* in order to join the EU. Also Serbia, which is not a member State yet, but a candidate one, has adopted a competition law regime back in 2009, with significant modifications in 2013. However, what is worth pointing out in this context is that one fact is the formal adoption of competition law provisions, and another is the effective implementation of them, with the consequential effects in the economic realm. The analysis of the datasets outlined in the previous paragraph clearly showed a direct proportionality link between the durable and effective implementation of a competition law regimes and the improvement of economic development indicators, thus establishing a correlation between competition, rule of law, government effectiveness, market performance and, more in general, well-being of citizens.[53]

However, the data showed also put into question, especially with regard to Serbia, and, with a certain extent, Croatia, the slightly sub-effective application of competition rules in these markets, notwithstanding the formal datum given by the existence of competition rules shaped along the lines of the EU model. This emerges, with particular reference to Croatia, especially from the work of Jasminka Pecotić

[53] Buccirossi P. and Ciari L., *Western Balkans and the Design of Effective Competition Law: The Role of Economic, Institutional and Cultural Characteristics*, in Begović B. and Popović D. V. (eds.), *Competition Authorities in South Eastern Europe*, New York, 2018, p. 7.

Kaufman and Ružica Šimić Banović,[54] from which it appears the portrait of a system which tries, through the formal implementation of the *acquis*, to look at the future, but remains anchored to some social and cultural behaviours and customs deeply embedded in the society. This represents a clear example of transplant of rules from another, considered more efficient, model, but having a scarce effectiveness due to the lack of acceptance of the norms by the social context, which is probably still not ready to assimilate these innovations. Indeed, according to the mentioned Authors, in post-socialist Countries, *competition systems reflect mostly a slow transformation from a relations-based to rule-based governance*.[55] The problem, therefore, appears to be the embedded custom of relying on informal institutions and relations in order to get something (such as the connection system that can be summarised in the Serbian and Croatian word *veza*), instead of relying on the formal and institutionalised processes. Therefore, according to the same Authors, *the gap between Western-like formal and (post)socialist-like informal institutions appear to be considerable and results in additional transaction costs*,[56] which, we may add, brings to lower trade and economic performances, which, consequently, because of the inseparable nexus that bounds market and society in modern economies, delivers poor social conditions and development.

This aspect is of particular interest under a comparative law perspective, since it shows how a 'misalignment' among the various formants can bring to subaverage performances in the transplanted provisions. In fact, and also by bearing in mind what was explained above – in more general terms – about Western Balkans Countries' legal systems, the innovations introduced by the legislative formant were often not properly followed by the jurisprudential one and cryptotypes deeply embedded in the society (like the mentioned *veza*) remained almost unchanged.[57] The impression is that of a different 'speed' among all these factors. Indeed, the enactment of competition rules in these Countries was part of the reforms needed, suggested, and in a way required in order to participate not only in the European Union, but also to receive financing by institutions such as the World Bank, the International Monetary Fund, and to be part of the international trade exchanges.[58] The solutions proposed aimed of course at the transition between the socialist planned economic system to the market one. At this purpose, the legislative formant almost completely aligned the legislation of these countries

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54 Pecotić Kaufman J. and Šimić Banović R., *The Role of (Informal) Governance and Culture in a National Competition System: A Case of a Post-Socialist Economy*, World Competition, 44, 1, 2021, pp. 81-108.

55 *Ibidem*, 81.

56 *Ibidem*, 82.

57 Buccirossi P. and Ciari L., *op. cit.*, p. 8.

58 Ajani G., *op. cit.* (n. 28), pp. 59, 125.

to the western models proposed in the field of competition, foreign investments, rule of law and accountability of political and administrative institutions, liberalisations, and so on. However, this quite huge modernising normative production, for various reasons, was not followed by the jurisprudential (and also administrative, especially in the field of competition law) formant and society in general. The reasons for this are multiples, but, for the sake of the present analysis, we can for sure mention a certain cultural resistance also of the judiciary, probably a lack of knowledge and also familiarity with the theoretical and legal concepts of the EU and, more generally, of market economy, plus the permanence of some contrasting interest which can get more advantage from an informal economy rather than in the context of a competitive market. In fact, some old customs are culturally difficult to eradicate exactly because of the very nature of competition, the rivalry we mentioned in the beginning of the present work. As we already outlined – and especially in a background where the plan and the presence of the State were the normality – the fact that, because of this rivalry, there will be some 'winners' and some 'losers' can be feared,[59] whilst informal structures and methods can result in a more reassuring scenario, especially when current needs are at stake and future development appears to be as something farther away. Moreover, in this context – and for the same background reasons – a strong role of the State in the economy remains, with the control over key sectors such as energy production.[60] This, of course, discourages external investments in these fields and the consequent entry of new operators, which can bring less expensive and more efficient services, that, in the field of energy production or transportation can also turn into a better and faster transition towards more environmentally sustainable services.

By entering more into the detail of the analysed Countries' competition law systems, all of them have opted for an administrative enforcement model, thus based upon an independent authority which should enforce competition rules through proceedings regulated by fixed rules and the fair proceeding principles in general.

In particular, the Slovenian Competition Protection Agency was established in 2013 as an independent administrative authority. However, it had to follow a peculiar regime form conducting its investigation and imposing a fine. In fact, it was required to establish an infringement of competition law through a first administrative proceeding, and, in order for a fine to be imposed, a second misdemeanour proceeding had to be carried out, with the consequent dispersion of time and resources, also because the decisions issued in the two proceedings were subject

[59] Pecotić Kaufman J. and Šimić Banović R., *op. cit.*, p. 94.

[60] *Ibid.*, pp. 88-89.

to two distinguished appeals.[61] Subsequent innovations have been introduced in September 2022 and entered into force on 26 January 2023 to render more effective the enforcement activity of the Slovenian competition Authority.[62] Anyhow, the data reported by the OECD in the annual report on competition law in Slovenia portray a satisfactory enforcement track record and a quite well-staffed and budgeted Authority.[63] Moreover, the innovations brought through the mentioned reform of the Slovenian competition act also designed a more efficient and less burdensome procedure for the notification and evaluation of mergers. Both the addressed improvements will for sure render the activity of the Slovenian Competition Authority more efficient in terms of time and cost of proceedings, with the consequent likely positive effects on an economy that – as previously reported – already shows good indicators in term of growth, development and wealth distribution. Finally, according to the same OECD report, the Slovenian Competition Protection Agency is actively involved in competition advocacy activities,[64] which turned out in an essential tool for shifting the predominant cultural basis from a resistance to competition and the market economy into its acceptance and the positive economic data already mentioned, which have a big significance if we consider that the three Balkans Countries analysed were part of the same State entity.

Shifting the attention to Croatia, the situation of competition law and enforcement in the Country showed the crucial time shift in the adoption and application of competition rules – and of a culture of competition – marked by the more recent entrance into the internal market. Indeed, as the mentioned paper by Pecotić Kaufman and Šimić Banović showed, some resistances still exist in the Croatian context, but it is also worth underlining the general improving trend in the datasets analysed above, which shows an increased development of the economy. The Croatian Competition Act was introduced in 2009, amended in 2013 and subsequently in 2021[65]). The last development occurred in response to the input

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61 OECD, Annual Report on Competition Policy Developments in Slovenia – 2021, 2022, p. 4, [https://one.oecd.org/document/DAF/COMP/AR(2022)32/en/pdf], accessed 12 April 2024. See also Smiljanic V. And Rihtar K., *Institutional Design, Efficiency and Due Process in Competition Enforcement: Lessons from Slovenia and Serbia*, Yearbook of Antitrust and Regulatory Studies, 2020, 22, p. 70.

62 Šešok J., *Main Developments in Competition Law and Policy 2022 – Slovenia*, Kluwer Competition Law Blog, 2023, [https://competitionlawblog.kluwercompetitionlaw.com/2023/02/02/main-developments-in-competition-law-and-policy-2022-slovenia/], accessed 12 April 2024. The English version of the Slovenian Prevention of Restriction of Competition Act (unfortunately without the 2021 amendments) is available at [https://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/angleska_stran/ZPOMK-1-AN_REV-za_objavo_na_spletu.pdf], Accessed 12 April 2024.

63 OECD, Annual Report on Competition Policy Developments in Slovenia – 2021, cit., 13-14.

64 *Ibid. p.* 11.

65 The English version of the Croatian Competition Act is available at [https://www.aztn.hr/ea/wp-content/uploads//2023/02/COMPETITION-ACT-2021-consolidated-241122-ENG.pdf], Accessed 12 April 2024.

represented by EU law through Directive 1/2019 (the so-called ECN+ Directive, aimed at empowering the effectiveness and strengthening the independence of European national competition Authorities[66]), which was implemented in Croatia by means of the Act on the Amendments to the Competition Act, entered into force on 24 April 2021.[67] This reform fully aligned the Croatian Competition Agency (AZTN, established in 1995 and operational since 1997) with the EU *acquis* and empowered it with new tools aimed at rendering its enforcement activity more effective. It introduced tools such as periodic penalty payment and settlement in cartel cases. In addition, the reform defined terms such as cartel, leniency statement, and outlined the procedure for the disclosure of leniency statements and settlement submissions. However, apart from an institutional design that fits the mainly recognised standards, additional efforts are needed with regard to State Owned Enterprises, especially in network industries, such as the energy sector,[68] and to control corruption and clientelism, which are considered to be still a quite widespread phenomenon, especially in public procurement.[69] Having regard to the track record of competition decisions, according to OECD data it is below average in respect of economies comparable to Croatia, with 45 decisions issued by the Croatia Authority in the period 2015-2019 against the average of 60 in other 15 comparable economies during the same period.[70]

Being the most advanced and industrialised economy among non-EU member States in the area, Serbia represents probably the best example of the economic and social transition that the implementation of a competitive market should bring. As the economic indicators reported above showed, improvements are undergoing through the years in Serbia, but much more work needs to be done, especially with regard to government effectiveness, the rule of law, and the control of corruption. All these three profiles are needed in order to establish a healthy competitive market, since no effective competition can occur if there still exists arbitrariness in certain procedures or the negative outcome that corruption brings, especially in the public procurement sector, which is the most touched by this phenomenon in

66 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published in the Official Journal of the EU 14 January 2019, L 11/3.

67 Published in the Official Journal of the Republic of Croatia 16 April 2021, no. 41.

68 OECD, Croatia Country Profile, cit., pp. 21-24, [https://www.oecd.org/south-east-europe/programme/Croatia-country-profile.pdf], Accessed 12 April 2024.

69 *Ibid*.

70 *Ibid.*, p. 24.

Serbia,[71] but which also represents a key field for the development of the country (especially with regard to infrastructures and networks). The control of competition in the Country is entrusted to the Commission for the Protection of Competition (CPC, established in 2005), whose statute, together with the relevant competition legislation (the Law on Protection of Competition, enacted in 2009 and reformed in 2013[72]), is quite in line with the EU standards. The competition Authority is independent from the Government, and it has the power to impose fine on infringers of competition law and it has advocacy duties.[73] Moreover, it is equipped with tools which are commonly used by the main competition Authorities, such as leniency programmes. However, the budget of the Authority, according to the OECD suggestions, should be increased and this need is reflected by the quite low track record of decisions registered by the Serbian Competition Authority in the period 2015-2019, with a track record of 30 decisions versus the average 60 issued in other 15 comparable economies analysed by the OECD.[74] However, according to the European Commission, the transparency of the Authority needs to be strengthened, together with the advocacy efforts.[75] Moreover, the European Commission defined *modest* the specialisation of the judiciary in competition law matters, suggesting that it has to be *improved significantly*.[76] Competition in Serbia needs to be strengthened especially in network sectors, such as energy. In these fields, a part of the European rules has been adopted, but there is still much work to be done. In particular, the energy sector is regulated by a public Authority, the Energy Agency of the Republic of Serbia (AERS), which however can be subject to political influence (its funding and structure are subject to the Parliament's approval).[77] Moreover, it has not the power to impose fines, and its staff is considered below what is needed to carry out its mandate.[78] Improvements are also needed in order to liberalise the energy market and to make public procurement

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71 OECD, Serbia Country Profile, 2022, p. 18, [https://www.oecd.org/south-east-europe/programme/Serbia-Country-Profile.pdf], accessed 12 April 2024.

72 The English version of the Serbian Competition Act is available at [https://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf], Accessed 12 April 2024. For an overview of the Serbian competition law regime, see also Marković Bajalović D., *op. cit.*, pp. 55-59.

73 About the Serbian CPC's advocacy duties see Lukić G. and Potpara J., *Competition advocacy in the legislative procedure to ensure competitive markets in the Republic of Serbia*, in OECD, *Competition Policy in Eastern Europe and Central Asia. Advocacy of competition*, January 2024, pp. 21-23, [https://www.oecd.org/daf/competition/oecd-gvh-newsletter23-january2024-en.pdf], Accessed 12 April 2024.

74 OECD, Serbia Country Profile, cit., p. 21. See also Smiljanic V. and Rihtar K., *op. cit.*, 70.

75 European Commission, Serbia 2023 Report, 2023, p. 107, [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf], Accessed 12 April 2024.

76 *Ibid*.

77 OECD, Serbia Country Profile, cit., p. 19.

78 *Ibid*.

decisions in line with the EU *acquis*.[79] In addition, the Country registers – as a sort of heritage from its past – an important presence of SOEs, active especially in public services markets (such as district heating or water management).[80] However, especially under the influence of international entities such as the World Bank, Serbia has made progress in this sector, and in November 2023 passed a reform which should improve the management of SOEs, introducing a centralised management (not for the energy sector).[81]

5. CONCLUSION: COMPETITION AS A RECIPE FOR GROWTH

The present paper tries to establish a starting point for the development of a theoretical-empirical analysis on the correlation between economic performances of Countries and the development and implementation of a proper and functioning competition law regime. Moreover, it is aimed at proving the positive effects of the legal transplants incentivised by the requirement to implement the *acquis communautaire* on the economies shifting from a post-socialist to a market economy. The method underlying this work is the comparative method, with specific reference to an analysis-synthesis based upon the theory of formants.

After having recalled the importance of competition on the internal market and the factors underlying its essential role, the paper introduced the main peculiarities of the Western Balkan Countries' legal systems, based mostly in their history, characterised by the dissolution of the socialist Yugoslavia and directed towards the integration in the European Union. Subsequently, the analysis turned on its empiric prong, by scrutinising a series of datasets aimed at showing the beneficial effects of the European market system, based upon competition, and therefore on competition in itself. The analysis covered both features that should ease or render more difficult the establishment of a proper competition on the market, such as corruption, and the beneficial effects that this market system should bring in terms of social improvement, innovation and development in the markets concerned. The results of this analysis confirmed our assumptions, by showing the differences between three Western Balkans Countries which were part of the same entity, Yugoslavia, but that then followed a different path towards their 'Europeanisation', *i.e.*, Slovenia, Croatia and Serbia. These outcomes show how Slovenia,

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79 *Ibid*.

80 The World Bank, *Reforming Serbian State-Owned Enterprises May Unleash Growth and Investments*, 2023, [https://www.worldbank.org/en/news/opinion/2023/11/30/reforming-serbian-state-owned-enterprises-may-unleash-growth-and-investments], Accessed 12 April 2024.

81 *Ibid*.

the first one to adopt the European model, presents development and growth indicators more similar to the benchmark Countries France and Germany, followed by Croatia and with Serbia as last and far away from Slovenia, but with improving results, due, we assume, to the progressive alignment with the EU requirements.

This shows how the transplants of the European market model in these Countries proved to be beneficial. However, the following analysis showed how some cryptotypes deeply embedded in these societies' fabric are still present and they partially stifle these Countries' path towards a complete development. Also in this case, the analysis shows a better positioning of Slovenia, followed by Croatia and Serbia, thus reinforcing the evidence regarding the beneficial effects brought by the EU *acquis*' adoption. Anyhow, the presence of these cryptotypes demonstrates how the simple implementation of the European prescriptions does not guarantee their full effectiveness, since they are still not fully followed – in certain contexts – by the society and also by certain institutions.[82] An example is the scarce familiarity of the Judiciary of some former Yugoslavian Countries with regard to competition law[83] and, more in general, the persistence of some operational formant inherited from the socialist past. Also the population, given the persistence of certain customs based on clientelism, has still to fully understand the beneficial effects that competition can bring to individuals, especially pertaining to the lower classes, since for their improvement they do not have to rely on someone's help, but simply on their abilities, along the line of Einaudi's mentioned 'equality of the starting points'.

Therefore, having in mind the positive results reached by Slovenia, the policies that the other Western Balkans Countries have to follow in light of the planned enlargement of the EU in this area have to be founded on competition law and on the implementation of a culture of competition and sound administration as first step. This must be reached through advocacy, promoted by the same EU and by markets by stimulating local Institutions. This can generate a bottom-up positive feedback loop bringing to a renewal of these societies and an improvement of their performances related to rule of law and legality. The competition-development-legality relationship at the basis of the present paper relies on the Ordoliberal concept of what we can define 'free market in a free State', which can be described as a system in which a strong State, not captured by private power, establishes the *level playing field* of the market activities, but without detrimentally influencing them (of course, the State can also participate in the market, with shares in com-

82 Mucaj A., *Competition Law Framework in Kosovo and the Role of the EU in Promoting Competition Policies in Other Countries and Regions Wishing to Join the Block*, Yearbook of Antitrust and Regulatory Studies, 2020, 22, p. 109.

83 European Commission, Serbia 2023 Report, *op. cit.,* p. 106.

panies, but subject to the same rules of competition directed at private firms, with the exception represented by the essential services of general interest). This is the only model which, by establishing limits to both the private and public power, can really empower the individuals' situation. This shows – in a crucial moment of history – how the European Union model, notwithstanding all its (big, but not object of the present paper) pitfalls, represents not a problem but a guarantee of pluralism, development and democratic values. In this sense, the strengthening of rule of law-based institutions is necessary in order to build, in the words of Luigi Einaudi, "The state as a limit, the state which imposes limits on physical violence, on the dominance of one man over others, of one class over others, which seeks to give men the most evenly distributed opportunities to set off towards destinations that are as diverse or distant from each other as possible. The rule of law as a condition for the anarchy of spirits."[84]

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Review paper

PROPOSAL FOR PERMISSION TO REVISE - WHERE ARE WE FIVE YEARS LATER?*

Vedrana Švedl Blažeka, LLM
Attorney at Law in the Law firm Željko Švedl & Vedrana Švedl Blažeka j.t.d.
Trg Ante Starčevića 10/I, Osijek, Republic of Croatia
vedrana.svedl@gmail.com

ABSTRACT

The amendment to the Civil Procedure Act from 2019 established revision by permission as the basic form of this extraordinary legal remedy, which in legal theory and practice caused numerous controversies and lively articulations of (counter)arguments by supporters and opponents of implementation. In the circumstances in which this kind of legislative intervention was carried out, which certainly has an impact on access to the court, it caused considerable resistance among practitioners and a part of the theory of law. On the other hand, there was a need to position the role of the Supreme Court of the Republic of Croatia in the Croatian legal system in accordance with the function established by the constitution and law. However, the intervention in the revision institute was carried out without a comprehensive analysis of all the factors that objectively endangered that function until that moment. This is therefore the starting point in this research, which aims to examine the achievements of the implementation of this institute in practice after five years of existence and to examine whether the goal that part of the professional and scientific community intensively strived for in the process of its implementation was truly realized. In the end, has the authority of the Supreme Court of the Republic of Croatia, with its newly strengthened function, set an example for the courts as a whole and is it correcting the mistakes of the lower courts that until then stifled its actual function. In addition to the effects of the introduction of this institute into the Croatian civil procedural law in today's conditions, the success of the proposal for permission to revise will be analysed in relation to practical challenges and doubts. The analysis of the problem of objectification and transparency of the admissibility criteria is considered extremely important in order to truly enable the applicants of the proposal for permission to revise to realize and protect their rights in a unique and equal way in relation

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to everyone. Clear and objective criteria for drawing up a proposal for permission to revise still do not exist, and they unjustifiably depend solely on the discretionary assessment of the court. The above cannot be an example of acting in the spirit of encouraging legal certainty. The previous disastrous passage of the proposal for permission to revise and the observed length of time in solving socially extremely sensitive issues indicate caution and the necessity of certain corrections in the institute of revision by permission itself. In the final remarks, an approach to the solution of open controversies and doubts will be offered in order to demystify the institute of revision by permission, or more specifically, the proposal for permission to revise, which at this moment is still a lottery for professionals who are authorized to invest it.

Keywords: *legal remedy, revision by permission, important legal question, objective submission conditions*

1. INTRODUCTION

The amendment to the Civil Procedure Act from 2019 (hereinafter: CPA) made significant changes to the norms that until then regulated the revision institute and the revision procedure itself. In this sense, the revision by permission was founded and thus formed as the basic form of this extraordinary legal remedy.[1] Some legal systems close to us, on which the Croatian legislator often relies, in this specific case the Slovenian and the German legislation, have known the solution of the revision institute as adopted by the 2019 Amendment to the CPA in the Croatian legal system in different forms before. In this particular case, the Croatian legislator chose the institute of revision as a means of ensuring the uniform application of rights and the equality of all in its application, along with an accompanying attempt to realize the constitutional and legal public function of the Supreme Court of the Republic of Croatia (hereinafter: SCRC), choosing a rather radical Slovenian solution for the current state of the judiciary in the Republic of Croatia.[2] It seems that, apart from the theoretical

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1 Civil Procedure Act (Zakon o parničnom postupku), Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14, 70/19, 89/14, 70/19, 80/22, 114/22, 155/23.

2 See Bobek, M., *Quantity or Quality? Re-assessing the Role of Supreme Jurisdictions in Central Europe?*, European University Institute, Department of Law, EUI Working Paper LAW, San Domenico di Fiesole, 2007, pp. 26 – 27 (The author describes the situation in the Czech Republic and in post-communist Europe. Objective disputed questions are presented in relation to the role of the SCRC and the issue of individual legal protection of citizens. Moreover, the author's conclusion regarding the real problems of the Central European countries, due to which the new models of the SCRC approach seem to have been done at the wrong time and in the wrong place, is especially highlighted.); Domej, T., *What is an important case? Admissibility of appeals to the Supreme court in the german-speaking jurisdictions*, in: Uzelac, A.; Van Rhee, C.H, Nobody's Perfect, Intersentia, 2014, p. 285 (Differences are observed in the consideration of an important issue in the German legal systems, whereby differences are clearly observed between certain not only legal but also social parameters of the concept of importance and (excessive) restrictiveness when it comes to the application of requirements to a correct court decision.); Galič, A., *Za reformo revizije v pravdnem postopku*, Pravna praksa, Ljubljana, No. 43, 2007; Karlovšek, I., *Kaj bo prinesla novela ZPP-E*, Pravna praksa, Ljubljana, No. 39 - 40 2016, p. 16 (The negative consequences of the implemen-

analysis of a narrow circle of domestic scientists, it was not preceded by the evidently necessary analysis and research of the situation at lower court instances. The fact that from 2019 to the middle of 2021 the SCRC allowed the revision of only 17.42 % of the proposals for permission to revise, including proposals with the same/identical legal issues, is devastating.[3] Controversies and doubts observed in practice, brought about by the drastic change in the regulation of this extraordinary legal remedy, are not negligible even today, even though it seems that legal theory has given up on further analysis of the highly accentuated changes of this institute. Considering the controversies that followed its implementation, it does not seem justified to stop with the analysis of this extremely important legal institute. Since the interest of the interest group in positioning the SCRC in ensuring the uniform application of the law and the equality of citizens prevailed beyond any doubt (primarily judges of the SCRC and part of the legal theorists), while the criticisms of lawyers and some legal theorists were not seriously considered, this paper will try to examine whether there was a need for a more systematic and cautious implementation of the newly conceived revision institute or should a less radical solution have been found after a five-year gap. The fact is that this institute has been implemented in the Croatian legal system and that it has been producing certain effects for five years. In this paper, will therefore be examined the actual reach of the institute in practice, while not going into the justification or non-justification of the implementation itself. This paper will therefore consider the extent of achieving the goal of this institute despite the (non)establishment of clear and transparent criteria for the successful submission of a proposal for permission to revise, as well as the existence of an objective justification of strict formalism arising from a non-transparent base. At the very least, it strives to establish standards that will not result in an overwhelming number of rejections of motions for proposals for permission to revise. So, the initial indicators are not positive and show that 81.68 % of the applicants are struggling with the discretionary positions of the court, where they are obliged to fulfil the (non)existing and non-transparent

tation of this solution in Slovenia are pointed out, and distrust in the quality of judging at lower levels is justified. The use of the phrase how the applicants are actually holding on to the rope in anticipation of the success of the revisions truthfully describes the situation on the ground even today.); Tobor, Z.; Zeifert, M., *How Polish Courts Use Previous Judical Decisions?*, in: Studia Iuridica Lublinensia, Katowice, 2019 (In the paper, the authors presented the openness of the Polish legal system to precedential law which deviates from the application in countries where precedents are the basis for judicial consideration of cases.); Zobec, J., *Ustavnopravni aspekti revizije po dopuštenju u Republici Sloveniji*, Zbornik Pravnog fakulteta Sveučilišta u Zagrebu, Vol. 68, No. 5 – 6, 2018, pp. 697 – 680 (This author, like *Bobek*, presents an objective view of the difficulties in performing the existing function of the SCRC and emphasizes the fact, which is also confirmed by this research, that it would be misleading to think that it is possible to stop with the modernization of the role of the SCRC and that there is room for the development of more effective mechanisms for the implementation of the implemented audit institute.).

[3] Seminar of Jadranko Jug, Judge of the Supreme Court of the Republic of Croatia before the Croatian Bar Association, Zagreb (September 2021).

criteria for drafting a proposal for permission to revise, which is often formulated by the SCRC itself. Also, the question of whether there is access to adequate information (databases) in the Croatian legal system today to form the very proposal for permission to revise should be emphasized. The formulation of an important legal question and a specific exposition of the reasons for the importance of the legal question posed today are a non-negligible stumbling block for the applicants of proposals for revision permission, despite the fact that they are legal experts, lawyers (Art. 91 a of the CPA). On the other hand, the quality of lower court decisions and their impact on the parties' access to revision by permission, both before the 2019 Amendment and today, has been unjustifiably left aside and beyond any objective criticism. In the described conditions, is it possible to talk about an effective and expedient change of the SCRC function paradigm, or should we seriously consider adjustments due to observed unfavourable circumstances during the five-year period of application of the modified institute of revision by permission?

Scientific methods common to the field of legal science will be applied in the work. The first part of the paper will present the reasons and motives for radical interventions in the institute of revision and will present the new regulations of this institute. The central part of the paper will present the challenges and controversies arising from the application of this institute in practice from its implementation until today. In this sense, the difficulties in the very formation of the proposal for permission to revise and the decision-making approach according to that proposal will be considered. In addition, the effectiveness of the inflexible approach in the application of this institute will be considered from the perspective of the proposer within the framework of the current situation in the domestic judiciary and its perception in the public. The concluding remarks will present the results of the research and suggest the consideration of a more flexible approach in the application of this institute to the extent that the paradigm of the SCRC function will not be called into question.

2. SOME ASPECTS OF REVISION BY PERMISSION IN THE CROATIAN LEGAL SYSTEM

2.1. About the motives of the radical turn to the revision institute as an extraordinary legal remedy

Until the drastic interventions of the revision institute and the revision procedure in 2019, the SCRC was burdened with numerous unresolved cases and a continuous influx of new ones.[4] In this sense, the realization of the very function of the SCRC,

[4] Bratković, M., *Revizija po dopuštenju: hrvatske dvojbe i slovenska iskustva*, in: Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična dostignuća, Split, 2016),

based on the constitutional arrangement according to which everyone is equal before the law and has the right to a fair trial (Art. 14, 16 and 116 of the Constitution of the Republic of Croatia (hereinafter: Constitution), Art. 20 of the Law on Courts), was brought up to date.[5] It was drafted in compliance with the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), which emphasizes the right to a fair trial through the elements of the right of access to court, equality of arms, the prohibition of arbitrary treatment and the right to a reasoned decision, etc.[6] Although the right of access to court is recognized in theory as the highest procedural rule, it is not absolute, which means that in certain conditions it can be limited in the sense of limiting the rules governing extraordinary legal remedies.[7] It was therefore necessary to set up the SCRC in accordance with the function of ensuring the uniform application of the law and the equality of citizens.

The first significant step towards changing the regulatory framework of the revision institute was taken after the intervention of the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Court) in 2006, which reacted to disturbances in the constitutional competences of the Constitutional Court and the SCRC, and then in 2008 and 2011, however, no significant progress has been made and there has been no relief and reduction in the flow of cases in the decision-making of the SCRC.[8] However, there is no information or inquiry on

(hereinafter: Bratković, *Revizija po dopuštenju: hrvatske dvojbe i slovenska iskustva*), pp. 324 - 325; Dika, M., *Marginalije uz prijedlog novog uređenja revizije u parničnom postupku*, Odvjetnik, No. 3 - 4, 2018, (hereinafter: Dika, Marginalije uz prijedlog novog uređenja revizije u parničnom postupku), p. 22; Katić D., *Zašto (opet) nove izmjene Zakona o parničnom postupk*u, in: Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična dostignuća, Zbornik radova s II. Međunarodnog savjetovanja, (2016) Split, (hereinafter: Katić, *Zašto (opet) nove izmjene Zakona o parničnom postupk*u) p. 150; Poretti, P.; Mišković, M., *Novine u revizijskom postupku*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 1, 2019, p. 506 – 507.

5 Grbin, I., *Izvanredni pravni lijekovi - revizija prema zakonskim novelama*, Pravo i porezi, No. XIII, 2014, p. 31; Poretti; Mišković, *op. cit.*, note 4, p. 503.

6 Poretti; Mišković, *op. cit.*, note 4, p. 504; Convention for the Protection of Human Rights and Fundamental Freedoms (Konvencija o zaštiti ljudskih prava i temeljnih sloboda), Official Gazette, International Agreements, No. 18/97, 9/99, 14/02, 13/03, 9/05, 1/06, 2/10,13/17.

7 Lovrić, M., *Pravo na pristup sudu kao esencija vladavine prava*, Financije i pravo, Vol. 7, No. 1, 2019, p. 42; Šarin, D., *Pretpostavke za pristup sudu - pravna stajališta i praksa Europskog suda za ljudska prava*, Pravni vjesnik, Vol. 32, No. 1, 2016, p. 268.

8 Gović, I., *Revizija u svjetlu posljednjih izmjena i dopuna Zakona o parničnom postupku*, Zbornik Pravnog Fakulteta Sveučilišta u Rijeci, Vol. 29, No. 2, 2008, p. 1121; Poretti; Mišković, *op. cit.*, note 4, p. 504, 506; Constitutional Court of the Republic of Croatia decision number: U-I-1568/04 from 20 December 2006; Constitution of the Republic of Croatia (Ustav Republike Hrvatske), *Official Gazette*, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.; Judiciary Act; Law on Courts (Zakon o sudovima), Official Gazette, No. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23.

the reasons to burden the highest judicial instances, nor the contribution that the practice of lower courts had to such a situation. So, only with legislative interventions from 2019 and following the model of the rather radical Slovenian solution, significant and fundamental changes were made to the revision institute through a "two-phase" revision procedure.[9] There is nothing objectionable in adopting solutions from other legal systems, especially those related to ours, but the implementation of these solutions in domestic legislation is possible with adaptation to the specific circumstances of the domestic legal system.[10] On the one hand, the changes were harshly criticized and were essentially implemented without the consensus of judges, lawyers, and two groups of legal theorists.[11]

Discussions about the role of the SCRC with the aim of finally realizing its constitutional and legal function, which was discussed in the previous text, led to the question of whether the function of the SCRC is contained in the protection of public or private interests.[12] Revision in the existing regulatory framework has an emphasized public function of the SCRC in shaping the predictability, uniqueness and consistency of judicial practice.[13] The intervention of the SCRC in a certain

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9 Civil Procedure Act (Zakon o pravdnem postopku), Official Gazette, št. 73/07 – uradno prečiščeno besedilo, 45/08 – ZArbit, 45/08, 111/08 – odl. US, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 40/13 – odl. US, 92/13 – odl. US, 10/14 – odl. US, 48/15 – odl. US, 6/17 – odl. US, 10/17, 16/19 – ZNP-1, 70/19 – odl. US, 1/22 – odl. US in 3/22 – Zdeb (hereandafter: Slovenian CPA). Dika, *Marginalije uz prijedlog novog uređenja revizije u parničnom postupku*, *op. cit.*, note 3, pp. 23 – 24.

10 Garašić, J., *Osvrt na novopredložene odredbe o reviziji u parničnom postupku,* in: 18. Nacrt prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku, Odvjetnik, No. 3 - 4, 2018, p. 38; Portal Ius Info, [https://www.iusinfo.hr/aktualno/dnevne-novosti/hrvatska-i-dalje-na-zacelju-eu-a-u-percepciji-neovisnosti-pravosuđa-50831], Accessed 29 February 2024; Portal Telegram.hr, [https://www.telegram.hr/politika-kriminal/europska-komisija-objavila-je-godisnje-istrazivanje-o-pravosudu-mi-smo-rekorderi-imamo-najvise-sudaca-i-najmanje-im-vjerujemo/], Accessed 29 February 2024; Goverment of the Republic of Croatia, [https://vlada.gov.hr/vijesti/potrebna-sinergija-kvalitetnih-reformskih-mjera-i-profesionalnosti-u-okviru-pravosudja/35462], Accessed 29 Februrary 2024.

11 Dika, *Marginalije uz prijedlog novog uređenja revizije u parničnom postupku, op. cit.*, note 4, pp. 23 - 26; Garašić, *op. cit.*, note 10, p. 38, pp. 56 - 58; Bodul, D., *Discussions on a New Model of Revision in Croatian Civil Procedure Law*, Journal of Legal and Social Studies in South East Europe, Vol. 1 - 2, No. 1, 2019, p. 74; Bodul, D.; Čuveljak, J.; Grbić, S., *(Još) o ujednačavanju sudske prakse u građanskim predmetima*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 41, No. 1, 2020, pp. 145 – 146; Katić, *O revizijama i noveliranju Zakona o parničnom postupku*, in: Okrugli stol o ZPP-u u Hrvatskoj odvjetničkoj komori, *Odvjetnik*, No. 3 - 4, 2018, p. 61 (hereinafter: Katić, *O revizijama i noveliranju Zakona o parničnom postupku*)

12 See Galič, A., *A Civil Law Perspective on the Supreme Court and Its Functions*, paper presented at the conference The Functions of the Supreme Court - Issues of Process and Administration of Justice, Warsaw, (11-14 June 2014).

13 Bratković, M., *Što je važno pravno pitanje u reviziji?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 68, No. 5 - 6, 2018, p. 857 (hereinafter: Bratković, *Što je važno pravno pitanje u reviziji?*); Poretti; Mišković, *op. cit.*, note 4, p. 517.

case would have to go beyond the private interest of the party in the individual case who is trying to realize the individually violated right whose protection he is seeking from the court, therefore legal theory considers that individual protection is essentially "collateral" in the system that protects the public interest.[14] It is intended to enable intervention in cases when questions are raised that contribute to the public interest, the uniqueness of judicial practice and the development of law.[15] However, the question of whether the private interest of the parties (where realization of legal protection is in the private or individual interest of the party conducting a particular court proceeding) should be completely omitted in the newly renovated revision institute is still relevant today, and even more so with the increase in court costs.[16] The positions of legal theory on whether the dominant public or private interest is diverse, and one comes across dominant positions in favour of the public interest and more moderate positions in favour of the private interest of the parties who essentially enable, with their dispositions, the activity of the SCRC, which it tried so hard to position strictly.[17] Each of these positions must be considered within the time, circumstances and trends in which it takes place, and in the Croatian example, one cannot ignore the lack of trust in the legal system, and the quality and uniformity of second-instance decisions.[18] In this paper, we would take the position that the fact that the parties initiate litigation in order to protect their subjective rights and ultimately bear all the costs of this struggle is very significant, but we also see nothing controversial in the fact that the public interest is protected in a balanced way through individual party interventions of all citizens.[19]

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14 Betetto, N., *Role of the Supreme Court of the Republic of Slovenia in Ensuring a Uniform Application of Law*, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, Vol. 68., No. 5 – 6, 2018, p. 690; Bratković, *Što je važno pravno pitanje u reviziji?*, *op. cit.*, note 13, p. 858.

15 Betetto, *op. cit.*, note 14, p. 689; Katić, *Zašto (opet) nove izmjene Zakona o parničnom postupku*, *op. cit.*, note 4, p. 150; Pelcl, H., *Dopuštenost izvanredne revizije u građanskom parničnom postupku Republike Hrvatske*, Anali Pravnog fakulteta Univerziteta u Zenici, Vol. 9, No. 17, 2016, p. 214.

16 Katić, *Zašto (opet) nove izmjene Zakona o parničnom postupk*u, *op. cit.*, note 4, pp. 146 - 147; Katić, *O revizijama i noveliranju Zakona o parničnom postupku*, *op. cit.*, note 11, p. 63; Poretti; Mišković, *op. cit.*, note 3, p. 517; Švedl Blažeka, V., *Propisal for permission to revise in croatian law-achieving a goal or source of disputes?*, Conformity, Complience and Conformism in Law, International conference of PhD students in law, Timisoara, 14th edition, 2022, pp. 632 – 633.

17 Dika, *Marginalije uz prijedlog novog uređenja revizije u parničnom postupku*, *op. cit.*, note 4, p. 25; see also Šagovac, A., *Stranputice revizije prema Nacrtu prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku*, Organizator, No. 6565, 2019; Bratković, *Revizija po dopuštenju: hrvatske dvojbe i slovenska iskustva*, *op. cit.*, note 4, p. 856; Poretti; Mišković, *op. cit.,* note 4, p. 519; Katić, *Zašto (opet) nove izmjene Zakona o parničnom postupk*u, *op. cit.*, note 4, p. 202.

18 Švedl Blažeka, *op. cit.*, note 16, p. 633.

19 *Ibid.*

2.2. Revision by permission in the Croatian legal system through the regulatory framework

Revision is determined as an extraordinary legal remedy that is filed against second-instance decisions that legally end the proceedings, and by its legal nature it is independent, devolutive, non-suspensive, limited and bilateral, due to a violation of the law, with the fulfilment of the assumptions prescribed by law.[20] The SCRC decides on the proposal for permission to revise with the previously described goal of ensuring the uniform application of the law and the equality of all citizens.[21] In the existing understanding on the scope of authority of the judicial practice of second-instance courts, the impression is left that they do not provide a satisfactory guarantee of legal security and realization of the rule of law. In this sense, the legal contribution of the institute and the function of the revision institute is to examine the regularity and legality of the final second-instance verdict, the final intermediate verdict, and the final decision that finalizes the proceedings.[22] What is still considered a significant legislative omission is the failure to establish objective criteria on the basis of which the applicants will be able to create a proposal for permission to revise that meets the conditions for consideration by the SCRC. On the other hand, unnecessary burdens can be observed in the process of creating a proposal for permission to revise, which essentially do not contribute to the purpose of the institute itself, for example, explaining the importance of the revision question or creating a proposal that fills a significant part of the text of the permission to revise itself. At the same time, this position of the author is not influenced by the possibility that the statistics of the rejection of proposals for permission to revise have improved, while in fact the situation from the perspective of the applicant in practice is such that practitioners await a decision on their request with great uncertainty according to the criterion "try and hope for the best outcome".

From 2019, the amendment of this institute was implemented and in 2022, where earlier the provision of Art. 382 a and 385 CPA - on exceptional investment options, this legal remedy in specific cases and due to certain reasons was deleted, whereby the restrictions were strengthened instead of mitigated, while the rest are basically corrections that did not deviate from the requirements of the earlier decision from 2019. Thus, according to the provision of Art. 382 of the CPA, the par-

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20 Dika, M., *Građansko parnično procesno pravo, Pravni lijekovi*, X. Knjiga, Narodne novine, Zagreb, 2010, p. 258 (hereinafter: Dika, *Građansko parnično procesno pravo, Pravni lijekovi*); Poretti; Mišković, *op. cit.*, note 4, p. 508.

21 Jelinić, Z., *Sudska praksa u građanskim predmetima u sustavu primjene i tumačenja prava*, in: Zbornik Aktualnosti građanskog procesnog prava-nacionalna i usporedna pravnoteorijska i praktična dostignuća, Pravni fakultet u Splitu, Split, 2015, p. 183.

22 Poretti; Mišković, *op. cit.*, note 4, p. 509.

ties may file a revision against the judgment rendered in the second instance if the SCRC has allowed the filing of a revision. Thus, the SCRC decides on the admissibility of the revision based on the motion for permission to revise (Art. 387 CPA). The proposal for permission to revise is submitted within 30 days from the delivery of the second-instance decision, and in the case of permission within 30 days from the delivery of the revision decision on its admissibility (Art. 382 and 387 of the CPA). The SCRC will reach, in accordance with the provisions of Art. 385 a of the CPA revision, a decision on a legal issue that the lower-level courts considered in that dispute, which is important for the decision in the dispute and for ensuring the uniform application of the law and the equality of all in its application, or for the development of law in judicial practice, especially if it is a question of law for which the decision of the second-instance court deviates from the practice of the SCRC or if it is a question of law on which there is no practice of that court, especially if the practice of higher courts is not uniform or if it is a question of law on which the practice of the SCRC is not unique, or if the SCRC has already taken an understanding on that issue and the judgment of the second-instance court is based on that understanding, but especially considering the reasons presented during the previous first-instance and appeal proceedings, due to a change in the legal system conditioned by new legislation or international agreements and the decision of the Constitutional Court, the European Court of Human Rights (hereinafter: the ECtHR) or the Court of the European Union (hereinafter: CJEU) should review the judicial practice. In addition to the above, the SCRC will also allow a revision if the party makes it probable that in the first- and second-instance proceedings, due to particularly serious violations of the provisions of the civil procedure or incorrect application of substantive law, a fundamental human right guaranteed by the Constitution and the ECHR has been violated. Freedom and that the party, if it was possible, had already referred to these violations in a lower-level procedure. Thus, the role of the SCRC in deciding on the admissibility of a motion for permission to revise, which can therefore be filed against all second-instance decisions, is reinforced by the requirement to meet strict but limited legal presumptions. The proposal for permission to revise the SCRC is not decided, as before, in a smaller composition, but at a council session where the public is excluded, however, when it judges that it is in the public's interest, the council can hold the session in public and invite the parties and their representatives to it (Art. 389 of the CPA).

The motion for permission to revise, in addition to the information that every submission must contain, in accordance with Art. 387 CPA, the designation of the judgment against which it is submitted, a specified legal issue from Article 385 a para. 1 of the CPA or a specified fundamental human right from Article 385 a para. 2 of the CPA for which the party believes that it has been violated in the proceed-

ings, with proof that the party has exhausted the permitted legal recourse in this regard, after which clearly indicating reasons why the party believes that the SCRC should allow it to revise in terms of the previously stated assumptions of the article with specific reference to the relevant regulations and parts of court decisions. The SCRC will reject a motion for permission to revise if, based on what has been submitted to it, it assesses that the motion does not involve an important legal issue as required by Article 385 a para. 1 of the CPA. However, in the decision rejecting the motion for permission to revise, the court will specifically state the reason for the rejection, referring, if possible, to its previous practice. Furthermore, it is allowed to only provide extremely detailed reasons for decisions, if it judges that this is in the interest of the public (Art. 389 b CPA). Furthermore, it is important to mention that the decision allowing the revision will indicate in relation to which legal issue or in relation to which violation of fundamental human rights and in relation to which part of the decision the submission of the revision is allowed. If the motion is rejected the decision will include violations of fundamental human rights in relation to the proposal for permission to revise, and have it withdrawn. A legal remedy against the rejected decision on the proposal for permission to revise is not allowed, and the SCRC is obliged to decide on the proposal for permission to revise within a reasonable time, and certainly within a period shorter than six months from the receipt of the proposal for permission to revise (Art. 389 c CPA). It is considered relevant to point out the indicative circumstances related to the costs of embarking on an undertaking called the submission of a proposal for permission to revise. Moreover, one of the legislator's attempts to reduce the flow of these proposals to the Supreme Court even after the introduction of this institute was carried out in 2021, when (nevertheless) amendments to the Court Fees Tariff introduced the obligation to pay a court fee on a proposal for permission to revise, which caused an additional material burden on the parties.[23]

3. PROPOSAL FOR PERMISSION TO REVISE AND ATTENDANT CONTROVERSIES

3.1. Challenges of submitting a proposal for permission to revise through the lens of the applicant

Earlier it was indicated that according to the available data from September 1, 2019. until 31 July 2021, 7,755 proposals for revision permission were submitted to SCRC of which 4,071 proposals (81.68 %) were rejected.[24] The statistics

[23] Court Fees Tarife (Uredba o tarifi sudskih pristojbi), *Official Gazette,* No.53/19, 92/21.

[24] Tribune held in Zagreb: Revision in civil proceedings *de lege ferenda* - revision by permission (February 9, 2017):

include accepted and rejected motions of the same subject matter. In these conditions, the question arises on the reasons and the criteria that must be met so that the proposal for permission to revise does not result in rejection. The legal norm that governs the proposal for permission to revise from Art. 387 CPA still does not contain a single objective and transparent criterion that can refer to the conditions that the applicant must fulfil in order for his proposal to be viable.[25] So, the situation in practice is such that the requirements for form and concrete criterion are still covered with insecurity of the radical solution for the norm from the provisions of Art. 387 of the CPA, which is still fundamentally flawed.[26] The difficulties that the applicants of proposals for permission to revise objectively have in practice arise from unclear, non-transparent and unilaterally determined criteria for meeting the conditions for creating a proposal for permission to revise, whereby the framework in not set in an unique form but on a case-by-case basis. The main controversies and doubts are related to the scope of the discretionary powers of judges of the SCRC, raising an important question and explaining the reasons for its importance.

3.1.1. Scope of application of discretionary assessment in the consideration of proposals for permission to revise

Pursuant to the provisions of Art. 387, the CPA stipulates that in the proposal for permission to revise, the party must specifically indicate the specified legal issue for which it proposes to be allowed to submit a revision, and clearly set out the reasons why it considers it important in the sense of the provisions of Art. 385 a para. 1. of the CPA, so that the SCRC should allow it to revise in terms of the previously stated assumptions of the article with specific reference to the

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[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjFspKTs8r2AhVVuKQKHXRdDtMQFnoECAgQAQ&url=https%3A%2F%2Finformator.hr%2Fstrucni-clanci%2Fpravna-shvacanja-vrhovnog-suda-korigirana-novelom-zppa&usg=AOvVaw2LNyqULN_m0upRA9rPSb1t], Accessed 16 March 2022.

[25] For the most comprehensive overview of the organizational shortcomings on the institute of revision from 2019, see Garašić, *Osvrt na novopredložene odredbe o reviziji u parničnom postupku,* in: 18. Nacrtu prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku, Odvjetnik, No. 3 - 4, 2018; Bratković, M., *Što je prijedlog za dopuštenje revizije, a što revizija u parničnom postupku*, Pravo i porezi, No.1, 2020, p. 14 (hereinafter: Bratković, *Što je prijedlog za dopuštenje revizije, a što revizija u parničnom postupku*) p. 15; Pelcl, *op. cit.*, note 15, pp. 209 – 210.

[26] Garašić, *op. cit.*, note 10, p. 47; Decisions of the SCRC stating e.g., "valid reasons for validity", "not exposed or stated", "appropriate reasons" and "adequate reasons for validity" number: Revd-1226/2021 from 30 March 2021, Revd-3487/2021 from 19 October 2022, Revd-892/2022 from 15 March 2022, Revd-1810/2021 from 05 October 2022, Revd-2503/2020 from 02 December 2020, Revd-4022/2020 from 23 February 2021, Revd-3284/2022 from 28 September 2022, all available at Portal sudske prakse Vrhovni sud Republike Hrvatske, Accessed 25 April 2024.

relevant regulations and parts of court decisions. The doctrinal position is supported, according to which the decision on the proposal for permission to revise does not have discretionary features in the existing regulatory framework, which is applied within the framework of an abstract legal norm.[27] The trust in court decisions made in the Croatian legal system, as defined by legal theory, is in itself non-sustainable and unconfirmed by research. In recent times, on the other hand, we have witnessed negative examples of the behaviour of SCRC in their public statements aimed at the parties to proceedings on which SCRC decides. Media exposure of SCRC in socially extremely sensitive cases showed that our legal system as a whole did not justify the trust it expects from citizens by inertia. An example is the media case of a custody dispute, and another no less important problem of CHF loans whose duration and inaction is covered in public media.[28] Thus, in the existing undeniably negative social perception of judging, it is clear that the

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27 Bratković, *Revizija po dopuštenju: hrvatske dvojbe i slovenska iskustva*, *op. cit.*, note 4, p. 333 (This author explicitly states that the Supreme Court's conduct in decision-making cannot be considered discretionary. However, in its decisions, the Supreme Court often states that "*the court ruled that no specific reasons were given* ..." e.g. decisions number: Revd-4068/2021 from 20 October 2021, Revd-413/2021 from 02 March 2021, Revd-2478/2021 from 15 June 2021, Revd-4513/2021 from 20 October 2021, Revd-5210/2021 from 19 January 2022, Revd- 1386/2023 from 03 May 2023, Revd-3718/2022 from 21 September 2022, Revd-454/2022 from 09 February 2022, Revd-127/2022 from 19 January 2022, Revd-5408/2021 from 22 December 2021, Revd-2251/2022 from 05 October 2022, Revd-1813/2021 from 30 March 2022, Revd-3635/2021 from 23 February 2022 etc., all available at Portal sudske prakse Vrhovni sud Republike Hrvatske, Accessed on 25. April 2024.; Švedl Blažeka, *op. cit.*, note 16, pp. 637 – 638.

28 Portal Jutarnji.hr,
[https://www.jutarnji.hr/vijesti/hrvatska/vrhovni-sud-se-oglasio-o-tome-sto-je-dobronic-mislio-kada-je-rekao-da-severina-nije-mala-zenica-ovako-je-to-bilo-15420012], Accessed on 29 February 2024.
Portal Dnevnik.hr,
[https://dnevnik.hr/vijesti/hrvatska/vrhovni-sud-reagirao-na-komentare-radovana-dobronica-o-severininom-slucaju---825214.html], Accessed 29 February 2024.
Portal Jutarnji.hr,
[https://www.jutarnji.hr/vijesti/hrvatska/veliki-prosvjed-udruge-franak-55-tisuca-obitelji-ceka-pravdu-15321613], Accessed 29 February2024.
Portal Indeks.hr,
[https://www.index.hr/vijesti/clanak/prosvjed-udruge-franak-u-centru-zagreba-zahtijevamo-odluku-vrhovnog-suda/2451542.aspx], Accessed on 29 February 2024.
Portal Večernji.hr,
[https://www.vecernji.hr/biznis/udruga-franak-prijavila-predsjednika-vrhovnog-suda-duru-sessu-ustavnom-sudu-1386637], Accessed 29 February 2024.
Portal Večernji.hr,
[https://www.vecernji.hr/vijesti/pitanje-je-moze-li-prosireno-vijece-vrhovnog-suda-ujednacavati-hrvatsku-sudsku-praksu-1734897], Accessed 29 February 2024.
Portal Varaždinski.net.hr,
[https://varazdinski.net.hr/vijesti/drustvo/4361429/udruga-franak-varazdinski-zupanijski-sud-pokusava-glumiti-vrhovni-sud-i-unosi-kaos-u-sudski-sustav/], Accessed 29 February 2024.
Portal Slobodnadalmacija.hr,

arbitrariness of court decisions is still an actual issue on all levels of judging. There is no counter-evidence that the parties have enough confidence in the court decisions made at a lower level, which would have an impact on reducing the flow of cases to the SCRC.

There are not enough convincing arguments that the SCRC would recognize the importance of a legal question. It is possible to accept the position that the authority of SCRC is acquired through persuasiveness and strength of arguments, but also through consistency in achieving equality of all, which cannot function in a rigorous system based solely on strict formalism. The practice of the SCRC still does not show grounds so that we can exclude the threat of the party's right to a fair trial.[29] The theoretical position according to which the courts should be given time to solve this problem is not acceptable.[30] The parties are not interested in the deliberations of the courts because they are not obliged to be burdened with the formation of judicial practice, but have a legitimate interest in expecting that inconsistencies are reacted to as soon as possible in order to ensure equality for all and create an impression of legal security. The path to unification of judicial practice is evidently slow and uncertain in all aspects, participants adjustments included. One of the further examples of bad practice is that the long-term and sluggishness of the creation of the authoritative uniform judicial practice of the SCRC consequently leads to objective impatience in the lower courts and the different practice of the county courts is created which in such circumstances results in the hope that the case will be assigned to the court which took a more positive

[https://zadarski.slobodnadalmacija.hr/zadar/tribina/udruga-franak-neodrzivo-shvacanje-gradanskog-odjela-vrhovnog-suda-rh-nije-proslo-sudsku-evidenciju-kada-ce-odluka-konacno-biti-donesena-1268453], Accessed 29 February 2024.
Nacional.hr,
[https://www.nacional.hr/udruga-franak-gradani-traze-odgovor-zasto-pojedini-suci-vrhovnog-suda-i-dalje-pogoduju-stranim-bankama/], Accessed 29 February 2024.
Portal Slobodnadalmacija.hr,
[https://sibenski.slobodnadalmacija.hr/sibenik/vijesti/hrvatska-i-svijet/prava-sramota-blizi-se-datum-zastare-za-tuzbe-zbog-kredita-u-svicarskim-francima-gradani-cekaju-a-vrhovni-sud-suti-1268183], Accessed 29 February 2024.
Nacional.hr,
[https://www.nacional.hr/dsv-bira-nove-suce-vrhovnog-suda-vodeca-kandidatkinja-presudila-je-protiv-stedisa-u-slucaju-franak/], Accessed 29 February 2024.
Udruga Franak,
[https://udrugafranak.hr/europski-sud-za-ljudska-odbacio-je-tuzbe-banaka-protiv-republike-hrvatske-za-slucaj-franak/], Accessed 29 February 2024.

[29] Pelcl, H., *op. cit.*, note 15, p. 210.

[30] Bratković, Što je važno pravno pitanje u reviziji, *op. cit.*, note 13, pp. 866 – 867; Švedl Blažeka, V. *op. cit.*, note 16, p. 634.

approach on the subject matter during department sessions.[31] It is proposed to introduce prescribed forms for submitting a proposal for permission to revise, modelled on the instructions given to applicants by the Constitutional Court, The European Court of Human Rights (hereinafter: the ECtHR) or the Court of Justice of the EU (hereinafter: CJEU), which, despite a certain degree of formalism, still show an awareness of the position of the applicant, whether they are professionals or not.[32] It seems that after five years the time has come to re-consider whether the SCRC provided Croatian citizens with a uniform application of the law and equality, or whether due to "formalistic (bureaucratic) cynicism such a radical legislative intervention, which was based on the idea that "when the door to the Supreme Court is wide open it is the same as if the doors of the highest judicial instance are closed» left the parties in front of firmly closed doors.[33]

It is not necessary to present a large number of examples on the dysfunctionality of the rigorous approach to the revision institute to indicate that after a five-year period of application it seeks compromises in the approach to normative solutions.[34] In the attempts to find one's way in the sea of ambiguities, one would like to mention a very specific example of an attempt to prevent the creation of the SCRC practice. In the already mentioned example, the so-called converted CHF loans, around which in practice a number of disputed issues have arisen, of which the most relevant issue of compensation after conversion in the period from 2016 to 2020 which has not been resolved (even to this day).[35] In that case, the prosecutor

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31 County court in Varaždin, Announcement of the Civil Department of the County Court in Varaždin on the adopted legal interpretation from 14 June 2023; Sudovi.hr, [https://sudovi.hr/hr/zsvz/priopcenja/priopcenje-gradanskog-odjela-zupanijskog-suda-u-varazdinu-o-zauzetom-pravnom], Accessed 29 February 2024.

32 Instructions for applying are published at web sites of the Constitutional Court of the Republic of Croatia, [https://www.usud.hr/hr/ustavne-tuzbe-upute], Accessed 11 April 2022; European Court of Human Rights (hereinafter: ECtHR), [https://www.echr.coe.int/Pages/home.aspx?p=applicants/hrv&c], Accessed 11 April 2022.; European union Law: [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32020Q0214(01)], Accessed on 11 April 2022.

33 Dika, M., *Marginalije uz prijedlog novog uređenja revizije u parničnom postupku*, *op. cit.*, note 4, p. 25; Katić, D., *O revizijama i noveliranju Zakona o parničnom postupku, op. cit.,* note 11, p. 61.

34 See Švedl Blažeka, V., *op. cit*., note 16, pp. 640 – 641.
Portal Večernji.hr,
[https://www.vecernji.hr/vijesti/vrhovni-sud-revidira-presude-o-vracanju-bruto-placa-specijalizanata-1717851], Accessed on 29 February 2024.
Portal Telegram.hr,
[https://www.telegram.hr/politika-kriminal/vazna-odluka-ustavnog-suda-doktor-koji-je-dao-otkaz-odmah-nakon-specijalizacije-ne-mora-bolnici-vratiti-novac/], Accessed 29 February 2024.

35 Švedl Blažeka, V., *op. cit.*, note 16, pp. 342 – 343; Supreme Court of the Republic of Croatia, [https://www.vsrh.hr/vrhovni-sud-republike-hrvatske-donio-pravno-shvacanje-o-pravnim-ucincima-sporazuma-o-konverziji.aspx], Accessed 29 February 2024.

withdrew the lawsuit, which prevented the SCRC from creating case law based on that sample, because he recognized that the decision on the previous issue, which he considers controversial, is also in a case that is not representative of the previous decision of the CJEU. In this way, the need to balance public and private interests in the paradigm of the function of the SCRC itself became actualized anew.

3.1.2. Controversies surrounding an important legal issue and presenting the reasons of importance

In considering the scope of legal protection as well as the current scope of the effects of the new paradigm of the SCRC function, we should recall two relevant controversies in the application of the revision institute and the related composition of proposals for permission to revise that are still present after interventions in the CPA in 2022 (Art. 387). In this sense, the question of an important legal issue that is defined in legal theory as a substantive or procedural issue that arose in a specific case is still considered as an issue and is important for ensuring the uniform application of law and the equality of all in its application.[36] Matters of a factual nature cannot be considered in the revision procedure.[37] Within the normative framework, the SCRC can decide on a specific legal issue only if the decision in the specific case depends on its solution.[38] The questions that the petitioners for permission to revise are authorized to submit in this sense would be those questions that would justify the intervention of the reviewing court and the adoption of a legal understanding, so they would need a general character in the context of meaning and importance.[39] Therefore, the legal understanding expressed by the court through the question posed could be general and applicable in the future in an unlimited number of cases in the application of the norm to which it refers.[40] In this process, it is evidently intended to achieve the goal of laying the foundation for consideration of those issues that are primarily important for ensuring the uni-

Portal Tportal.hr,
[https://www.tportal.hr/biznis/clanak/vrhovni-sud-odgodio-donosenje-odluke-o-obestecenju-duznika-u-francima-za-19-prosinac-20221213], Accessed 29 February 2024.
Portal Slobodnadalmacija.hr,
[https://zadarski.slobodnadalmacija.hr/zadar/tribina/udruga-franak-neodrzivo-shvacanje-gradanskog-odjela-vrhovnog-suda-rh-nije-proslo-sudsku-evidenciju-kada-ce-odluka-konacno-biti-donesena-1268453], Accessed 29 February 2024.

36 Bratković, M., Što je važno pravno pitanje u reviziji?, *op. cit.,* note 13, pp. 858 – 859.

37 *Ibid.*

38 *Ibid*, p. 861.

39 *Ibid.*, pp. 858 – 859.

40 *Ibid.*

form application of the law and the equality of all in its application.[41] A question that is closely related to the facts of a specific dispute, which questions the correct application of substantive law in a specific case, and as a result of which the answer depends on the established circumstances of an individual case, and not on those that are generally applicable, is considered inadmissible.[42] The conclusion is that it is actually about legal standards that are shaped by the SCRC, and the normative framework only provides the criteria by which the SCRC should be guided.[43] The problem, however, lies in the fact that there are no clear criteria to guide the applicants, both in accordance with the guidelines of the law (Art. 385 a of the CPA) and those developed by judicial practice. The observed approach of the SCRC is considered bad practice because legal issues that are not recognized as important are not always stated in the decisions, only the number of issues, and the potential applicants do not have information on the rejected proposals for permission to revise.[44] Specifying the aforementioned in the rationale of the decision should be the standard in cases of rejection, and it cannot be considered a condition for exemption from legal obligation described in Art. 389 b of the CPA.[45]

The next controversy from current Art. 387. is still related to the issue of what is meant by the criterion "clearly indicate reasons why the party believes that the

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41 E.g. decisions of SCRC, decision number: Revd-547/2021 from 29 September 2021, Revd-3237/2020 from 24 February 2021, Revd-1853/2020 from 04 November 2020, Revd-144/2023 from 18 January 2023, Revd-332/2021 from 07 September 2021, Revd-520/2022 from 13 April 2022, all available at Portal sudske prakse Vrhovni sud Republike Hrvatske, Accessed 25 April 2024.

42 Bratković, Što je važno pravno pitanje u reviziji?, *op. cit.*, note 13, pp. 858- 859; e.g. decisions of the SCRC, decision number: Revd-1794/2020 from 29 July 2020, Revd-4022/2020 from 23 February 2021, Revd-1766/2020 from 04 November 2020, Revd-2738/2021 from 07 September 2021, Revd-2733/2020 from 05 November 2020, all available at Portal sudske prakse Vrhovni sud Republike Hrvatske, Accessed 25 April 2024.

43 Bratković, M., Što je važno pravno pitanje u reviziji?, *op. cit.*, note 13, p. 859.

44 E.g. decisions of the SCRC, decision number: Revd-1226/2021 from 30 March 2021, Revd-689/2020 from 06 May 2020, Revd-2969/2020 from 21 January 2021, Revd-4022/2020 from 23 February 2021, Revd-547/2021 from 29 September 2021, Revd-1825/2021 from 11 October 2021, Revd-3925/2022 from 04 October 2022, Revd-1721/2021 from 20 April 2021, Revd-4023/2021 from 29 September 2021, Revd-178/2021 from 20 January 2021, Revd-2871/2022 from 08 March 2023 but part of the decisions also contains legal questions asked, e.g.: Revd-865/2020 from 23 July 2020, Revd-4202/2021 from 29 September 2021, Revd-1794/2022 from 26 April 2022, Revd-3284/2022 from 28 September 2022, Revd-4122/2022 from 17 January 2022, Revd-4158/2021 from 29 September 2021, Revd-4686/2022 from 01 March 2023, all available at Portal sudske prakse Vrhovni sud Republike Hrvatske, Accessed on 25 April 2024.; Švedl Blažeka, *op. cit.*, note 15, pp. 639 – 640.

45 Sessa, Đ., *Novela zakona o parničnom postupku - troškovi, električno vođenje postupka, žalba, revizija, udružena tužba*, Pravo u gospodarstvu, Vol. 51, No. 1, 2012, p. 208 ; Švedl Blažeka, V., *op. cit.*, note 16, p. 640; see Crnić, I., *Treba li ukinuti vrhovni i drugostupanjske parnične sudove*, Informator, broj: 6328, 2014, pp. 1 – 2, available at Informator.hr, [https://informator.hr/strucni-clanci/treba-li-ukinuti-vrhovni-i-drugostupanjske-parnicne-sudove], Accessed 01 March 2024.

SCRC should allow it to revise" in terms of the previously stated assumptions.[46] The criterion of "clearly indicate reasons why the party believes that the SCRC should allow it to revise" itself in the existing normative framework does not require a further explanation of the motion and there is no legal basis for discretionary judging the quality of the indicated reasons for the importance of the question.[47] Provision of Art. 357 of the CPA requires the presentation of the reasons why the party considers the legal issue to be important. Admittedly, even such a regulation cannot meet the criterion of uniformity, but it indicates only that certain reasons could have been stated clearly enough. It must be in sight of the circumstance that for an individual judge the reasons presented in a proposal for permission to revise may be sufficient for action, while for another individual they are not, which still represents a serious threat to legal security and actualizes the problem of non-objectified criteria for the admissibility of the proposal itself.[48] In this context, the fundamental questions are the purpose of the petitioners (parties) to present to SCRC as the highest national judicial instance, with the previously presented function, their subjective views on the importance of the question and what is essentially the goal of such an action.[49] It should be borne in mind that this kind of solution is also a problem because the reasons given by the party may be different from the reasons of importance that may be recognized by the SCRC.[50] Therefore, in this sense, it is still considered a legitimate conclusion that the described normative solution is not optimal nor clear enough. Furthermore, the author concludes it has no relevant purpose at all. In addition, one can see not only the two-phase implementation of this legal remedy (proposal for permission to revise with the revision itself), but also the practical submission of two submissions that are in principle potentially identical in content, which is not in accordance with the principle of economy and represents an unnecessary expense for the parties.

Furthermore, there is also an impression of disruption in the paradigm of the SCRC function, according to which the actual circumstances of consideration are created by the applicants. In legal theory, points of view have been highlighted that justify the establishment of drastically strict conditions for addressing the SCRC in order to realize the legal protection of violated rights, which can hardly be justified by objective and understandable reasons, at least until the state of quality and trust in the decisions of lower courts is consolidated. The point of view that the legality or illegality of the contested decision is not decisive for the assess-

46 Švedl Blažeka, V. *op. cit.*, note 16, p. 640.

47 *Ibid.*.

48 *Ibid.*.

49 *Ibid.*.

50 *Ibid.*.

ment of whether it contains an important legal issue for which the revision should be allowed is in the authors opinion still considered controversial.[51] In this sense, certain situations are serious problems in which, for example, second-instance decisions do not have to be legal, but there are simply no mechanisms to cancel the far-reaching harmful consequences of such decisions. In this sense, on the one hand, it is almost impossible to expect legal discipline from second-instance courts with a firmly positioned position of power, which results in a situation in which parties and the legal system as a whole are forced to suffer potentially unsustainable legal positions through bad judicial practice. In these conditions, the fact that the drastic restriction of the access of the SCRC, not only the one derived from the CPA, but with the abstract and non-transparent criteria set by the SCRC, a mechanism for correcting illegal decisions does not exist in practice, which essentially means that the new paradigm of the SCRC's function has certainly not been realized. There is not even the slightest justification for the SCRC to turn its head away from the existence of an obviously illegal second-instance decision. What is seen as an objective threat is a potential new paradigm for the role of the SCRC, which is enabling bad court decisions to become relevant practice or a source of threat to the equality of all citizens in the application of the law. At the same time, the actual function of the SCRC is lost in numerous formalities, in addition to the aforementioned, endangering legal certainty and the development of law.

In line with what has been said, it is necessary to point out the position presented by legal theory, according to which the SCRC should not guess "what the writer wanted to say", i.e. approach the creation of a legal question on its own.[52] Such an attitude cannot be justified because the fact is that the law does not even prevent it. It is understandable that the SCRC should not intervene in cases of submitting a proposal for permission to revise where, for example, an important legal question has not been raised or where the raised question has missed the entire subject of the dispute, therefore, where the minimum procedural requirements have been violated. However, in other cases, there is no obstacle to reformulating the issue, which would nevertheless take a precedential position through a specific case and create a truly relevant case law with the full realization of the new paradigm of the function of the SCRC. An analogous examination of the functioning of the CJEU established that this court is authorized to make a decision on how to formulate the question.[53] So, although the national courts determine the content of a cer-

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51 Bratković, M., Što je važno pravno pitanje u reviziji?, *op. cit.*, note 13, pp. 861 – 862.

52 Eraković, A., *Izvanredna revizija*, Hrvatska pravna revija, Vol. 10., No. 2, 2020, pp 104; Švedl Blažeka, V., *op. cit.*, note 16, p. 638.

53 Pošćić, A.; Martinović, A., *Postavljanje prethodnog pitanja Sudu Europske Unije*, in: Zbornik radova Građansko pravo-sporna pitanja i aktualna sudska praksa - 2018, Vrhovni sud RH i Pravosudna akademija, Tuheljske toplice, 2018, pp. 233 – 234.

tain question, the CJEU is authorized to formulate or reformulate the question addressed to it or even change it with the aim of providing a useful answer to the national court that will be helpful in the solution of the case.[54] The above is considered a good and purposeful practice.

3.2. The role of lawyers in the preparation of the proposal for permission to revise

The formulation of an important legal question and the presentation of the reasons for the importance of the legal question raised can still be considered a dominant source of controversy in the process of the actual drafting of the proposal for permission to revise, and consequently its admissibility. The scope of the problem exists despite the fact that the lawyers are authorized to invest this legal remedy for their clients according to Art. 91 a of the CPA. The conducted research showed that there is a negative perception of the competences of these legal professionals (in a mild interpretation) and their ability to manage in the undertaking of drafting a proposal for permission to revise.[55] In this sense, some legal experts emphasized the obtainment of special licenses for lawyers to prepare proposals for the permission to revise, which should guarantee the quality of the lawyer's work in that area.[56] The aforementioned was met with resistance in the legal profession, and such a radical idea has not taken place. However, the impression of a discriminatory offensive against legal professionals in relation to the judges themselves and other services, which does not leave an impression of professional correctness and equal positions. On the other hand, no research was conducted on the situation that would justify the existing tendencies that discredit the legal service. Are about 5,000 lawyers incompetent to draw up an extraordinary legal remedy compared to the competence of 20 or so judges of the civil department of the SCRC that decide on it.[57] This approach seems to be dominated by the criterion of guesswork, so those who happen to meet that criterion are the ones who initiate the process

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54 Pošćić, A.; Martinović, A., *op. cit.*, note 53, pp. 233 – 234.

55 Betetto, N., *op. cit.*, note 14, p. 701; Bratković, *Revizija po dopuštenju: hrvatske dvojbe i slovenska iskustva*, *op. cit.*, note 4, p. 345 - 346; Tribune held in Zagreb: Revision in civil proceedings de lege ferenda - revision by permission (February 9, 2017) available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjFspKTs8r2AhVVuKQKHXRdDtMQFnoECAgQAQ&url=https%3A%2F%2Finformator.hr%2Fstrucni-clanci%2Fpravna-shvacanja-vrhovnog-suda-korigirana-novelom-zpp-a&usg=AOvVaw2LNyqULN_m0upRA9rPSb1t], Accessed 16 March 2022.

56 Betetto, N., *op. cit.*, note 14, p. 701.

57 Email statement of the Croatian Bar Association from 22 March 2022.; Katić, *O revizijama i noveliranju Zakona o parničnom postupku*, *op. cit.*, note 11, p. 60; Švedl Blažeka, V., *op. cit.*, note 16, p. 636.

of unifying court practice and the process of ensuring uniform application of laws and the equality of citizens.[58]

In the phase of preparation and drafting of the proposal for permission to revise, according to the Croatian regulatory framework, access to domestic judicial practice, which in Croatian conditions is still a utopian requirement, plays a big role. Such a state of affairs significantly complicates the work of the persons authorized to draw up proposals for permission to revise - lawyers, who have already been defined as the bottleneck of both the former and the newly formed revision institute.[59] In this regard, it is considered necessary to mention the point of view which expressly indicates that no action will be taken on the proposal for permission to revise in the event that the SCRC has taken a position on a certain issue, i.e. that it will not intervene on that issue and why would it, if it had already decided on it earlier.[60] The stated position, no matter how inadequately presented, would be acceptable in real terms if the parties had clear and adequate databases available. An insight into the form and content of the questions asked can be a guide in perfecting the technique of asking important legal questions in the proposal for permission to revise. The fact is that the SCRC's legal understandings by departments in relation to certain issues are published on the SCRC's website.[61] However, the resolution of disputed judicial positions was often not approached at the stage of the proceedings before the second-instance court, but some of the questions raised were already included in the ongoing revision procedures. Therefore, unfortunately, the state of access to practice is not adapted to the needs of the applicant and complicates the process of working on a proposal for permission to revise.

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58 Švedl Blažeka, V., *op. cit.*, note 16, p. 636.

59 *Ibid.*, pp. 635 – 636.

60 "*You have a decision of the second-instance court that confirmed the first-instance verdict, rejected your appeal, but with a legal position that does not agree with the revise decision. We will say - we will not intervene in that case because we have already taken legal views and the courts have ruled on it. Should we intervene in every case?*" Tribune held in Zagreb, February 9, 2017: Revision in civil proceedings de lege ferenda - revision by permission (9 February 2017), available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjFspKTs8r2AhVVuKQKHXRdDtMQFnoECAgQAQ&url=https%3A%2F%2Finformator.hr%2Fstrucni-clanci%2Fpravna-shvacanja-vrhovnog-suda-korigirana-novelom-zpp-a&usg=AOvVaw2L-NyqULN_m0upRA9rPSb1t], Accessed 16 March 2022.

61 The Supreme Court of the Republic of Croatia, [http://www.vsrh.hr/EasyWeb.asp?pcpid=2149], Accessed 29 February 2024.

4. POSITIONING OF LOWER COURTS IN THE DEVELOPMENT OF THE INSTITUTE OF REVISION BY PERMISSION - PRESENTATION OF THE CURRENT SITUATION

In the context of the research that this paper wants to present, it can be seen that the quality of work of lower level courts is still completely marginalized, while the new paradigm of the SCRC's function is still legislatively and theoretically dominant in relation to the real effects, not the legal protection of litigants. It should be borne in mind that the change in the paradigm on the function of the SCRC has its justified goal and purpose, but it is difficult to justify and even more difficult to assess the success of the legislative intervention in this institute as long as there was no systematic and comprehensive analysis of the quality of decisions of lower courts. It is indisputable that it is a parameter that has a non-negligible influence on the flow of cases to the SCRC even after the changes have been made. However, certain analyses have been made and in relation to the perception on the decisions of lower courts, they are not optimistic.[62] There are somewhat more optimistic views of the situation in unifying court practice through the trial procedure, but the actual indicators and achievements of the trial procedure institute are currently not visible.[63] The arbitrariness of lower court decisions is undoubtedly still a source of controversy. It is evident that the problem for the parties is the quality of decisions of the second-instance courts, that is, the legal positions presented in them as well as that lower courts have doubts about the application of the practice of the CJEU (non-application).[64] In 2021, 63% of the decisions of the lower courts were cancelled or changed due to the revision by permission, which means that the problems at the lower levels of judgment are not negligible.[65] The research therefore emphasizes the problem of inappropriate rigor of the SCRC access criteria, which calls for more flexible solutions to the problem.[66]

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62 For a more detailed overview of case law see Anić, M., *Pravično suđenje u odlukama Ustavnog suda Republike Hrvatske s posebnim osvrtom na zabranu arbitrarnog postupanja*, Zagrebačka pravna revija, Vol 10, No. 1, 2021; Glavina, M., *The Reality of National Judges as EU Law Judges: Knowledge, Experiences and Attitudes of Lower Court in Slovenia and Croatia*, Croatian Yearbook of European Law and Policy, No. 17, 2021; Nowak, T.; Glavina, M., *National Courts as Regulatory Agencies and the Application of EU Law*, Journal of European Integration, Vol. 43, No. 6, 2020.

63 Bodul, D.; Čuveljak, J.; Grbić, S., *op. cit.*, note 11, pp. 149 - 150; see also Maganić, A., *Neujednačena sudska praksa nakon prvog oglednog postupka*, Ius Info, 26.05.2020., available at [https://www.iusinfo.hr/aktualno/u-sredistu/41748], Accessed 18 March 2022.

64 See also Šagovac, A., *Stranputice revizije prema Nacrtu prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku*, Organizator, No. 6565, 2019.

65 Data of the SCRC submitted at the request of the author in writing number: Sui-22/2022 from 18 February 2022; Švedl Blažeka, *op. cit.*, note 16, p. 637.

66 Crnić, I., *op. cit.*, note 45, pp. 1 – 2.

5. CONCLUDING REMARKS

The analysis of one of the elementary novelties on the institute of revision - the proposal for permission to revise, five years after the legal implementation, does not show a revolutionary practical effect of this institute. It follows the path of more restrictions within a frame of less transparent guidelines for action. So, formalities are getting stronger. On the other side, the parties are still struggling with lack of transparency, uniformity, confidence in the institute of the revision by permission, questionable lower court decisions quality, time-consuming decision making in important issues etc. The main criticism, however, is directed at the provision of Art. 387 of the CPA and the formulated conditions for the admissibility of the motion for permission to revise. It is not disputed that a paradigm shift in the function of the SCRC is necessary, but the circumstances in which the regulatory and practical framework has changed even today does not support the redundant formalism established on the way to the SCRC. It can still be reasonably concluded that the form of legal protection is more important than the goal and purpose of legal protection, and especially the equality of all applicants. Strict requirements that do not tolerate deviations would possibly be justified under the conditions of clear, transparent and uniformly set rules of the game, i.e. criteria that can be objectively met, without jeopardizing the existing function paradigm.

The main advantages of more flexible approach to the institute of revision by permission are prevention of illegal decisions and them passing through the record system, protection of legal security and actually ensuring and enabling equality for all in the application of law. A minimal contribution to correcting the current understanding on the institute of revision by permission and proposals for permission to revise can be made by compiling guidelines for applicants or prescribed forms, as do other national and supranational courts. It is the founded, indicated, as well as effective consideration of the already mentioned solution practiced by the CJEU, which is truly practical, meaningful and serves a purpose. So, the SCRC by the power of it's considered authority has the final say on the final content of an important legal question. In such circumstances, the SCRC is well on its way to realizing its real goal and purpose as a result of which it will certainly strengthen trust in the institution itself. It would certainly be supported as the model for reducing costs that the revision process entails by permission, as well as the model that in practice does not require the preparation of two content-identical motions. These circumstances actually enable Croatian citizens equality and uniformity in the application of law and due to "formalist (bureaucratic) cynicism" will not bring the parties to a completely closed door to the highest court in the Republic of Croatia.

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Review article

NEW EUROPEAN REGIME FOR COMBATTING LATE PAYMENTS IN COMMERCIAL TRANSACTIONS – KEY ELEMENTS OF REVISION AFTER A DECADE

Sanja Gongeta, PhD, Assistant Professor
University of Applied Sciences "Lavoslav Ružička" in Vukovar
Blage Zadre 2, Vukovar, Croatia
sanja.gongeta@vevu.hr

ABSTRACT

It has been a decade since the Late Payment Directive (2011/7/EU) came into force. At the time of its adoption and implementation into the legislation of Member States marked by the circumstances of a less digital world, it provided legal certainty and protection to small and medium-sized enterprises in case larger or more powerful businesses failed to fulfil their financial obligations on time. Business digitization, geopolitical events, and inflation have influenced entrepreneurs' operations and their decision-making in the allocation of financial resources, indirectly leading to a disruption of payment culture and an increase in the number of unpaid invoices. According to available data from the European Payment Report, late payments affect entrepreneurs in all sectors and all Member States, with small and medium-sized enterprises, the generators of the European Union's gross domestic product, being the most affected. In order to address this growing issue, the European Commission has presented a proposal for revised rules on late payments at the end of 2023. The paper analyses secondary data to answer the question of the effectiveness of existing rules in preventing late payments and highlights the most significant elements of the new Regulation proposal. By comparing existing and revised legal solutions, paper addresses whether the new rules can solve this problem.

Keywords: *Commercial transactions, Competitiveness, Late payments, Regulation*

1. INTRODUCTION

Commercial transaction serves "to transmit economic values such as materials, products, and services from those who want to exchange them for another value, usually money, to those who need them and are willing to pay a countervalue."[1]

[1] Drobnig, U. M. *Encyclopedia Britannica*. 2022. [https://www.britannica.com/topic/commercial-transaction], Accessed 1 March 2024.

The fulfilment of obligatory relations is consistently aimed at achieving them as swiftly as possible. This is because the exchange of goods and the establishment of equilibrium are their underlying purposes. Therefore, the deadline for discharging obligations is a crucial requirement for a lawful fulfilment of duties.[2]

Late payments in commercial transactions represent a significant challenge for businesses, particularly small and medium-sized enterprises (SMEs), by exacerbating liquidity problems, increasing operational costs, and potentially leading to insolvency. The financial crisis of the late 2000s and subsequent economic downturns, including the COVID-19 pandemic, have highlighted the severity of late payments' impact on business stability and growth.[3]

Statistical analyses reveal that a large proportion of businesses across Europe, suffer from late payments, with variations in the intensity and frequency of such occurrences across different EU countries.[4]

Despite legislative measures like Directive 2011/7/EU aimed at reducing late payment durations across the EU, significant disparities remain. Southern European countries typically experience longer delays compared to their Northern counterparts.[5] This indicates a need for a more robust and uniformly enforced regulatory framework.

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2 Gorenc, V. V*rijeme ispunjenja obveze (može li se rastuća nelikvidnost ukloniti donošenjem "novih" propisa o roku plaćanja)*, Računovodstvo, revizija i financije 2009., pp. 171-174.: 171; Gorenc, V. (2011), Rokovi ispunjenja novčanih obveza od 1. siječnja 2012., Računovodstvo, revizija i financije 2011., pp. 140-145; Gongeta, S., *Combating late payments in commercial transactions–the case of Croatia*, *Economic Integrations, Competition and Corporation*, 2014, pp. 116-117; Krahmer, J. *Commercial Transactions,* 38 Sw L.J. 207 (1984), [https://scholar.smu.edu/smulr/vol38/iss1/10].

3 Gołaś, Z.; Gołaś, J. *Late payments in Poland: economic and legal perspectives*. European Research Studies Journal, XXIV (Special Issue 1), 2021. pp. 90-106. [https://doi.org/10.35808/ersj/2031]; McLoughlin, D. Commercial Transactions. Golden Gate University Law Review, vol. 8, no. 1, 1977, pp. 43-54.; Miller, T.; Wongsaro, S. *The Domino Effect: the impact of late payments,* 2017 Plum Consulting London; Nicolas, T. *Short-term financial constraints and SMEs' investment decision: evidence from the working capital channel*, Small Business Economics, 2021.

4 According to the EU Payment Observatory p. 14 „in Poland, almost two thirds of all surveyed enterprises indicate facing issues due to late payments (65 %). The percentage is above 60 % in Cyprus (64 %) and Czechia and Malta (61 %). At the other end of the spectrum, the figure for Bulgaria and the Netherlands is less than half of that (25 %). Austria and Sweden are ranked third in performing better (32 %). Two out of the four big European economies, namely Italy (52 %) and France (47 %) seem to have a higher than European average number of companies suffering from late payments (43 %), while the opposite is true for Spain (36 %) and Germany (33 %). Remarkably, the smallest economies in the European Union occupy the top spots, with Cyprus (64 %), Malta (61 %) and Luxembourg (53 %) all landing among the 6 countries indicating the largest issues with late payments".

5 Maque, I.; San-José, L. *Understanding and solving late payment: the role of organizational routines*. Management International, 2018, Vol. 22, No. 1, pp. 146-156. [https://doi.org/10.7202/1053694ar]; Gołaś, Z.; Gołaś, J. *op cit.* note 3.

Efforts to address late payments require a multifaceted approach, including legislative policies, active enforcement provisions in contracts, and the use of organizational routines to understand and tackle late payment as an organizational phenomenon.[6]

The legislative and policy measures undertaken by the European Union aim to create a more predictable and secure commercial environment conducive to timely payments.[7]

To protect European businesses, particularly SMEs, against late payment, the European Union adopted Directive 2011/7/EU on combating late payment in commercial transactions in February 2011.[8] This Directive, which repealed the earlier Directive 2000/35/EC[9], introduced several key measures, such as payment terms, statutory interest, compensation for recovery costs and unfair contract terms.

Initially, in a comparatively less digital era, it established legal clarity and safeguarded small and medium-sized enterprises (SMEs) against delayed financial commitments from larger or more influential businesses. However, the landscape of business operations and financial decision-making has evolved, influenced by digital transformation, geopolitical shifts, and inflationary pressures. These changes have indirectly disrupted payment practices, leading to a surge in unpaid invoices.[10]

In response to this escalating challenge, in September of 2023, the European Commission proposed a Regulation on combating late payment in commercial transactions[11], an updated regulation on late payments.

The main objectives of the Proposal can be condensed into several policy areas preventing late payment from occurring – equally by introducing stricter enforce-

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6 *Ibid.*

7 Peel, M. *et al.*, L*ate payment and credit management in the small firm sector: some empirical evidence*. International Small Business Journal Researching Entrepreneurship, 2000, Vol. 18, No. 2, pp. 17-37. [https://doi.org/10.1177/0266242600182001].

8 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast) Text with EEA relevance OJ L 48, 23 February 2011, pp. 1–10.

9 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions OJ L 200, 8 August 2000, pp. 35–38.; No longer in force, Date of end of validity: 16/03/2013.

10 Huertas, M., The EU's Late Payments Regulation proposal – key points and problems, 2023, https://legal.pwc.de/en/news/articles/the-eu-s-late-payments-regulation-proposal-key-points-and-problems

11 Proposal for a Regulation of The European Parliament and Of The Council on combating late payment in commercial transactions (Text with EEA relevance) Strasbourg, 12 September 2023 COM (2023) 533 final 2023/0323 (COD).

ment measures, facilitating timely payments and strengthening redress mechanisms, ensuring fair payment conditions and empowering companies.[12]

The revision is primarily motivated by the need to address shortcomings in the existing EU legal framework concerning late payments, which significantly affect SMEs due to asymmetries in bargaining power between large clients and smaller suppliers.

These shortcomings include inadequate preventive measures, insufficient deterrents, and ineffective enforcement and redress mechanisms within Directive 2011/7/EU on combating late payments. The ultimate aim is to improve payment discipline across all actors (public authorities, large companies, and SMEs) and protect companies from the negative effects of payment delays in commercial transactions.

2. CONTEMPORARY SMES CHALLENGES WITH LATE PAYMENTS IN THE UNITED KINGDOM AND EUROPEAN UNION – A COMPARISON

Tot[13] and Gongeta[14] highlight that late payments can lead to severe consequences for businesses, including cash flow problems, increased borrowing costs, and even insolvencies. In the construction industry, these issues are particularly acute, prompting the exploration of technological solutions like smart contracts to mitigate such negative outcomes.[15] Elghaish *et al.* further emphasize the importance of addressing late payments to foster business growth and sustainability.

To provide a comprehensive analysis on the impact of late payments on the development and growth of businesses across Europe, including a special focus on the United Kingdom the data from the European Payment Report 2023 are used. This report, yearly published by Intrum UK, is based on insights from over 10.000 C-level executives and explores how businesses are managing liquidity issues amidst economic disruptions and all the statistical data presented in this chapter are based on that report.

The report indicates that UK businesses are particularly pessimistic about inflation, with a higher percentage (68%) finding it difficult to pay suppliers on time

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12 Huertas, M., *op. cit.*, note 10.

13 Tot, I. *Late Payment Directive : Recent and Pending Cases at the Court of Justice* // InterEULawEast, 3 (2016), 2; pp. 71-86.

14 Huertas, M., *op. cit.*, note 2.

15 Elghaish, F. *et al.*, *Integrated project delivery with blockchain: an automated financial system*. Automation in Construction, 2020. p. 114, 103182. [https://doi.org/10.1016/j.autcon.2020.103182].

due to inflation, compared to the European average of 56%. This suggests a more acute impact of inflation on UK businesses, likely exacerbated by local economic factors and Brexit implications.

The UK's outlook on inflation stabilization is more pessimistic than the European average. A significant 38% of UK respondents believe it will take more than two years for inflation to stabilize below 2%, compared to 26% on average in Europe. This highlights a more cautious or realistic assessment of economic recovery within the UK.

The concern over late payments is a common theme across Europe, but the UK exhibits particular challenges, with 61% of businesses expecting late payments to increase. The payment gap has widened significantly in the UK, signalling a worsening trend that affects cash flow and financial stability.[16]

Also, the report emphasizes that 65% of UK businesses are taking steps to reduce credit risk, similar to the European trend. The reliance on early arrears and working with debt collection agencies is notably high in the UK, reflecting a proactive approach to mitigating the impact of late payments.

Despite economic pressures, both UK and European businesses are maintaining their commitments to sustainability. However, the UK shows a slightly higher acceleration in sustainability efforts (64% vs. the European average of 58%), possibly driven by stringent regulatory standards and consumer expectations in the UK.[17]

Digital transformation is identified as a strategic priority for UK businesses (77%) more than the European average (67%). This underscores the UK's focus on leveraging technology to navigate economic uncertainties, improve payment practices, and enhance operational efficiency.

Like their European counterparts, UK businesses are prioritizing cost-cutting and improving efficiency. However, the emphasis is stronger in the UK (80% vs. 72% European average), indicating a more intense pressure to optimize operations amidst financial strains.[18]

The UK's approach of sacrificing growth for efficiency reflects broader European trends, where businesses prioritize immediate survival over expansion. The strategic shift towards efficiency, liquidity, and risk management echoes across Europe, albeit more pronounced in the UK due to its unique economic challenges.

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16 European Payment Report 2023. p. 12.

17 *Ibid.* p. 16.

18 *Ibid.* p. 18

According to European Payment Report for the 2023, United Kingdom uses various strategies and measures implemented to combat late payments, a pressing issue impacting the cash flow and financial sustainability of businesses. To address this, UK businesses have prioritized cutting costs (80%) and strengthening liquidity (79%) as their top strategies.

The same Report shows that significant 65% of respondents have initiated steps to reduce credit risk and focus on managing late payments, with a particular emphasis on tackling early arrears - 78% of businesses are adopting this approach.

The Report highlights the challenges businesses face due to outdated technology and lack of in-house expertise in managing late payments.

Despite the urgent need to upgrade technology platforms for better debt management, 54% of businesses are hesitant to make such investments in the current uncertain economic climate.

Similarly, 55% of respondents expressed a desire to improve their late payment management practices but found it difficult due to a lack of resources and expertise.

Businesses are also leveraging the European Late Payment Directive, with 50% using its provisions to charge fees and interest for late payments, an increase from 46% in the previous year. This reflects the growing issue of payment delays that companies are facing.

Businesses report dedicating significant time and resources to chasing late payments, with UK companies spending an average of 71 days a year on such activities.

In combating late payments, the Report suggests that businesses are stuck between the necessity to cut costs and the need to invest in improving payment processes. While many focus on early arrears to mitigate larger losses, the lack of proper systems and expertise remains a substantial barrier.

Despite these challenges, there's a noticeable effort among businesses to maintain ethical standards and prompt payment cultures, with 35% having a code of ethics in place to encourage timely payments.[19]

Presented data from the European Payment Report 2023 underscores the critical need for effective measures to address late payments. These data suggest that while existing rules like the European Late Payment Directive are utilized, their effectiveness in preventing late payments is limited. The continued high incidence of

[19] *Ibid.*

late payments, significant time spent chasing payments, and reliance on reactive measures (early arrears, debt collection) point to the need for more robust and preventive regulations. The adoption of digital invoicing solutions and technological advancements can significantly improve payment practices, enhancing the financial stability and growth of SMEs across Europe.

3. THE EVOLUTION OF THE EU'S LATE PAYMENTS LEGISLATIVE POLICY

SMEs are often described as the backbone of the European economy, providing a substantial portion of jobs and significantly contributing to innovation and economic growth.[20] However, their size and negotiating power can put them at a disadvantage in commercial transactions, especially when dealing with larger companies or public authorities. Late payments can strain their liquidity, limit their ability to invest and grow, and in severe cases, lead to insolvency.

The issue of late payments exacerbates the risk aversion of SMEs, making them more reluctant to engage in cross-border transactions due to concerns over payment reliability in different jurisdictions. This hesitancy undermines the European Union's efforts to encourage a more integrated and competitive single market.[21]

Latest researches show a significant discrepancy between the expressed opinions on the need for timely payments and the actual payment behaviours of the surveyed micro-enterprises. Late payments are perceived as unethical by a vast majority of respondents, who also agree that such practices tarnish the debtor enterprise's image, undermine trust with business partners, and deteriorate the quality of relationships with suppliers. The majority of micro-enterprises acknowledge the necessity of making timely payments to suppliers, though nearly half believe that delaying payments can be justified under certain circumstances.[22]

Recognizing the gravity of this issue, the European Union has sought to address it through legislative measures, notably with the Directive 2011/7/EU on combating late payment in commercial transactions.

The theme of payment behaviour attracted considerable attention from European decision-makers. In its Resolution of 17 January 2019 on the implementation of

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[20] Proposal for a Regulation of The European Parliament and Of the Council on combating late payment in commercial transactions (Text with EEA relevance) Strasbourg, 12 September 2023 COM (2023) 533 final 2023/0323 (COD).

[21] *Ibid*.

[22] Ziętek-Kwaśniewska K., *The problem of late payments in the opinion of micro-enterprises*. Prace Naukowe Uniwersytetu Ekonomicznego We Wrocławiu 2017(478): pp. 463-471. [https://doi.org/10.15611/].

the Directive 2011/7/EU, the European Parliament had called on the Commission and the Member States to foster "a decisive shift towards a culture of prompt payment." The theme also featured prominently in the SME Strategy adopted by the Commission in 2020, which noted the need for "a decisive shift towards a new business culture in which prompt payment is the norm." Accordingly, the Commission committed to supporting the implementation of the Late Payment Directive by equipping it with strong monitoring and enforcement tools.[23]

The Study on building a responsible payment culture in the EU – Improving the effectiveness of the Late Payment Directive, aimed to collect evidence and provide inputs on a series of possible actions to foster the effectiveness of the Directive 2011/7/EU.

The work was articulated in 6 thematic areas, dealing with identifying the conditions for creating an EU observatory on payment behaviour[24]; facilitating the uptake of financial tools[25] addressing the issues originated by poor payment behaviour and fostering the use of e-invoicing; facilitating access to credit information on prospective clients[26]; implementing synergies between public procurement and prompt payment objectives[27]; fostering the use of Alternative Dispute Resolution tools to settle payment delays disputes[28]; and enhancing SMEs' credit management capabilities.[29]

In light of the inadequacies of the 2011 Directive on combating late payments, the European Commission's thorough assessments and consultations have highlighted the need for a regulatory overhaul. The existing framework's shortcomings, notably its failure to introduce effective preventive, enforcement, and redress measures, have prompted the Commission to propose a new Regulation aimed at instilling fairness and enhancing the resilience of SMEs and the supply chain at large.[30]

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23 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Study on building a responsible payment culture in the EU – Improving the effectiveness of the Late Payment Directive (2011/7/EU), Publications Office of the European Union, 2022, [https://data.europa.eu/doi/10.2873/34185].

24 This would monitor and analyse payment practices across member states, providing a clear picture of compliance and areas needing improvement.

25 Addressing issues caused by poor payment behaviour through financial tools and fostering the use of e-invoicing.

26 Making credit information on prospective clients more accessible to SMEs.

27 Ensuring that public procurement policies support prompt payment objectives.

28 Promoting the use of these tools to settle payment delay disputes efficiently.

29 Providing training and resources to improve internal credit management practices.

30 European Commission, *op. cit.,* note 23.

The European Commission has taken a decisive step to tackle the chronic issue of late payments in commercial transactions, a problem that significantly impacts the financial health and survival of SMEs across the European Union.

With late payments being a contributing factor to one in four bankruptcies, the power imbalance between large corporations and their smaller counterparts has led to a culture of delayed payments, forcing many SMEs into precarious financial positions.

If we analyse the legislative framework for combating late payments in European member states, the measures established through legal acts can be classified into several main categories: Preventative measures[31], remedial measures[32], initiatives contributing to changing business culture[33], supportive measures in changing business culture[34] and other measures.[35]

For example, Austria in its Late Payment Act[36] included stricter payment terms, contract management, unfair contractual terms and the role of business organisations as part of regulatory framework. Also, in its Initiative named Payin7Days Petition, Austria provided something like an open letter, which launches a petition to reduce late payments. According to the letter, Austrian states (Land) and the federal government is lagging behind with on time payments. The petition aims to achieve better payment morale from the public sector towards businesses, especially SMEs.[37]

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31 Main preventative measures are stricter payment terms, transparency of payment practices, invoice management measures, e-Procurement, financial mechanisms, measures creating rights for suppliers, stricter payment terms in contracts between larger companies and SMEs, obligations for larger companies and public authorities, Restriction of access to public funds, introduction of specific criteria in public tender assessment, obligations for larger companies when conducting business with SMEs and provisions applicable to contracts where one party is a third country.

32 Main remedial measures are Alternative Dispute Resolution System, administrative sanctions, administrative sanctions protecting suppliers and measures creating rights for suppliers.

33 Main initiatives contributing to changing business culture include prompt payment codes, corporate social responsibility, credit ratings, credit management education and contract management.

34 Supportive measures in changing business culture are defining unfair contractual terms and the role of business organisations, awareness raising activities, labels and prizes, working groups, wording in soft law measures, endorsement of soft law measures, assessment criteria and disclosure commitments.

35 Compensation for recovery costs proportional to the size of the debt, legal provisions on the retention of title, tax regulations and assessment criteria can be classified as other measures.

36 Late payment Act,
[https://www.ris.bka.gv.at/eli/bgbl/I/2013/50].

37 [https://www.ots.at/presseaussendung/OTS_20210425_OTS0019/offener-brief-republik-muss-den-zahlungsmoral-turbo-zuenden], Accessed 12 February 2024; EU Payment Observatory Repository: [https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive/eu-payment-observatory/observatory-documentation_en], Accessed 12 February 2024.

Belgium has adopted a strengthened Late Payment in Commercial Transactions Act starting Feb. 1, 2022[38]. It includes transparency of payment practices, stricter payment terms in contracts between larger companies and SMEs and contract management.

It is interesting that when speaking about combating late payments in commercial transactions, Bulgarian Law on Obligations and Contracts[39] with its preventive and "other measures" states "Albeit outside the time scopes of analysis, nevertheless a measure that is always relevant is the provision of the Law on Obligations and Contracts, stating that in case of non-fulfilment of a monetary obligation, the debtor owes compensation in the amount of the legal interest from the day of the delay". In Bulgarian Commercial Act which is in force since 20th of February 2013 it is stated that "parties to commercial contracts may agree on a term for payments in period of no more than 60 days unless the nature of the goods of services require a longer period. When a government entity is party to a commercial contract, this period is of a duration of no more than 30 days. If no payment term has been agreed upon, the monetary obligation must be fulfilled within 14 days of receipt of an invoice or other request for payment. A compensation in amount of 40 EUR is due for the costs of collection to the creditor who has fulfilled his obligations."[40]

Croatia has enacted a whole range of laws, mechanisms, and instruments for the purpose of enforcing the adherence to payment deadlines in commercial transactions.[41] The Law on Financial Operations and Pre-Bankruptcy Settlement[42] is the main piece of legislation transposing the Late Payment Directive. The Law changes the provisions related to the Kuna for the purpose of introducing the Euro. Also, regarding the reference rate that serves as the basis for determining interest on late payment, it is stipulated that the reference rate will be the interest

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38 Act amending the Act of August 2, 2002 on combating late payment in commercial transactions [https://etaamb.openjustice.be/nl/wet-van-14-augustus-2021_n2021032597.html], Accessed 10 February 2024.

39 It is adopted and in force since 1991.
[https://lex.bg/laws/ldoc/2121934337], Accessed 10 February 2024.

40 [https://lex.bg/laws/ldoc/-14917630], Accessed 10 February 2024.

41 For example Law on Electronic Invoicing in Public Procurement, Law on factoring, Documentation of the PD model and methodology for calculating the credit rating of entrepreneurs using machine learning applications (ML.PD), Guidelines for encouraging the participation of SMEs in the public procurement market, Law on public procurement, Preliminary assessment form for the Draft Law on deadlines for the fulfilment of financial obligations, Law prohibiting unfair trade practices in the food supply chain, Law on Obligations (including provisions on payments for contractual obligations), the National Insolvency Register as a publicly available electronic register which seeks to improve the provision of information to relevant creditors and courts about insolvency proceedings.

42 Official Gazette 108/12, 144/12, 81/13, 112/13, 71/15, 78/15, 114/22.

rate applied by the European Central Bank to its last main refinancing operations or the marginal interest rate resulting from tender procedures for a variable rate for the last major refinancing operations of the European Central Bank.[43]

In Denmark, key measures are stated in Act on Interest and Other Conditions in the event of Late Payment (Interest Act) introducing stricter payment term for G2B transactions[4445] and Public Procurement Act introducing "dynamic purchasing systems".

3.1. Overview of the Directive 2011/7/EU

To protect European businesses, particularly SMEs, against late payment, the EU adopted Directive 2011/7/EU on combating late payment in commercial transactions in February 2011. and was due to be integrated into national law by EU

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43 EU Payment Observatory Repository:
[https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive/eu-payment-observatory/observatory-documentation_en], Accessed 12 February 2024.

44 „The amendments to the Interest Act transpose the provisions of the Late Payments Directive into Danish national law. The Act sets out a stricter payment term for G2B transactions, by stipulating that the agreed payment period in an agreement where the debtor is a public authority cannot be more than 30 days (§3b(1)). Only one exception from this rule is allowed: according to §3b(2), "The Minister for Justice may, after consultation with the Minister for Business and Growth, lay down rules stipulating that the payment period referred to in paragraph 1 may be up to 60 days for public authorities carrying out economic activities of an industrial and commercial nature by offering goods or services on the market, where the authority as a public undertaking falls within the definition in Article 2(b) Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings and on financial transparency within certain undertakings." EU Payment Observatory Repository:
[https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive/eu-payment-observatory/observatory-documentation_en], Accessed 12 February 2024.

45 "The Public Procurement Act deals with public procurement and tender procedures. While it does not mention the issue of late payments, it sets out the general framework of public procurement in the country, as well as establishes an e-procurement system. Particularly, §78(3) stipulates that "A contracting authority must arrange for the payment of remuneration in appropriate installments to the participating partners.""In addition, in §101-108 the Act establishes the concept of ""dynamic purchasing system"" (dynamiske indkøbssystemer), which are an electronic procurement process. This is applicable in the procurement of services that are generally available on the market and meet the requirements of the contracting entity. Moreover, the Act foresees that anyone who meets the minimum eligibility requirements and is not covered by the grounds for exclusion, must be included in the dynamic purchasing system. The contracting public authority is additionally obliged to continuously admit new participants to the system and cannot limit the number of participants. Finally, §109-115 cover ""electronic auctions"" and §116-118 deal with ""electronic auctions." EU Payment Observatory Repository:
[https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive/eu-payment-observatory/observatory-documentation_en], Accessed 12 February 2024.

countries by 16 March 2013 at the latest.[46] The Directive established a culture of prompt payment within the EU, setting maximum payment periods and enforcing interest for late payments to deter the practice. It also allows for the recovery of reasonable recovery costs incurred through the pursuit of late payments, thus attempting to level the playing field for SMEs.

The directive applies to commercial transactions between undertakings, or between undertakings and public authorities, excluding transactions with consumers, payments under cheque and bill of exchange laws, and compensation for damages. It defines terms such as commercial transactions, public authority, undertaking, late payment, and "statutory interest for late payment".

The Late Payment Directive defines commercial transactions as "transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration."[47] Late payment is defined as "payment not made within the contractual or statutory period of payment".[48]

Undertakings are entitled to statutory interest for late payment if they have fulfilled their contractual and legal obligations and have not received payment within the agreed timeframe.[49]

Public authorities must pay their invoices within 30 calendar days (extendable under certain conditions to 60 days), ensuring quick compensation for creditors.[50]

Creditors are entitled to a minimum of EUR 40 as compensation for recovery costs, in addition to interest for late payment. They may also claim reasonable compensation for any recovery costs exceeding this fixed sum.[51]

Contractual terms or practices that grossly deviate from good commercial practice, contrary to good faith and fair dealing, or exclude the right to charge interest for late payment or compensation for recovery costs are deemed grossly unfair to the creditor.[52]

Member States must ensure transparency regarding the rights and obligations stemming from the directive and encourage awareness among undertakings about the remedies available for late payment.[53]

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46 Maque; San-José, op. *cit.,* note 6.

47 Art. 2. p. 1. Directive 2011/7/EU.

48 Art. 2. p. 4. Directive 2011/7/EU.

49 Art. 3. Directive 2011/7/EU.

50 Art. 4. Directive 2011/7/EU.

51 Art. 6. Directive 2011/7/EU.

52 Art. 7. Directive 2011/7/EU.

53 Art. 8. Directive 2011/7/EU.

Sellers can retain title to goods until full payment if expressly agreed upon, providing security in transactions.[54]

An enforceable title for unchallenged claims related to late payment must be obtainable within 90 calendar days, facilitating swift and effective redress for creditors.[55]

Recent data indicates an improvement; the 2021 Survey on the Access to Finance of Enterprises (SAFE) showed that 42% of EU businesses encountered payment delays, a decrease from 49% in 2019. Despite these improvements, over 50% of businesses in 8 Member States continue to report late payment issues.

Despite its well-intentioned provisions, the Directive faced criticism for its limited effectiveness in addressing the root causes of late payments. Critics argue that while the Directive provided a legal framework, it did not sufficiently address the power imbalances between SMEs and larger corporations, which often led to SMEs hesitating to enforce their rights due to fear of damaging business relationships.[56] Furthermore, the lack of robust enforcement mechanisms meant that many businesses, especially in certain EU countries, continued to experience significant payment delays.

Recognizing the significance of payment practices, the European Parliament and the European Commission have emphasized the need for a culture of prompt payment and enhanced enforcement of the Directive 2011/7/EU through various strategies and resolutions.[57]

3.2. Reasons and Key Elements of the Revision

The European Union internal market is characterized by a vast volume of commercial transactions, with an estimated 18 billion invoices issued annually.[58] This immense flow of transactions underpins the European economy, where the smooth

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54 Art. 9. Directive 2011/7/EU.

55 Art. 10. Directive 2011/7/EU.

56 Conti, M. *et al. Government late payments and firm's survival. Evidence from the EU*. Journal of law and economics, 64 (3), 2021, p. 603-627, DOI: 10.13140/RG.2.2.34292.68480; Drobnig, U. M. Encyclopedia Britannica. 2022. [https://www.britannica.com/topic/commercial-transaction], Accessed 1 March 2024.

57 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Study on building a responsible payment culture in the EU – Improving the effectiveness of the Late Payment Directive (2011/7/EU), Publications Office of the European Union, 2022, [https://data.europa.eu/doi/10.2873/34185].

58 European Commission (2019). Study on the evaluation of invoicing rules of Directive 2006/112/EC. Final Report.

operation and competitiveness of enterprises, especially small and medium-sized enterprises (SMEs), are critically dependent on reliable payment streams.

Deferred payments, where goods or services are supplied before payment, necessitate a framework that ensures these payments are made promptly. Yet, late payments are a widespread issue, affecting businesses across all sectors and Member States, with a particularly severe impact on SMEs.[59]

Core Challenges for SMEs are asymmetry in bargaining power, inadequacy of current legal frameworks.[60]

A significant cause of late payments is the imbalance of power between large clients and their smaller suppliers. This asymmetry often forces suppliers to accept unfavourable payment terms and conditions, putting them at a financial disadvantage. For large clients, late payments serve as an attractive, cost-free financing option, imposing undue financial strain on the creditors.[61]

In 2022. Altares Dun & Bradstreet[62] conducted research on business payments in 14 European countries, focused specifically on the Netherlands. The study found that over a quarter (25.8 percent) of Dutch business invoices are not paid on time, based on research among more than 300,000 companies in the Netherlands. This issue is most prevalent among large companies, with only 36 percent of the largest companies paying on time, compared to 78 percent of the smallest organizations.

The practice of employing acceptance or verification procedures to confirm that goods or services meet contractual requirements, alongside the verification of invoice accuracy and compliance, is frequently leveraged to intentionally prolong the payment timeframe. Therefore, the incorporation of such procedures into a contract should be objectively warranted by the specific nature or distinct characteristics of the contract in question.[63]

The existing EU legal framework, specifically Directive 2011/7/EU, has been identified as lacking in several areas. It does not offer sufficient preventive measures against late payments nor does it provide adequate deterrents. Furthermore, the mechanisms for enforcement and seeking redress under the Directive 2011/7/

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59 Nicolas, T., *Short-term financial constraints and SMEs' investment decision: evidence from the working capital channel*, Small Business Economics (2021). European Payment Report 2022. Intrum

60 Directive 2000/35/EC *op. cit.*, note 9.

61 Huertas, M., *op. cit.*, note 10.

62 Altares Dun & Bradstreet, *Payment Study North Europe*, 2022. Rotterdam: [https://altares87872.activehosted.com/content/pyND2/2023/11/03/082cf7f2-8c0f-4d1b-b578-945b96dad7cc.pdf].

63 Judgment of 20 October 2022, *BFF Finance Iberia SAU v Gerencia Regional de Salud de la Junta de Castilla y León*, OJ C 53, 15 February 2021, p. 19, C585/20, EU: C: 2022:806, paragraph 53.

EU are considered insufficient, failing to protect businesses effectively from the repercussions of late payments.[64]

In response to these challenges, the proposal for a new regulation seeks to overhaul the current system by introducing measures designed to improve payment discipline across all actors in the commercial landscape, including public authorities, large corporations, and SMEs; provide robust protection for businesses from the adverse effects of delayed payments in commercial transactions; enhance the resilience and competitiveness of the European economy by ensuring that businesses, especially SMEs, can rely on timely payments for their goods and services.[65]

The initiative is part of the European Commission's 2023 work program under the objective "A Europe Fit for the Digital Age," reflecting the priority given to adapting EU policies to the contemporary economic environment and the challenges of digitalization.

The proposal is consistent with key EU policy provisions, including the Commission Communications on updating the New Industrial Strategy and the SME Strategy for a sustainable and digital Europe. It also addresses recommendations from the Fit for Future Platform and resolutions from the European Parliament calling for improved payment practices.

By targeting the revision of the Late Payment Directive, the proposal aims to address identified shortcomings and ensure that EU businesses operate in a more favourable and fairer commercial environment.

The proposed regulation finds its legal foundation in Article 114 of the Treaty on the Functioning of the European Union (TFEU)[66]. This article is a critical piece of the EU legislative framework, providing a basis for the harmonization of laws and regulations within Member States to ensure the functioning of the internal market. Article 114 TFEU supports measures aimed at removing obstacles to the internal market or preventing potential distortions of competition within it, making it a fitting legal basis for the proposed regulation aimed at combating late payment in commercial transactions.

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64 *Ibid.*

65 Commission Staff Working Document Executive Summary of The Impact Assessment Report Accompanying the Document Proposal for A Regulation of The European Parliament And Of The Council On Combating Late Payment In Commercial Transactions Strasbourg, 12 September 2023 SWD (2023) 313 final.

66 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 August 2012, pp. 47–390.

The necessity for revising the Late Payment Directive was significantly informed by comprehensive ex-post evaluations. These evaluations scrutinized the Directive's effectiveness, relevance, efficiency, and coherence, alongside its EU added value.

Ex-post evaluation of Late Payment Directive[67] showed that nearly two-thirds of companies are familiar with the rules governing late payments, and 86% are aware of their entitlement to claim compensation and, or interest for late payments. Still, this knowledge doesn't necessarily prevent late payments and 80% of companies that faced late payments in the past three years knew they could claim compensation or interest. Awareness of the regulations is linked to a smaller likelihood of worsening payment delays over three years compared to unaware firms.[68]

Despite the awareness, the Late Payment Directive's provisions are underutilized, with 60% of respondents never claiming their rights to interest and/or compensation. SMEs, in particular, are less likely to assert their rights compared to larger companies.

The Directive seems more effective in countries with shorter average payment times, where companies are more inclined to enforce their rights.[69]

The main deterrent against claiming rights under the Directive is the fear of harming business relationships, along with the absence of efficient remedies.

Payment durations have slightly decreased in recent years across the EU, but substantial disparities persist among Member States. For Business to Business (B2B) transactions, the average payment duration has decreased from 56 days in 2011 to 47 days in 2014, with a minimal reduction in payment delays. 90% of companies adhere to the Directive's mandate for payment terms of 60 days or less, with 70% not exceeding 30 days. However, sector and country affiliations significantly influence payment terms more than company size or rule awareness, with manufacturing and construction sectors experiencing longer payment terms than others.[70]

For transactions between public authorities and businesses (PA2B), average payment duration decreased from 65 days in 2011 to 58 days in 2014, though it still exceeds Directive stipulations, with some Member States seeing increased delays.

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67 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Lofstrom, F., Rivoire, L., Gallo, C. *et al.*, Ex-post evaluation of Late Payment Directive, Publications Office, 2015, [https://data.europa.eu/doi/10.2873/016503], p. 6-7.

68 *Ibid.*

69 *Ibid.*, p. 8.

70 *Ibid.*

Firms working mainly with public authorities are less likely to report worsened payment delays than those dealing primarily with other businesses.

Factors like national business culture, economic conditions, and power imbalances play more critical roles in determining payment behaviours than legislation alone. Currently, there's no clear evidence that the Directive has significantly impacted cross-border transaction uncertainty reduction. While the Directive was recognized for its relevance and efficiency, a critical finding was its limited effectiveness in fully addressing the fear and reluctance among creditors, especially SMEs, to assert their rights against late payments. This hesitancy is attributed to concerns about harming commercial relationships.

The evaluations pointed to a need for stronger preventive measures, more substantial deterrents, and enhanced enforcement mechanisms to protect businesses from the adverse impacts of late payments effectively.

Also, analysing the persistent challenges highlighted by the European Payment Report 2023 indicate that the existing rules have had some impact, but further changes and enhancements are necessary to effectively prevent late payments and support business growth and stability.

The rigorous ex-post evaluations, extensive stakeholder consultations, and thorough impact assessments collectively underscore the necessity for and potential benefits of the proposed Regulation on Combating Late Payment in Commercial Transactions. By addressing the limitations of the existing framework and incorporating stakeholder feedback, the proposal aims to introduce a more robust, effective, and equitable regime for managing commercial payments across the EU, with particular emphasis on safeguarding the interests and sustainability of SMEs.

4. MAIN DIFFERENCES AND IMPROVEMENTS OF THE LATE PAYMENT REGULATION PROPOSAL

The European Commission has decided to revise the current Late Payment Directive due to identified inadequacies in tackling the late payment problem in commercial transactions. Since 2015, various studies, assessments, and resolutions, including the 2019 European Parliament Resolution[71] and the 2021 Opinion of the Fit for Future Platform, highlighted the directive's main shortcomings. These include a lack of preventive measures, effective enforcement, accessible redress

[71] European Parliament resolution of 19 September 2019 on the importance of European remembrance for the future of Europe (2019/2819(RSP)) OJ C 171, 6 May 2021, pp. 25–29.

mechanisms for SMEs, unclear concepts, and the absence of a maximum payment term in Business-to-Business (B2B) transactions.

To address these issues and enhance the framework for combating late payments, the Commission proposed a new Regulation on late Payments. The proposed Late Payment Regulation introduces several significant changes compared to the existing directive: direct applicability and uniform provisions, stricter payment terms, automatic interest and compensation fees, enforcement and redress measures, protection of subcontractors, verification procedures limit.

According to Article 1, Regulation covers payments in business transactions, including those between businesses and public authorities, involving the delivery of goods or services, as well as public works and engineering projects. It excludes transactions with consumers, damage compensations, and payments within the scope of insolvency or restructuring proceedings. Except for a specific provision, it does not alter existing regulations established by Directive (EU) 2019/633.[72]

Under the Proposal of Regulation, the terms are defined as follows: "undertaking" is any organization conducting economic or professional activities independently. A "public authority" refers to a contracting authority as detailed in specific EU Directives. "Late payment" is a payment not made within the defined contractual or statutory period. The "amount due" includes the sum owed within the payment period plus applicable taxes and charges. An "enforceable title" is any legal document that allows for the forced collection of a debt. "Retention of title" is an agreement where the seller retains ownership of goods until full payment. "Procedure of acceptance or verification" checks the conformity of goods or services with contract requirements. A "debtor" is anyone owing payment for goods or services. A "creditor" is anyone who has provided goods or services and is owed payment.[73]

Regarding payment periods in commercial transactions, the payment period is capped at 30 calendar days from when the debtor receives the invoice or equivalent request for payment, assuming the goods or services have been received. This applies to both Business to Business and Business to Public Authority Transactions, including for regular and non-regular supplies of non-perishable agricultural and food products, unless a shorter period is specified by national law.

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72 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, OJ L 172, 26 June 2019, p. 18.

73 Art. 2. Proposal for a Regulation.

Additionally, a contract may specify a procedure of acceptance or verification of goods or services, strictly when necessary, with details including its duration. Such a procedure must not extend beyond 30 calendar days from receipt of the goods or services, with the total payment period not exceeding 30 calendar days post-procedure, irrespective of any shorter periods set by national laws.[74]

For public works contracts under EU Directives 2014/23/EU[75], 2014/24/EU[76], 2014/25/EU[77], and 2009/81/EC[78], contractors must prove to contracting authorities that they have paid their direct subcontractors on time as per this Regulation.

This evidence, likely a written declaration, should accompany any payment request. If the contracting authority lacks such proof or knows of late payments to subcontractors, it must promptly inform its Member State's enforcement authority.[79]

If a payment is late, the debtor must pay interest unless not responsible for the delay. This interest is automatically owed without needing a reminder if the creditor has met its contractual and legal duties, the debtor received the invoice or payment request, and payment wasn't made within the specified period.

Creditors cannot waive their right to late payment interest. The invoice receipt date cannot be contractually altered by the parties. The debtor must ensure the invoice or payment request is promptly processed upon receipt. Interest accrues from the latest of either the invoice's receipt or the goods or services' receipt and continues until full payment is made.[80]

The interest rate for late payment will be the reference rate plus 8 percentage points. For Eurozone countries, the reference rate is either the European Central Bank's main refinancing operations rate or the marginal interest rate from its latest

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74 Art. 3. Proposal for a Regulation.

75 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance OJ L 94, 28 March 2014, pp. 1–64.

76 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance OJ L 94, 28.3.2014, pp. 65–242

77 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance OJ L 94, 28 March 2014, pp. 243–374.

78 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

79 Art. 4. Proposal for a Regulation.

80 Art. 5. Proposal for a Regulation.

variable-rate tender operations. Non-Eurozone Member States will use the rate set by their national central bank. Reference rates for the first and second semesters are set on 1 January and 1 July of each year.[81]

When payments are scheduled in instalments and any instalment is overdue, interest for late payment will be calculated on the unpaid amount, with compensation also provided as per Article 8.[82]

When interest for late payment is due as per Article 5 of Proposal, debtors must automatically pay a flat fee of EUR 50 for recovery costs per commercial transaction, without requiring a reminder. Creditors cannot waive this right. Besides the flat fee, creditors can also seek reasonable compensation for recovery costs exceeding this amount caused by late payment. This does not affect creditors' rights to other forms of compensation.[83]

Contractual terms and practices that violate specific regulations will be considered null and void, including: (a) setting payment periods against Article 3's guidelines; (b) denying creditors' rights to interest for late payment or compensation for recovery costs as in Articles 5 and 8; (c) extending verification or acceptance procedures beyond Article 3(3)'s limits; (d) intentionally delaying invoice issuance.

Proposal defines obligation for Member States that they must provide effective means to address these issues, including legal or administrative action by organizations representing creditors or businesses.[84]

Also, Member States must promote transparency about the rights and obligations under this Regulation, including publicizing the applicable late payment interest rates. The Commission will also make these rates available online.

Creditors should receive an enforceable title within 90 days of action, excluding document service periods and creditor-caused delays, without affecting Regulation (EC) 1896/2006's[85] provisions. Member States will designate enforcement authorities to ensure payment deadlines are met, facilitate cross-border cooperation, and coordinate with other regulatory bodies, including sharing information.

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81 Art. 6. Proposal for a Regulation.

82 Art. 7. Proposal for a Regulation.

83 Art. 8. Proposal for a Regulation.

84 Art. 9. Proposal for a Regulation.

85 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure OJ L 399, 30 December 2006, pp. 1–32.

Complaints about late payments in the agricultural and food sector will be directed to the appropriate authorities under Directive (EU) 2019/633[86]. [87]

The future outlook for SMEs under the new Regulation is cautiously optimistic. By addressing the root causes of late payments and enhancing the regulatory framework, the EU aims to create a fairer and more resilient business environment. This will not only support the financial stability of SMEs but also promote a more integrated and competitive single market

While the Directive 2011/7/EU laid the groundwork for addressing late payments, its limited effectiveness necessitated a comprehensive review and overhaul. The proposed new Regulation represents a significant step forward in ensuring timely payments, fostering a culture of prompt payment, and enhancing the overall resilience of the EU economy.

5. CONCLUSION

In the broader context of the European Union's ongoing battle against late payments, the progression from Directive 2011/7/EU to the proposed Regulation represents a significant shift in strategy, emphasizing the EU's commitment to enhancing the efficiency and uniformity of its approach to this pervasive issue.

The Directive, while a landmark step, laid the groundwork by setting clear expectations for payment terms, introducing automatic entitlements to statutory interest for late payments, and empowering creditors with the ability to claim compensation for recovery costs. Furthermore, it tackled the challenge of unfair contract terms, granting member states the authority to address grossly unfair contractual deviations.

Still, the complexity of economic interactions within the single market, compounded by the unique challenges faced by SMEs, necessitates a more uniform and directly enforceable set of rules across the EU.

The European Payment Report 2023 highlights that, despite the Directive's intentions, late payments remain a significant obstacle, with inflation and other economic factors exacerbating the situation. This is not just an issue of financial logistics but one that deeply affects the sustainability and growth potential of businesses, especially SMEs, which are often at a disadvantage in their bargaining positions.

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[86] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain PE/4/2019/REV/2 OJ L 111, 25 April 2019, pp. 59–72.

[87] Art. 11. – 13. Proposal for a Regulation.

Recognizing these challenges, the Commission's proposal to replace the Directive with a Regulation is a strategic pivot designed to streamline and strengthen the EU's approach. Unlike a Directive, which requires individual member states to enact national legislation, a Regulation is directly applicable, ensuring that the rules are uniformly applied across all member states without additional national legislative measures. This shift is particularly advantageous for businesses engaged in cross-border trade within the EU, offering them a clearer, more predictable legal framework.

The proposed Regulation not only maintains the core achievements of the Directive, such as specified payment terms, statutory interest for late payments, and mechanisms for recovering costs but also introduces nuanced flexibilities. It recognizes the diverse economic landscapes of member states by allowing them the leeway to establish enforcement bodies and implement Alternative Dispute Resolution (ADR) mechanisms tailored to their specific contexts. Furthermore, it acknowledges the importance of education and training in credit management and financial digital literacy, underscoring the need for a holistic approach to fostering a responsible payment culture.

By focusing on direct applicability and uniform enforcement, the proposed Regulation aims to reduce the administrative burden on businesses, simplify cross-border transactions, and ultimately create a more conducive environment for economic growth and stability in the European single market. This forward-looking approach illustrates the European Union's adaptability and responsiveness to the needs of its economic ecosystem, particularly in supporting SMEs and facilitating a smoother integration of digital and sustainable business practices.

The transition from Directive 2011/7/EU to the proposed Regulation represents a significant shift in the EU's strategy to combat late payments. By addressing the identified shortcomings and incorporating stakeholder feedback, the new regulation has the potential to provide a more effective and equitable framework for managing commercial payments. The new legal framework will certainly serve as a basis for future research on its effectiveness, with a particular emphasis on the development of digital technologies that will undoubtedly impact possible payment methods."

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Review article

ECONOMIC SANCTIONS BASED ON INTERNATIONAL AND EU LAW

Gábor Fekete, PhD Student
Doctoral School of University of Pécs, Faculty of Law
H-7633, Pécs, Ybl Miklós utca 1/b, Hungary
gaborfekete@outlook.com

ABSTRACT

The use of "sanctions" is an instrument of the Common Foreign and Security Policy for the EU, which aims to prevent and respond to various crises. The term "sanctions" covers a range of measures, particularly arms embargoes, travel restrictions, asset freezes and other economic restrictions. The EU currently applies several sanctions packages, some of which are part of a range of sanctions based on international law and others which go beyond it.

The economic effects of the restrictions also affect civil law relations. Their scope is not limited to the actors on the sanctions list but extends to persons directly and indirectly associated with them, ultimately affecting the legal relations of persons not on the sanctions list who have no economic links with the sanctioned country or region.

In the first part, the study provides an overview of the system of "sanctions policy", the reasons for and the means of applying restrictive measures, including an introduction to the powers and case law of the Court of Justice of the European Union concerning sanctions. The second part of the study deals with economic sanctions. Firstly, it identifies the scope of restrictive measures as economic restrictions. Secondly, it describes the civil law implications of economic sanctions from the courts' perspective when applying the law by describing the applicable legal provisions. On the other hand, the case law of the Court of Justice of the European Union will be presented to show the obligations imposed by the EU on the courts applying economic restrictions in the conclusion and performance of specific legal transactions and in resolving disputes arising from them.

The study is not concerned with assessing the necessity and effectiveness of sanctions but only with their effects as legal facts on the application of the law.

***Keywords**: common commercial policy, economic sanctions, EU law, principle of effectiveness*

1. SANCTIONS POLICY, IN BRIEF

At times, a word may possess contradictory meanings; such is the case with *'sanction,'* which can denote both 'to permit, encourage' and 'to punish to deter'. From the beginning, two fundamental notions of law were wrapped up in this word: law as something that permits or approves and law that forbids by punishing.[1] In this paper, we use the term sanction in the latter sense. One more linguistic remark: in the plural, sanctions mean a coercive measure, especially one taken by one or more states against another guilty of violating international law.

As restrictive measures are applied by states, sanctions are derived from sovereignty and are allowed by international law to settle disputes between states. Part of sovereignty is the power to decide whom a state allows to enter or transit its territory and determine who can trade on its territory and with what; these are the arms embargoes and travel restrictions. A sovereign can restrict property disposal on its territory and the business activities of its citizens and legal entities in other states; these are asset freezes and other economic restrictions. Restrictions may be lawful, under the rule of law, or contrary to the rule of law, arbitrary. Sanctions are based on a variety of grounds, typically the preservation of international peace and security or to achieve a foreign policy goal, in particular, the protection of human rights, the fight against terrorism, chemical disarmament, weapons of mass destruction, the fight against cyber warfare, the fight against corruption. Their effectiveness is enhanced if they are enforced with the same content by a group of states, like the United Nations (UN) or the European Union (EU)[2]. The sanctions based on international and EU law are presented below.

1.1. Types of Sanctions

As regards the subject of sanctions, a distinction can be made between classical and horizontal sanctions. Classical sanctions are imposed on individual states or territories. Horizontal or smart or targeted sanctions are imposed on specific persons or bodies. Classical sanctions have been sanctions on countries, but they have resulted in significant humanitarian damage, and it is questionable how effective they have been in achieving the desired effect. Increasingly, 'individual' sanctions have been used, first in the areas of terrorism, cyber-attacks, and chemical weapons-related measures. The advantage of horizontal sanctions is that they are personalised and can, therefore, be used effectively against organisations independent

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1 American Heritage Dictionary of the English Language, Fifth Edition. *S.v.* , *sanction* [https://www.thefreedictionary.com/sanction], Accessed: 05 April 2024 .

2 van Bergeijk, P.; Biersteker, T., *How and When Do Sanctions Work? the Evidence. On Target? EU Sanctions as Security Policy Tools*, [doi:10.2815/710375]. Accessed 05 April 2024.

of national borders, e.g. terrorist organisations.[3] They are also flexible enough to allow certain responsible persons or bodies to be added to the sanctions list while allowing for the possibility of deletion.

Sanctions are tools for achieving foreign policy goals; the subject matter of sanctions depends on the objectives and legal possibilities of the state or entity applying them. Using the example of the UN, the relation of the objective and possibilities are as follows: The UN Security Council can take action to maintain or restore international peace and security under Chapter VII of the United Nations Charter. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations.[4] The UN has a broad mandate, but its means to do so are limited. In the next chapter, the EU will be used as an example to illustrate in detail how UN sanctions influence and facilitate other sanctions policies. Before doing so, however, it is necessary to examine how the protection of human rights has been included among the subjects to be protected by sanctions.

The idea of horizontal sanctions in the field of human rights protection is relatively new, originating in the United States. In response to Sergei Magnitsky's death and to address human rights violations and corruption, the US passed the "Magnitsky Act" in 2012, which targeted Russian officials believed to be involved in Magnitsky's detention, abuse and death by freezing their assets and banning their entry to the United States. The Global Magnitsky Act, adopted in 2016, has gone beyond the scope of one controversial incident. The Magnitsky Act has been expanded and applied to other countries, which allows the US government to sanction individuals from any country involved in severe human rights abuses or significant corruption.[5] The Global Magnitsky Act is a global response to substantial human rights and corruption violations.

Several other countries, including the United Kingdom, Canada, and the European Union, have also adopted their versions of Magnitsky-like sanctions legislation to hold individuals accountable for human rights violations and corruption world-

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3 European Union Institute for Security Studies, Portela, C., *A blacklist is (almost) born – Building a resilient EU human rights sanctions regime*, [https://data.europa.eu/doi/10.2815/408461], Accessed 05 April 2024.

4 Article 41 of the United Nations Charter.

5 Congressional Research Service, *The Global Magnitsky Human Rights Accountability Act,* 2020, [https://crsreports.congress.gov/product/pdf/IF/IF10576] Accessed 05 April 2024

wide. In December 2020, the EU adopted the Council-Adopted Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998, establishing a framework for targeted restrictive measures to address serious human rights violations and abuses worldwide. On this basis, the EU's Member States should lay down rules on penalties applicable to infringements of this Regulation's provisions and ensure that they are implemented; this has resulted in a mosaic of practices across the EU, involving more than 160 designated competent authorities within Member States.[6]

1.2. Development of EU's Sanctions Regime, in Brief

1.2.1. Development of EU's Sanctions Regime

Sovereignty is the basis for the application of sanctions. Still, a group of states sometimes realises it is in their state's interest to exercise sovereignty jointly with other states on specific issues. Along these lines, the EU Member States have agreed to "establish among themselves a European Union, (…) on which the Member States confer competences to attain objectives they have in common."[7]. One of the competences exclusively delegated to the EU is the common commercial policy.[8], which is an area inevitably affected by applying economic restrictive measures. As a consequence, sanctions applicable by EU Member States must also take into account a specific legal context, the rules of EU law, and therefore, these provisions have inevitably appeared in EU law and have evolved over the past decades in parallel with the development of the Community and the sanctioning regimes.[9]

The EU sanctions policy can be divided into three periods[10], which are also seen as a developmental arc. As will be seen, this evolution has concerned partly the nature and targeting of sanctions and partly the rules for adopting these measures.

In the early period up to the Maastricht Treaty, the question of the sovereignty of the Member States in the application and enforcement of sanctions was not raised

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6 European Parliament, Directorate-General for External Policies of the Union, Portela, C., Olsen, K., *Implementation and monitoring of the EU sanctions' regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions*, [https://data.europa.eu/doi/10.2861/747624], Accessed 05 April 2024.

7 Article 1 TEU (Lisbon).

8 Article 3 (1) e) TFEU (Lisbon).

9 van Bergeijk, P.; Biersteker, T., *How and When Do Sanctions Work? the Evidence. On Target? EU Sanctions as Security Policy Tools*, Accessed 05 April 2024.

10 Viktor S., *Korlátozott tagállami mozgástér a közös kül- és biztonságpolitikában? – a (gazdasági) szankciók alkalmazásának jogi feltételei az Európai Unióban*, (Limited room for manoeuvre for Member States in the Common Foreign and Security Policy? - the legal conditions for the application of (economic) sanctions in the European Union) Állam- és Jogtudomány, Vol. LIX, No. 2, 2018, pp. 53 – 71.

between the Member States and the Community institutions. UNSC sanctions were transposed into the legal systems of the Member States independently and at different times. The independent implementation by Member States has also led to differences in substance.

By the 1980s, Community interpretation of the law began to suggest that sanctions measures should be adopted within the framework of a common commercial policy due to their trade policy nature. This view was based partly on the need for effective sanctions enforcement by the Community and partly on a new understanding of the division of powers in relation to trade policy.

Az effectiveness, from a legal point of view, implies that the national rules of procedure may not make it virtually or in practice impossible or excessively difficult to exercise rights under EU law.[11] The European Commission, as the guardian of the EU treaties, has the task of enforcing EU law, by monitoring the application of EU primary and secondary law and ensuring its uniform application throughout the EU.[12]

The new understanding of the division of powers concerning trade policy was materialized in Opinion 1/78 of the Court of Justice of the EU. Its relevant element for our topic is that the EU's common commercial policy must extend beyond traditional trade instruments to remain effective. This policy includes measures with non-commercial objectives, such as development, foreign and security policy, and environmental or health protection, as long as they directly impact trade. Article 207(1) TFEU acknowledges this interaction. From 1982 to 1993, before the Maastricht Treaty, trade policy sanctions required unanimous decisions by Member States within the European Political Cooperation framework.[13]

The new legal basis established by the Maastricht Treaty[14] is a regulation in line with the practice of the previous period. These rules and sanctions were decided on a new, two-stage legal basis, based on Article 228a of the Treaty on European Union**.** It made it clear that trade policy measures required based on intergovernmental agreements between Member States would be formulated and implemented uniformly through the powers conferred on the Union. The provision concerned measures against third countries, so it established competence for traditional sanctions against countries but was unsuitable for application to horizontal sanctions.[15]

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11 Case C-49/14 Finanmadrid, [2016] ECLI:EU:C:2016:98 point 40.

12 Article 17 TEU (Lisbon).

13 Opinion of advocate general Sharpston in Opinion procedure 2/15 par 101. [ECLI: EU: C:2016:992].

14 TEU (Maastricht).

15 Meissner K., *How to sanction international wrongdoing? The design of EU restrictive measures,* Rev Int Organ. 2023, pp 61-85.

The Treaty of Lisbon has clarified the legal basis for the imposition of sanctions and, in addition to providing for the application of horizontal sanctions, allows countries to impose "restrictive measures against natural or legal persons and groups or non-State entities."[16].

The sanctions applied by the EU can be divided into three categories.[17]

Firstly, sanctions for the implementation of sanctions adopted by the UN Security Council (hereinafter: UNSC). All EU Member States are also UN Member States, UNSC resolutions are binding on all Member States. If the implementation of a UNSC resolution concerns a shared or exclusive competence of EU Member States, the EU has a legislative obligation. e.g. Afghanistan, Central African Republic. The UNSC's competence is limited to the maintenance of international peace and security, but it has no power to take decisions or restrictive measures on matters other than those covered by the UNSC resolution; therefore, the second group includes sanctions, which are based on a UNSC resolution but which the EU wishes to apply more broadly or more strictly than the UNSC resolution. e.g. Iran and Libya. The third group of cases includes EU autonomous sanctions, which are taken by EU Member States on their initiative in the absence of a UNSC Resolution and are presented as a coherent EU foreign policy. They are not created independently but typically in cooperation with the US or other countries and international organisations. e.g. Libya.

1.2.2. Relevant Case Law - Joint Cases *Yusuf and Kadi vs Council of the European Union*

As we have seen, the Maastricht system of sanctions policy was unsuitable for application to horizontal sanctions. The UN targeted financial sanctions regime was first established by Resolution UNSCR 1267 (1999), in which the United Nations Security Council imposes several measures against individuals and entities associated with Al-Qaida. The EU regulation implementing the first horizontal sanction also raised questions of competence and fundamental rights, which the CJEU interpreted in the Kadi and Yusuf cases and on a criticized dualist approach led to the annulment of the Regulation on fundamental rights grounds.[18]

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16 Article 215 (2) TFEU (Lisbon).

17 Biersteker T.; Portela, C, *EU Sanctions in Context: Three Types*, European Union Institute for Security Studies (EUISS), [http://www.jstor.org/stable/resrep06822], Accessed 05 April 2024.

18 Kokott, J.; Sobotta, C., *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?,* European Journal of International Law, Volume 23, Issue 4, November 2012, p. 1015–1024.

On 15 October 1999, the UN Security Council adopted Resolution 1267 (1999) ordering, among other things, Member States to freeze funds and other financial resources derived from assets owned or controlled, directly or indirectly, by the Taliban or by any undertaking owned or controlled by the Taliban. The Sanctions Committee designated Yassin Abdullah Kadi and the Al Barakaat International Foundation, based in Sweden, as having links to Usama bin Laden, the Al-Qaida network and the Taliban.

The Council of the European Community has adopted a Regulation freezing the funds and other financial resources of the persons and entities whose names appear on the list annexed to that Regulation. This follows changes to the list drawn up by the Sanctions Committee, which thus included Mr Kadi and Al Barakaat on 19 October 2001.

YA Kadi and Al Barakaat brought actions before the Court of First Instance to annul that EC regulation, claiming that the Council did not have the power to adopt it and that it infringed on a number of their fundamental rights, including the right to property and the right to defence.

The Court of First Instance dismissed the action and maintained the Regulation in force. The Court ruled that, as a general rule, the Community courts have no jurisdiction to review the validity of the Regulation in question and that a Member State's obligation under an international treaty takes precedence over Community law.

YA Kadi and Al Barakaat appealed against these judgments before the Court of Justice.

The Court of Justice set aside the judgment of the Court of First Instance and annulled the EC Council Regulation in so far as it concerns Mr Kadi and the Al Barakaat International Foundation, with effect from the expiry of a three-month period of grace.

Regarding jurisdiction, the Court of Justice confirmed that the Council had jurisdiction to adopt the Regulation based on Articles 60 EC and 301 EC, read in conjunction with Article 308 EC and that the Court of First Instance had erred in law in this respect but had reached the correct conclusion. The review by the Court of Justice of the validity of Community acts concerning fundamental rights must be regarded as an expression in the Community of the constitutional guarantee deriving from the EC Treaty as a separate legal system, which cannot be affected by an international agreement. It pointed out that the subject of the review is the Community Act implementing the international agreement and not the international agreement.

As regards the legal basis for the application of sanctions against persons, it pointed out that the Union and the Community are two integrated but distinct legal systems. The bridge between the Treaties could not be extended to other provisions of the EC Treaty because this would be against the will of the authors of the Treaties. It also pointed out that Article 301 of the EC Treaty could not be used by itself to impose sanctions on individuals. However, it stated that "In as much as they provide for Community powers to impose restrictive measures of an economic nature to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument".[19] (226)

As regards the right to property and the rights of the defence, it found that the EC Regulation under examination did not provide for a procedure for the communication of the facts justifying the listing of the names of the persons concerned at the same time as or after such listing and that the Council had not informed YA Kadi and Al Barakaat of the facts adopted against them which would have justified their initial listing. That breach of the rights of the defence of Mr Y.A. Kadi and Mr Al Barakaat also amounts to the violation of their right to a judicial remedy, as they could not defend their rights in appropriate conditions before the Community judicature.

The Court also held that freezing the funds constituted an unjustified restriction on Mr Kadi's right to property. The Court considers that the restrictive measures imposed by the Regulation constitute a restriction on that right, which is, in principle, justified. Still, in the present case, the Regulation was adopted without Mr Kadi being afforded any guarantee enabling him to challenge the infringement of his property rights.

2. ECONOMIC SANCTIONS

The preceding sections presented an overview of the foundations of sanctions policy, including its international and EU legal basis and the development of EU law in terms of both the division of powers and the legal basis for the applicability of different types of sanctions. The following section will introduce the general concept of economic sanctions and their relevance in civil proceedings.

2.1. Interpretation of Economic Sanctions under National Law

Sanctions policy is the set of objectives and legal bases for sanctions. As we have seen in the previous examples, individual sanction measures are autonomous legal

[19] Joined Cases C-402/05 P and C-415/05 P, [2008] ECLI:EU:C:2008:461, point: 226.

provisions that respond to specific situations. Such legal provisions are, for example, a UN Security Council Resolution in the case of the UN, a Common Position in the framework of the CFSP and an EU Regulation in the case of the EU. EU sanctions are, in fact, implemented by individual Member States. Although regulation has general application, it is binding in its entirety and is directly applicable in all Member States.[20], it also creates a legislative obligation for Member States to ensure effective enforcement of the EU law[21], e.g. by creating a framework legislation. Ensuring effective enforcement through framework legislation will relieve Member States of needing further legislation if new sanctions are adopted.[22] The advantage of national framework legislation for this paper is that the national legislator determined to use a general definition to ensure that the various economic sanctions are enforced, thus serving as a basis for a definition, which I will illustrate below using the Hungarian example.

The Hungarian State ensures the proper implementation of the financial and property restrictive measures imposed by the EU and the UNSC through the procedural rules contained in Act LII of 2017. The Act lays down general rules for the enforcement of economic sanctions. In this context, the Act defines the concept of economic sanctions in terms of its scope, specifies the persons subject to the restriction in terms of its subject matter, and establishes the organisational framework and procedures for enforcement.

According to the Act's generalised definition, a financial and property restrictive measure is a freezing of funds and economic resources ordered by an EU act or a UNSCR, a prohibition on making funds or economic resources available as provided for in an EU act or a UNSCR, a ban or restriction on financial transactions (transfer of funds) and the related authorisation procedure in cases specified in an EU act or a UNSCR.[23]

It defines by way of reference the subjects of a financial and property restrictive measure as a natural or legal person, entity without legal personality, or a natural or legal person, entity without legal personality, which is subject to an EU act or a UNSCR imposing a financial and property restrictive measure, or a natural or le-

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20 Article 288 TFEU (Lisbon).

21 Muzsalyi R., *Az EU-jog hatása a polgári eljárásjogra.* 2020, Budapest: Akadémiai Kiadó, [https://mersz.hu/hivatkozas/m768aejha_51_p1/#m768aejha_51_p1/], Accessed 05 April 2024.

22 Bismuth, R., *The New Frontiers of European Sanctions and the Grey Areas of International Law,* [https://geopolitique.eu/en/articles/the-new-frontiers-of-european-sanctions-and-the-grey-areas-of-international-law/], Accessed 05 April, 2024.

23 2. § point 5 of Act LII of 2017. on implementing the financial and property restrictive measures imposed by the European Union and the United Nations Security Council.

gal person, entity without legal personality, which is a member of an entity subject to an EU act or a UNSCR imposing a financial and property restrictive measure.[24]

The Act also directly defines the tasks of law enforcement bodies, such as service providers, supervisory bodies, asset registries, and the procedure for appeals. However, as can be seen from the case law below, sanctions and these rules are also applied indirectly, e.g. in the settlement of claims for damages.

2.2. Role of National Bodies

Under the Act, there are three types of national bodies: the supervisory body, the responsible authority, and the courts.

The supervisory body shall ensure that service providers comply with the obligations laid down by law and shall provide information to them.[25]

The authority is responsible for enforcing the rules of the different sanctioning regimes by monitoring economic operators and transactions. In the case of a person or transaction subject to a sanction, it decides on the obligation to refuse a transaction or, if other restrictions are necessary, initiates legal proceedings.[26]

The national court, a key player in the enforcement of sanctions, extends its jurisdiction beyond the restrictions on individual transactions. In civil matters, it undertakes two types of tasks: firstly, the enforcement of the restriction or discharge and, secondly, the remedy of the persons concerned in their application for a remedy regarding enforcement. This comprehensive role of the national court ensures a fair and just enforcement process.

Suppose a person subject to a financial and property restraint measure holds assets subject to a financial and property restraint measure subject to a freezing order in the territory of Hungary. In that case, the service provider obliged to do so may not execute the financial disposition, and the body keeping the property register may not perform the entry, which would result in a change of the right of disposal. The company registry court shall suspend the operation of the company concerned. The regional court having jurisdiction over the location of the assets shall order the assets to be frozen.[27] Suppose the EU act or UN Security Council resolution imposing the sanctioning measure allows for an exemption from asset freez-

[24] 2. § point 6 of Act LII of 2017.

[25] 3. § section 2 and 5 of Act LII of 2017.

[26] 4. § and 5. § of Act LII of 2017.

[27] 5. § of Act LII of 2017.

ing. In that case, the court will decide on a request to lift the freeze concerning the person or item of property concerned by the exemption. The court shall determine the decision based on the conditions and criteria in the EU Act or UNSCR. The discharge decision will be communicated to the other Member States and institutions of the European Union through the Minister for Justice by EU acts.[28]

The above measures taken to enforce a sanction are subject to appeal under the rules of the national implementing law governing the blocking. The appeal may be successful if it is established that the person concerned is not the subject of a financial and property restrictive measure imposed by an EU act or a UNSCR.[29]

2.3. Relevant National Case Law on the National Enforcement of Sanctions

The following simple example illustrates the national court's powers in enforcement and discharge and remedy procedures.

The EU sanction based on which the legal action is brought is to freeze all funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities or bodies listed in the Annex to the EU Regulation or by any natural or legal person, entity or body associated with them.

The national authority responsible for enforcing sanctions has detected that a domestic financial institution is directly majority-owned by a company established in another EU Member State whose majority owner is on the EU sanctions list. Based on the sanctioning provision described above, as it is controlled by the legal entity on the sanctions list, the domestic financial institution indirectly became subject to the financial and property restriction measure. The national authority responsible for enforcing the sanctions has initiated a freezing order on the real estate owned by the domestic financial institution before the regional courts of the place where the assets are located, and the regional court has ordered the real estate to be frozen.

In the meantime, the legal person subject to the sanction has been authorised, under a discharge procedure authorised by the other Member State, to acquire a majority holding in the majority shareholder of the domestic financial institution established in that other Member State. The legal person on the sanctions list has sold its ownership interest to another legal person established in that Member State. As a result of the sale, the domestic financial institution ceased to have a

[28] 12-13 § of Act LII of 2017.

[29] 11. § of Act LII of 2017.

relationship with the sanctioned person and was, therefore, no longer indirectly subject to the sanction.

Based on the domestic financial institution's application, the national authority responsible for enforcing the sanctions found that the domestic financial institution could no longer be considered subject to the sanction as a result of the transfer of property following the discharge and, as a result, initiated an appeal before the courts to lift the blocking of the domestic financial institution's immovable property. The court found the application to be justified based on the business records of the domestic financial institution and its owners and lifted the freeze.

3. CIVIL LAW EFFECTS OF ECONOMIC SANCTIONS FOLLOWING THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-168/17[30]

The case law detailed below shows that economic sanctions can also apply to persons not subject to sanctions. It also illustrates how economic sanctions can influence the decision of a national court on a question of civil substantive law.

The case is based on applying the restrictive measures imposed by the EU in Regulation (EU) No 204/2011 in view of the situation in Libya, according to the UN Security Council Resolution. The sanctions prohibit the making available, directly or indirectly, of funds or economic resources of any kind whatsoever to or for the benefit of the natural or legal persons, entities or bodies listed in Annexes II and III to the Regulation and the making available of any claim in connection with the contracts or transactions concerned. The Regulation also provides an exception for payments due under contracts, agreements or obligations concluded before the date of designation. The definition of funds is defined in the Regulation by way of example, stating that funds are financial assets and economic benefits of every kind. It included, among other things, credit, right of set-off, guarantees, performance bonds and other financial commitments and letters of credit.

The legal relationship underlying the reference for a preliminary ruling was a settlement dispute between two Hungarian banks established in the EU. The dispute arose out of the provision of a counter-guarantee by a Libyan bank for a guarantee given to a Libyan customer in relation to the execution of a contract by a Hungarian company in Libya. During the legal relationship, the Libyan bank was subject to the above restrictions for a shorter period and the Libyan customer for a longer period, which resulted in a dispute over the EU banks' settlement obligations.

[30] Case C-168/17 *SH vs TG*, [2019], ECLI:EU:C:2019:36.

Before the national court, there was no doubt that as long as the Libyan customer was subject to sanctions, no counter-guarantee payment could be made in its favour. However, a preliminary ruling was required on whether the payment and enforcement of the various bank guarantee services and fees were subject to the prohibition and the temporal scope of the restrictive measures applicable to payments and settlement, which required an interpretation of EU law.

3.1. The Main Proceedings and the Legal Issues

According to the facts of the main proceedings, on 7 July 2009, HIB, a Libyan company, as the client, and UF, a Hungarian construction company, as the contractor, concluded a construction contract to construct several utility infrastructure improvements in Libya. The customer required Libyan bank guarantees in connection with the contract. The guarantees ensured that the contractor would perform against the advance payment received from the customer (advance payment guarantee) and that the works undertaken would be performed in accordance with the contract (performance guarantee).

Sahara Bank, a Libyan bank, provided the requested guarantees for the benefit of the Libyan contractor, but made this conditional on the existence of a counter-guarantee provided by a Hungarian bank.

The Hungarian contractor agreed with SH Hungarian Bank to provide the advance payment and performance counter-guarantee requested by the Libyan bank. SH provided the counter-guarantee through TG, also a Hungarian bank, by mandating TG to provide the counter-guarantee and standby letter of credit to the Libyan bank, and therefore, SH agreed to pay TG an advance commission of 1,30% per quarter and to reimburse the Libyan bank for its fees and costs, as well as its financing costs and any applicable default interest.

On 24 November 2009, TG issued to the Libyan bank a counter-guarantee for the repayment of the advance payment due on 30 August 2013 and, on 17 December 2014, an irrevocable standby letter of credit due on 30 June 2014. In respect of these, the Libyan bank issued the bank guarantees required by the Libyan customer in favour of the Hungarian contractor.

The Libyan companies involved in the relationship were added to the list of persons covered by the EU Regulation imposing restrictive measures because of the situation in Libya. The Libyan customer (HIB) was listed by name from 1 March 2011 to 29 January 2014, and indirectly, the Libyan bank (Sahara Bank) was listed temporarily from 22 March 2011 to 2 September 2011.

SH met its payment obligations to TG until March 2011. Between 2 September 2011 and 16 July 2013, the TG paid Sahara Bank the fees due under the counter-guarantee contract with it.

The two Hungarian banks agreed that SH, as the depositor, would deposit the unpaid guarantee fees but only pay them because the restrictive measures on HIB would be lifted until the expiry of these two counter-guarantees. It is stipulated that no request for payment of any advance repayment guarantee can be honoured as long as the HIB is subject to restrictive measures. The advance repayment counter-guarantee issued by SH expired on 14 September 2013, but the HIB has not been removed from the list in Annex III to Regulation 204/2011.

SH has applied to the court to substitute the defendant's statement of judgment for releasing the deposit under the deposit agreement. The defendant, TG, counter-claimed against SH for paying fees under a counter-guarantee agreement in various legal actions. The Court of First Instance upheld the action, upheld the counter-claim in part on contractual grounds and held that the guarantee fees due to TG in its own right did not fall within the scope of Regulation No 204/2011 since the case concerned the consideration for the services of TG, a Hungarian legal person. By contrast, the guarantee fees paid by TG to Sahara Bank indirectly served to discharge an obligation in favour of HIB, which is subject to Regulation 204/2011 and, therefore, falls within the scope of that Regulation and cannot be claimed from SH.

The Court of Appeal partially reversed the judgment of the Court of First Instance and dismissed the counterclaim in its entirety. It held that the parties had amended the provision in their guarantee agreement establishing the right to a premium and the due date, taking note of the situation created by the penalty. The payment was conditional on the removal of HIB from the blacklist by the date of expiry of the guarantees, which did not happen, and therefore, no fee was due to TG. It further pointed out that the sanction under the mandatory EU regulation made it impossible to enforce the claim in the civil law relationship, and therefore, TG could not provide the guarantee service and was not entitled to its remuneration.

TG applied for review to the Curia, which initiated a preliminary ruling procedure to interpret the contested EU law.

3.2. Decision of the Court of Justice of the European Union

In its judgment, the CJEU answered the questions referred for a preliminary ruling more precisely, grouping them differently from both the application and the Advocate General's Opinion. In the CJEU's view, the question referred by the referring court is whether Article 5(2) of Regulation No 204/2011, first, Article

12 of that Regulation, second, Article 9 of that Regulation and, fourth, Article 17(1) of Regulation No 2016/44, which replaced Article 12 of Regulation No 204/2011, apply to the dispute described.

In its answer to the rephrased first question on the applicability of Article 5(2) of Regulation 204/2011 to the dispute described, the CJEU went into detail on all three cases described in the question referred, namely the case of a bank guarantee provided by an EU bank to a Libyan bank subject to a restriction, the case of a bank guarantee provided by an EU bank to a Libyan bank not subject to a restriction but in favour of a restricted entity, and the case of payment of the fee for a counter-guarantee agreement between two EU banks.

In answering this question, ECJ has referred to its previous relevant case law to support a broad interpretation of the regulatory concepts applicable. According to that case, a prohibition on making funds or economic resources available to a person is to be interpreted broadly as covering all acts which, under the applicable national law, are necessary to exercise an effective and absolute right of disposal. The prohibition covers any disposal, whether or not it is an obligation arising out of the performance of a contract. Furthermore, the concept of funds and economic resources has a broad meaning, encompassing all assets, irrespective of the means of obtaining them.

In the first case, concerning the payment of a guarantee fee by an EU bank to a Libyan bank subject to the restrictions, the CJEU underlined that Sahara Bank was on the list on which the restrictions were based from 22 March to 2 September 2011. Because of this period, only Regulation 204/2011 was applicable. The CJEU interpreted the prohibition in Article 5(2) of Regulation 204/2011 to include the direct provision of funds to a bank listed in the list of persons subject to the prohibition, irrespective of the legal title. The scope of the prohibition is independent of the fact that the payment obligation is based on the performance of a contract concluded before the Regulation's entry into force, which establishes a balanced service and counter-service.

In the second case, the CJEU held that if the beneficiary of the premium under the counter-guarantee contract of the insured bank guarantee is not subject to the prohibition, such a payment does not constitute a direct provision of funds within the meaning of Article 5(2) of the Regulation. However, an indirect provision or use for his benefit may arise because of the beneficiary's identity, subject to the prohibition. The CJEU has interpreted the concepts of indirect disposition and use of funds for the benefit of a listed person in the specific case.

The CJEU referred to the third case, the award of fees for a counter-guarantee agreement between two EU banks, as explained in the previous two cases. These

fees cannot be considered direct provisions within the meaning of Article 5(2) of the Regulation, but indirect provision to or use for the benefit of a restricted person may also arise in these cases.

The CJEU gave a detailed answer to the second question, which was rephrased, as to whether Article 12 of Regulation 204/2011 applies to the dispute described, and if so, which version of the text covered all the eventualities. In its answer, it addressed all three cases referred to in the referral, namely the case of a bank guarantee provided by an EU bank to a Libyan bank subject to a restriction, a bank guarantee provided by an EU bank to a Libyan bank not subject to a restriction but in favour of a restricted entity, and finally the payment of a fee for a counter-guarantee agreement between two EU banks.

The CJEU has analysed Article 12 of the Regulation and its different wording due to legislative changes as a basis for answering this question. It pointed out that the scope of the provision covers contracts and transactions which are directly or indirectly subject, in whole or in part, to restrictive measures. The sanction contained in the provision, the prohibition of payment, is drafted by way of example and, therefore, covers all claims relating to the contracts and transactions concerned. Concerning the change of legislation, it pointed out that the original wording of Article 12 of Regulation 204/2011 referred to claims by the Libyan government and any person by or for the benefit of the Libyan government. The version under Regulation 45/2014, which entered into force on 22 January 2014, covered the persons listed in Annex II or III to Regulation 204/2011 and the claim of any person in Libya.

It found that both the counter-guarantor (Sahara Bank) and the guarantor (HIB) were subject to the restrictions and, on the other hand, the counter-guarantee fee payment claim, if it originated from a person specified in the provision, was subject to the restriction in the Regulation and therefore the applicability of Article 12 in the case at issue in the main proceedings was justified.

In the first and second cases, the CJEU pointed out, concerning the claim for payment of a guarantee fee by the Libyan bank, which was and was not subject to the restriction, that since the last payment was made under the original wording of Article 12, the scope of the restriction should be examined based on the original provision. He pointed out that whether the Libyan bank was subject to the restriction is relevant to the application of Article 12 and that it is for the national court to determine whether it was.

In the third case, the CJEU also examined the different versions of Article 12 concerning assessing the remuneration of the counter-guarantee agreement between two EU banks. The CJEU considered that, since the EU bank was paid the fee for the counter-

guarantee granted to the Libyan bank, the EU bank could not be deemed acting on the Libyan government's behalf. However, even an EU bank may be subject to the restriction under Article 12(c) of Regulation 45/2014 if it is a person on the list in Annex III to the Regulation, any Libyan person or the Libyan government.

The CJEU has also interpreted the contractual chain consisting of the bank guarantee and two counter-guarantees described in the leading case for the applicability of Article 12(c). According to this provision, the parties to a counter-guarantee contract are the principal (SH) and the counter-guarantor (TG). The remuneration for the counter-guarantee contract is the consideration for the service provided by issuing the counter-guarantee. The counter-guarantor is, therefore, not acting on behalf of the beneficiary (Sahara Bank).

The CJEU has given a clear answer to the third question, rephrased, as to whether Article 9 of the Regulation applies to the dispute described based on the facts provided. According to its interpretation, there is a material and a personal limit to the applicability of the exception rule in Article 9. The material limitation is that the payment is based on the consideration due under contracts, agreements or obligations concluded before the restriction. The personal limit is that the person entitled to receive the payment is listed in Annex II or III of the Regulation.

CJEU pointed out that in the leading case, there was no payment under the above conditions, as there was no payment at all to the listed HIB and no payment to Sahara Bank at the time of its listing. Therefore, the application of Article 9 cannot arise in the main case.

In response to the rephrased fourth question, the CJEU noted that Regulation 2016/44 entered into force on 20 January 2016 and that the provisions of Article 17(1) are essentially identical to the wording of Article 12(1) of Regulation 204/2011 under Regulation 45/2014. As regards the choice of the applicable Regulation, it attached importance to the date of the final settlement, according to which, since the fees paid by TG to Sahara Bank were paid before 20 January 2016, the previous Regulation applies. However, the final settlement has not yet occurred between the two EU banks, SH and TG, and therefore, the payment falling within the scope of Regulation 2016/14 is subject to this Regulation.

3.3. Ratio Decidendi

In the judgment, the CJEU clarified that the concept of funds under the Regulation is to be interpreted broadly, covering the type of guarantee undertaking not expressly mentioned in the illustrative list, the provision of counter-guarantees

and all fees and commissions incurred in connection with the provision of such guarantees, irrespective of their denomination.

The prohibition covers the direct or indirect provision of funds or economic resources to or for the benefit of a person subject to a restrictive measure. The judgment makes it clear that a direct payment to a person on the restricted list is prohibited. It is, however, for the national court to determine whether, where the recipient of the direct transfer is not subject to the prohibition, there is an indirect provision or provision for the benefit of the person subject to the prohibition. In this context, it is necessary to establish the legal and financial link between the prohibited person and the recipient of the funds. It is also required to verify whether the payment results in exercising a right by the prohibited person or, in the case of a claim, enforcing a guarantee.

For the non-execution clause, the provisions of the Regulation in force at the time of final settlement shall apply to the funds paid and to the amounts and claims not yet settled.

It is up to the national court to decide, on the basis of the rules of the relevant sanction regime and the facts of the case before it, whether the economic link which the legislator seeks to restrict exists.

4. THE IMPORTANCE OF THE ECONOMIC SANCTIONS IN CIVIL LAW CASES

The presented judgments draw attention to the need for national courts to remain vigilant in their proceedings to ensure that funds are not made available, directly or indirectly, by their nationals or by other persons present in their territory to persons subject to financial restrictions. This obligation is not limited to cases of direct provision, which can be easily verified based on up-to-date personal records, but requires a broader examination. For all claims involving funds or economic resources, it may be necessary to "vet" the identity and economic links of the eligible parties to identify the legal and financial link that may confer a right of disposal on the restricted persons. Furthermore, in the case of complex contractual chains, it is also necessary to examine to which person in the complex legal web the financial asset or economic resource which is the subject of the proceedings confers a right.

Enforcement of the Regulation is not limited to litigation in the courts but can also arise in non-litigation, whether in enforcement or non-litigation concerning the liquidation of assets. The Act LII of 2017 on the Enforcement of Financial and Property Restrictive Measures imposes an obligation on service providers and supervisory bodies subject to the Prevention and Suppression of Money Launder-

ing and Terrorist Financing Act. In addition, the courts and company courts are required to enforce the freezing of assets.

In light of the above, knowledge of the material scope and temporal scope of the asset freeze and economic restrictions is essential both in the substantive assessment of a dispute and in the decision on enforcement. This judgment has clarified for practitioners the applicable legal instruments and the analytical criteria necessary for their correct application, both in terms of the broad concept of funds and the assessment of payments and enforcement.

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Review article

JUDICIALIZATION OF INTERNAL MARKET LAW: THE ROLE OF THE CJEU IN ADVANCING THE GOODS/SERVICES DICHOTOMY

Živa Šuta, mag. iur., Junior Researcher and Academic Assistant
University of Maribor, Faculty of Law
Mladinska ulica 9, 2000 Maribor, Slovenia
ziva.suta@um.si

ABSTRACT

Digital, economic, and societal development has prompted the industry to shift its focus from offering products or services to bundles of products and services. Given the breadth of product-service systems in the modern economy, it is becoming increasingly important to consider how they should be regulated at the EU level. This paper investigates whether the traditional distinction between goods and services in EU free movement law applies to product-service systems. To this end, EU primary law, specifically the distinction between goods and services under Article 26(2) of the TFEU, is examined. The argument of this paper builds on the body of case-law of the CJEU where the predominance test was applied to traditional cases of product-service bundles and the medium test to cases with a digital component. It proposes a functional, normative, and constitutional inquiry to determine whether product-service systems fall under the rules governing free movement of goods, services, or a sui generis category. It concludes that coherence of EU law, rather than convergence of the two freedoms, is required to ensure predictability and legal certainty for business owners and consumers.

Keywords*: activism, CJEU, convergence, goods and services, internal market, servitization*

1. INTRODUCTION

Marketing professor T. Leavitt famously wrote in 1984 that "people don't want to buy a quarter-inch drill, they want a quarter-inch hole".[1] In a similar vein, two managements scholars Vandermerwe and Rada wrote in 1988 that it is necessary to move "from the old and outdated focus on goods or services to inte-

[1] Leavitt, T., *The Marketing Imagination*, New York, Free Press, 1984; Freeman, ET., *Buying Quarter Inch Holes: Public Support through Results*, Archival Issues, Vol. 25, Issue 1/2, 2000, p. 92.

grated 'bundles' or systems (…) with services in the lead role". [2] They introduced 'servitization'[3] and defined the term as increasing the value of the core offering by adding services to product.[4] Thus, to remain competitive, business owners must offer product-service bundles rather than individual elements alone. Examples of servitization models include traditional services being added to the product, like delivery, spare parts provision, maintenance, help desk, renting cars or other transport means instead of buying them, and more advanced services, like subscription models, cloud computing and smart applications.[5]

The success of servitization-like business models is predicated on the assumption that customers are no longer satisfied with purchasing products alone and instead seek results and solutions to their problems.[6] This aligns with the consumer mindset to seek access to products rather than owning them, which has become even more prevalent with the arrival of the internet when economic integration became largely reliant on consumers' incentives to find the best deal for themselves.[7] Thus, it can be concluded that services have evolved into both drivers and objects of supply chain dynamics.[8]

The shift towards product-service bundles has been acknowledged in scholarly debate[9] as well as both at national and EU level. For instance, the National Board of Trade of Sweden issued a report on The Servicification of EU Manufacturing in which they acknowledged that services elements represent an increasing

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2 Vandermerwe, S.; Rada, J., *Servitization of Business: Adding Value by Adding Services*, European Management Journal, Vol. 6, Issue 4, 1988, p. 314.

3 In literature several synonyms were introduced: product-service systems, service infusion, going downstream, tertiarization, extended products, dematerialization etc. Hojnik, J., *The servitization of industry: EU law implications and challenges*, Common Market Law Review, Vol. 53, Issue 6, 2016, p. 1579.

4 Vandermerwe, S.; Rada, J., *loc. cit.*, note 2., p. 314.

5 Hojnik, J., *op. cit.,* note 3, p. 1580 – 1582; European Commission, *Innovation for a Sustainable Future – The Eco-innovation Action Plan (Eco-AP)*, Communication, COM(2011) 899 final, 15 December 2011.

6 *Ibid.*, p. 1601.

7 Lianos, I., *Updating the EU Internal Market Concept*, in: Amtenbrink, F.; Davies, G.; Kochenov, D.; Justin Lindeboom, J. (eds.), The Internal Market and the Future of European Integration, Essays in Honour of Laurence W. Gormley, Cambridge University Press, 2019, p. 526.

8 Sauvé, P., *To fuse, not to fuse, or simply confuse? Assessing the case for normative convergence between goods and services trade law*, Journal of International Economic Law, Vol. 22, Issue 3, 2019, p. 355.

9 Maduro, M. P., *Harmony and dissonance in free movement*, Cambridge Yearbook of European Legal Studies, Vol. 4, 2001, pp. 315-341; Joined Cases C-158 and 159/04, *AlfaVita Vassilopoulos v Greece*, ECLI:EU:C:2006:562, Opinion of AG Poiares Maduro; Tryfonidou, A., *Further steps on the road to convergence among the market freedoms*, European Law Review, Vol. 35, Issue 1, pp. 36-56; Andenas, M.; Roth, W. H., *Goods and services, two freedoms compared*, Mélanges en hommage à Michel Waelbroeck, Vol. II, 1999, p. 1377.

proportion of both input and output activities in the manufacturing industry.[10] Similarly, EU Commissioner Elzbieta Bienkowska stressed in her speech in 2015 titled 'Reindustrialisation of Europe: Industry 4.0 - Innovation, Growth and Jobs' that "manufacturing and services are two sides of the same coin" and that "in the modern economy, you cannot choose the one or the other . . . . You must do both".[11] The European Commission has employed a similar stance to the one of Professor T. Leavitt with a saying that people do not want light bulbs, but light.[12]

Additionally, case-law of the Court of Justice of the EU (CJEU) recognizes the growing importance of services in modern economy. In *X BV*[13] the CJEU was asked whether retail constitutes a service and thus falls under the scope of the Services Directive. Advocate General Szpunar agreed and pointed out that with the arrival of the internet retail not only consists of merely selling a product, but also of advising, counselling and offering follow-up services and that as such, it is not an activity which is merely ancillary to a product.[14] Later in 2021 Advocate General Hogan stressed in *KRONE – Verlag,*[15] that it is increasingly difficult to distinguish between products and services due to technological advances.[16] He referred to the Report on the safety and liability implications of Artificial Intelligence[17] which states that "(…) products and the provision of services are increasingly intertwined (…)".[18]

In the past year the European Commission announced in The Single Market at 30 Communication[19] that it will launch a priority process of addressing jointly

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10 Kommerskollegium, The National Board of Trade of Sweden, *The Servicification of EU Manufacturing*, Stockholm, 2016, p. 28; Kommerskollegium, The National Board of Trade of Sweden, *Servicification on the internal market: A regulatory perspective: The case of customisation by 3D printing*, Stockholm, 2015, p. 23.

11 Valero, J., *Brussels to Issue Sharing Economy "Guidelines" in March,* EurActiv, 28 January 2016, [https://www.euractiv.com/section/digital/news/brussels-to-issue-sharing-economy-guidelines-in-march/], Accessed 4 April 2024.

12 Hojnik, J., *Ecological modernization through servitization: EU regulatory support for sustainable product–service systems*, Review of European, Comparative & International Environmental Law, Vol. 27, Issue 2, 2018, p. 173.

13 Joined Cases C-360/15 and C-31/16 *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* ECLI:EU:C:2018:44.

14 Joined Cases C-360/15 and C-31/16 College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam ECLI:EU:C:2017:397, Opinion of AG Szpunar, para. 102. The CJEU agreed with AG.

15 Case C-65/20 VI v KRONE – Verlag Gesellschaft mbH & Co KG ECLI:EU:C:2021:471.

16 Case C-65/20 VI v KRONE – Verlag Gesellschaft mbH & Co KG ECLI:EU:C:2021:298, Opinion of AG Hogan, para. 30.

17 European Commision, *Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics*, COM(2020) 64 final.

18 *Ibid.,* pp. 13-14.

19 European Commission, *Single market at 30 Communication,* COM(2023) 162.

with Member States barriers to free movement of services in industrial ecosystems with a high services content.[20] It was stressed in the Communication that priority will be given in particular to construction, retail,[21] tourism[22] and business services.[23] The Communication also proposed an amended tax policy at EU level which would address distortions and ensure the good functioning of the Single Market.[24] In relation to this it included the Value Added Tax (VAT) in the Digital Age proposal.[25]

The increasingly blurred line between goods and services consequents in the increasingly intertwined legislation.[26] This calls for a response to these realities at EU level. Against this backdrop it is necessary to examine whether the existing EU legal framework is fit for the shift towards product-service bundles. In this article emphasis is placed on the primary EU law, namely TEU and TFEU[27] and the rules on free movement of goods and services contained therein. Part 2 looks at the position of goods and services in EU law and the reasons for establishing (and maintaining) the goods/services dichotomy. This is accompanied in Part 3 with the analysis of CJEU case-law which suggests a change in the judicial approach to free movement, but also has constitutional implications. Part 4 addresses the main question of the article and part 5 gives an overview of the alternative options for the facilitation of free movement of product-service bundles in the EU. It concludes that coherence of EU law is necessary rather than convergence of the two freedoms. Only this way predictability and legal certainty for business owners and consumers can be guaranteed.

2. FREE MOVEMENT OF GOODS AND SERVICES IN EU LAW

The establishment of the internal market has been a common goal of EU integration since its creation. Article 2 of the 1957 Treaty of Rome already declared that the European Economic Community aimed to establish a common market

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20 *Ibid.,* p. 16.

21 Retail is a service based on AG Szpunar Opinion in X BV.

22 Tourism sector illustrates the shift towards servitization as for example short-term rentals via applications entail both the rental of the product and the associated services (for example use of shared washing machines in the building).

23 *Ibid.*

24 *Ibid.,* p. 20.

25 *Ibid.*

26 Shin-yi, P., *A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods-Services Dichotomy*, Journal of World Trade, Vol. 54, Issue 5, 2020, p. 707.

27 Consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, pp. 1–388.

between the Member States.[28] Back then the CJEU reiterated in its *Schul*[29] judgment what is now Article 26 of the TFEU that the internal market involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.[30] Thus, the aim was to create a market that functions as if all Member States are one country.[31] The legacy of this process is seen in the second paragraph of Article 26 of the TFEU which introduces the four fundamental freedoms of the internal market, namely free movement of goods, persons, services and capital.[32]

When the EU internal market was established, goods accounted for more than 70% of the European economy.[33] Therefore, goods formed the primary focus when the Treaty rules on free movement were drafted.[34] Today, it is the reverse. It is claimed that services constitute over 70% of the European economy.[35] Part III of the draft EU Constitution acknowledged that services which were of scarcely any economic importance in 1957 in relation to goods have come into their own.[36]

Despite the importance of establishing the internal market, Treaties contain almost no definitions of goods and services. Much of the internal market law is thus case law developed by the CJEU[37] and its active role in interpreting concepts has a direct impact on trade and business with and within the EU.[38]

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28 Cuyvers, A., *The EU Common Market*, in: East African Community Law, Brill Nijhoff, 2017, p. 294.

29 Case 15/81 Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen Roosendaal ECLI:EU:C:1982:135.

30 *Ibid.*

31 Cuyvers, A., *The EU Common Market*, in: East African Community Law, Brill Nijhoff, 2017, p. 294.

32 Kellerbauer, M.; Klamert, M.; Tomkin, J. (Eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary,* Oxford University Press, 2019.

33 Cuyvers, A., *Free Movement of Goods in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 326.

34 *Ibid.*

35 Cuyvers, A., *Freedom of Establishment and the Freedom to Provide Services in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 376.

36 Draft Treaty Establishing a Constitution for Europe, Adopted by Consensus by the European Convention on 13 June and 10 July 2003, 2003/C 169/01.

37 Schütze, R., *European Union Law*, Cambridge: Cambridge University Press, 2015; Derlen, M.; Lindholm, J., Is It Good Law? Network Analysis and the CJEU's Internal Market Jurisprudence. Journal of International Economic Law, Vol. 20, Issue 2, 2017, p. 258.

38 Derlen, M.; Lindholm, J., *Is It Good Law? Network Analysis and the CJEU's Internal Market Jurisprudence*, Journal of International Economic Law, Vol. 20, Issue 2, 2017, p. 258.

2.1. Defining goods and services

The CJEU is bound by the limits imposed in the Treaties and is thus required to apply the distinction between goods and services. The differentiating characteristic for the CJEU has been that goods are material objects, whereas services are not.[39] The CJEU has defined goods as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.'[40] In this respect, the CJEU applies a broad definition of goods.[41] Rules on free movement of goods are applied for example to waste,[42] coins no longer in circulation,[43] animals,[44] and medicinal products for human use (human blood, plasma).[45] Despite the lack of tangibility and the ability to store them, TFEU rules on goods apply also to electricity[46] and natural gas.[47] Fishing rights, on the other hand, as intangible rights do not qualify as goods.[48] The CJEU also develops its case-law on goods in line with legal and cultural development. In *Josemans*[49] the CJEU excluded marijuana (as a narcotic) from the application of free movement rules, while they were applied in 2020 in a similar case.[50]

While goods are not defined in the Treaties, Articles 56 and 57 TFEU provide guidance in the pursuit of defining services as including all economic activities that are normally provided for remuneration and that are not covered by the other freedoms.[51] The CJEU applied rules on free movement of services to importation and distribution of lottery tickets,[52] donations in kind,[53] transmission of a TV

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39 Snell, J., *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, Oxford University Press, 2002, p. 4; Hojnik, *op. cit.*, note 3, p. 1621; Case 155/73 Giussepe Sacchi ECLI:EU:C:1974:40, paras. 6–7.

40 Case 7/68 Commission of the European Communities v Italian Republic ECLI:EU:C:1968:51.

41 Goods and products are synonyms in the case-law of the CJEU.

42 Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:1992:310.

43 Case 7/78 *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss* ECLI:EU:C:1978:209.

44 C-67/97 *Criminal proceedings against Ditlev Bluhme* ECLI:EU:C:1998:584.

45 Case C-296/15 *Medisanus d.o.o. v Splošna Bolnišnica Murska Sobota* ECLI:EU:C:2017:431.

46 Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66

47 C-159/94 *Commission of the European Communities v French Republic* ECLI:EU:C:2005:444.

48 Cuyvers, A., *Free Movement of Goods in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 327.

49 Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* ECLI:EU:C:2010:774.

50 Case C-663/18 *Criminal proceedings against B S and C A* ECLI:EU:C:2020:938

51 Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* ECLI:EU:C:1974:131, para. 26.

52 Case C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler ECLI:EU:C:1994:119.

53 Case C-318/07 Hein Persche v Finanzamt Lüdenscheid ECLI:EU:C:2009:33.

signal, including those in the nature of advertisements,[54] while trade in materials (tapes, file etc.) used for television programmes were defined as goods.[55] Based on the body of CJEU case-law we find that goods include tangible or intangible entities to which ownership rights can be assigned, while services require an intervention by the service provider rather than ownership transfer.[56]

2.2. Legal relevance of the dichotomy

The abovementioned distinction is often criticized. Marenco writes that 'the distinction between goods and services is largely formal and has no real economic significance. This distinction is sometimes awkward and normally ought not to entail legal consequences'.[57] Similarly, Jukka Snell considers that because of the significant convergence between the freedoms, it will usually also not make a real difference, in terms of outcome, which freedom applies.[58]

However, this article stresses that several legal consequences demand the distinction between goods and services to be preserved.[59] Those include: horizontal direct effect (HDE), applicability of the *Keck* exception, intensity of regulation, role of nationality and origin, cross-border element and specific EU-third party mechanisms.

In *Luisi and Carbone*[60] the CJEU held that not just service providers but also service recipients may rely on Article 56 TFEU.[61] Thus, if the transaction falls within the scope of the rules on services, Article 56 TFEU is binding not only on the Member States but also on private operators[62] which means that in horizontal relationships, rules on free movement of services have direct effect. On the other

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54 Case 155/73 Giussepe Sacchi ECLI:EU:C:1974:40, paras. 6–7.

55 Case 155/73 Giussepe Sacchi ECLI:EU:C:1974:40, paras. 6–7.; Cuyvers, A., *Freedom of Establishment and the Freedom to Provide Services in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 376.

56 Gadrey, J., *The Characterization of Goods and Services: An Alternative Approach*, Review of Income and Wealth, Series 46, Number 3, 2000, p. 378.

57 Hojnik, J., *Regulatory implications of servitization in the EU: Can lawyers follow the suit of digitised industry?*, EU law discussion group, Faculty of Law University of Oxford, 2016.

58 Snell, J., *op. cit.,* note 39, p. 4.

59 Hojnik, J., *op. cit.,* note 3., p. 1612.

60 Joined Cases 286/82 & 26/83 Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro ECLI:EU:C:1984:35.

61 *Ibid.,* p. 390.

62 Case C-159/00, Sapod Audic v Eco-Emballages SA ECLI:EU:C:2002:343; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan in Svenska Elektrikerförbundet ECLI:EU:C:2007:809; C-384/93 *Alpine Investments BV v Minister van Financiën* ECLI:EU:C:1995:126; Krenn, C., *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods*, Common Market Law Review, Vol. 49, Issue

hand, this is not applicable to the Treaty provisions on free movement of goods,[63] meaning that consumer, employees and other individuals may not rely on the provisions of the TFEU against (private) business owners before national tribunals. It is also worth mentioning the different approach to horizontal direct effect of provisions on services in TFEU (which have HDE) and the Services Directive (which, as a directive, lacks HDE). This disparity is often criticized in literature.[64] Interestingly, the agenda of the European Commission for the digital internal market shows a trend towards proposing more regulations rather than directives,[65] which might address and solve the issue of the lack of horizontal direct effect of directives in the future.[66]

Besides the different possibilities of individuals to claim rights under internal market rules (horizontal direct effect), *Keck*[67] decision provides for another reason why the distinction between goods and services pertains. In the framework of free movement of goods, the CJEU decided in *Keck* that it is left to the Member States to lay down detailed marketing rules when and how the goods can be sold.[68] On the other hand, Member States' autonomy to regulate selling arrangements under the *Keck* exception has so far not been applied outside the freedom of goods and thus does not apply to services.[69]

Other factors weigh in the legal relevance of the distinction. When it comes to the intensity of regulation, it is claimed that more regulating measures are to be justified on the grounds of consumer protection in the case of services. Therefore,

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1, 2012, pp. 177 – 215; Leczykiewicz, D.; Weatherill, S., *The Involvement of EU Law in Private Law Relationships*, Bloomsbury Publishing, 2013.

63 Hojnik, J., *Technology neutral EU law: digital goods within the traditional goods/services distinction*, International Journal of Law and Information Technology, Vol. 25, Issue 1, 2017, p. 73.

64 Criticism can be found for example: Luzak J., Time to Let Go of the Services/Goods Distinction? - CJEU in X (C-360/15 & C-31/16), Blog Recent developments in European Consumer Law, 1 February 2018, [https://recent-ecl.blogspot.com/2018/02/time-to-let-go-of-servicesgoods.html], Accessed 4 April 2024.; Hojnik, J., *op. cit.,* note 3, p. 1588.

65 For instance, the Batteries Directive was amended by the Batteries Regulation in 2023 (Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L 191/1). Digital Services Act, Digital Markets Act, Data Act, AI Act, Proposal for a Regulation on data collection and sharing relating to short-term accommodation rental services also illustrate the shift from directives to regulations.

66 On the other hand it may pose questions about the compatibility of this approach with the principles of subsidiarity and proportionality.

67 Joined cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard ECLI:EU:C:1993:905.

68 *Ibid.*, para 18.

69 Hojnik, J., *op. cit.,* note 63, p. 73.

the harmonization process in the service sector would be more intense than in the case of goods.[70] Moreover, only nationals of Member States may rely on the provisions on the free movement of services, however, for the application of the provisions on goods, the criterion is the origin of the product, not the nationality of the owner.[71] Cross-border element is also interpreted and applied differently. The compatibility of the restriction with the EU law may be tested, in the absence of a cross-border element, only with regard to the free movement of goods.[72] Finally, the EU–Turkey association regime fully liberalizes trade in goods and essentially applies Article 34 TFEU between the EU and Turkey, but does not grant such status to services.[73]

The aforementioned factors indicate that the application of rules on free movement of goods and services has a direct impact on the rights of business owners and consumers under EU law, as well as the legal certainty. Thus, the goods/service dichotomy must be preserved and applied carefully.

3. TRADITIONAL APPROACH OF THE CJEU TO PRODUCT/ SERVICE BUNDLES

As flagged above in reference to professors Leavitt, Vandermerwe and Rada, the blurry line between goods and services is not new. The CJEU has developed a special approach to address the issue in cases of product-service systems brought before it. To illustrate, in *18/84, Commission v France*[74] the CJEU decided that printing work cannot be described as a service, since it leads directly to the manufacture of a physical article.[75] Thus, rules on free movement of goods were applied. On the other hand, in *Van Schaik*[76] a contract on repair services for a car presented performance of services and not goods as the supply of spare parts was only ancillary to the service provision.[77] In *Omega*[78] the CJEU explained with regard to mar-

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70 Snell, J., *op. cit.,* note 39, p. 19.

71 Greaves, R., *Advertising Restrictions and the Free Movement of Goods and Services*, European Law Review, Vol. 23, Issue 4, 1998, p. 305.

72 *Ibid.*

73 Snell, J., *op. cit.,* note 39, p. 15; Vilímková, V., *The concept of goods in the case law of the Court of Justice*, The Lawyer Quarterly, Vol. 6, Issue 1, 2016, p. 40.

74 Case 21/84 *Commission of the European Communities v French Republic* ECLI:EU:C:1985:184.

75 Case 21/84 *Commission of the European Communities v French Republic* ECLI:EU:C:1985:184, para. 12.

76 Case C-55/93 *Criminal proceedings against Johannes Gerrit Cornelis van Schaik* ECLI:EU:C:1994:363.

77 Case C-55/93 *Criminal proceedings against Johannes Gerrit Cornelis van Schaik* ECLI:EU:C:1994:363.

78 Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn ECLI:EU:C:2004:614.

keting and sales that 'where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it'.[79]

Against this background the CJEU adopted the „dominance approach"[80] to determine whether within a certain product-service bundle goods or services dominate. In the *Burmanjer* case,[81] which has developed as the main reference for the test, the CJEU wrote that an economic activity should be examined in the context of either free movement of goods or freedom to provide services, if one of these elements 'is entirely secondary in relation to the other and may be considered together with it'.[82] Based on the test, the production of goods was categorised under goods, not services.[83] The dominance approach was also applied in subsequent case-law.[84] For instance in *Berlington Hungary*[85] Hungarian legislation, which prohibited the operation of slot machines outside casinos, was decided on the basis of free movement of services provisions, not goods.[86] Additionally, inaccurate health advice included in a printed newspaper copy did not constitute a '(defective) product'.[87]

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79 *Ibid.,* para. 26; see also for example Case C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler ECLI:EU:C:1994:119, para. 22; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português ECLI:EU:C:2003:446, para. 55.

80 The examined approach of the CJEU in the Burmanjer case was marked as 'dominance approach' by Hojnik, J., *op. cit.*, note 3, p. 1611.

81 Case C-20/03 Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong ECLI:EU:C:2005:307.

82 *Ibid.,* para. 43.

83 *Ibid.,* paras. 34, 35.

84 Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht ECLI*:EU:C:2006:631, para. 34; Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* ECLI:EU:C:2006:525, para. 36; Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* ECLI:EU:C:2010:725, para. 54; Joined Cases C-360/15 and C-31/16 *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam,* ECLI:EU:C:2018:44, Opinion of the AG, para. 85 ; Joined Cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals NV and General Services Antwerp NV v Belgische Staat and Middlegate Europe NV v Ministerraad,* ECLI:EU:C:2021:107, Opinion of the AG, para. 36.

85 C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* ECLI:EU:C:2015:386.

86 C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* ECLI:EU:C:2015:386.

87 Case C-65/20 *VI v KRONE – Verlag Gesellschaft mbH & Co KG* ECLI:EU:C:2021:471.

The wide acceptance of the dominance approach is seen from the fact that the CJEU applied it also to service-service bundles. In the *Uber Spain* case[88] the CJEU excluded intermediation services (as transport services) from the scope of free movement of services as the purpose of an intermediation service is to connect non-professional drivers using their own vehicle with persons who wish to make urban journeys.[89] This purpose, in the opinion of the CJEU, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of EU law.[90]

4. FREE MOVEMENT FOR PRODUCT-SERVICE BUNDLES?

What remains to be answered is how the dominance approach translates in the digital era. It seems that the application of the approach is more problematic since it is harder to establish, which part is 'entirely secondary' to the other;[91] for example, the applications or cloud system on the phone are equally important to consumers as the ownership and access to a physical phone.[92] Of course, each case must be assessed individually, but with product-service systems in place for quite some time, legal certainty should strengthen in unison.

In its jurisprudence, the CJEU primarily dealt with a special category of product-service bundles, digital goods, which can serve as guidance when interpreting broader issue of product-service systems. It held in *Dynamic Medien Vertriebs*[93] and *Football Association Premier League*[94] that the answer as to which freedom applies depends on the medium: if digital goods are not related to a tangible entity, rules on services will apply; if they do, rules concerning goods will apply.[95]

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88 Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

89 Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

90 Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981; Hojnik, J., *Servitization, IoT and Circular Economy. Need for Regulatory Intervention at EU Level?*, in: Keirsbilck, B.; Terryn, E. (eds.), Servitization and circular economy: economic and legal challenges, Intersentia, 2023, pp. 33-68.

91 Hojnik, J., *op. cit.,* note 3, p. 1612.

92 See research from Belgium, the Netherlands and the UK mentioned in: Slachmuylders, H., *iPhone as a Service? Some thoughts on Apple's rumoured hardware subscription service*, April 2022, CCM Blog, [https://kuleuven.limo.libis.be/discovery/fulldisplay?docid=lirias3717154&context=SearchWebhook&vid=32KUL_KUL:Lirias&lang=en&search_scope=lirias_profile&adaptor=SearchWebhook&tab=LIRIAS&query=any,contains,LIRIAS3717154&offset=0/], Accessed 4 April 2024.

93 Sale of DVDs or video cassettes with cartoons without an age-limit labels are goods. Case C-244/06 Dynamic Medien Vertriebs ECLI:EU:C:2008:85.

94 Importation of foreign decoding devices were considered as services. Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ECLI:EU:C:2011:631.

95 Hojnik, J., *op. cit.,* note 63, pp. 63 – 84.

It explained for example in *Football Association Premier League* that 'the national legislation is not directed at decoding devices, but deals with them only as an instrument enabling subscribers to obtain the encrypted broadcasting services' and thus, rules on free movement of goods do not apply.[96] This approach of the CJEU to assess the medium of the bundle based on the functional equivalence of its elements (the functional equivalents approach) [97] seems more in line with the servitization movement.[98] If we apply it to the example of 3D printing, free movement of goods rules will apply under the condition that the trader will send the customer already printed products; but if only a digital design is sent and the purchaser prints the product himself, rules on services will apply.[99] The application of this approach, which derives from only a handful of cases, however, remains limited, as the current position of the CJEU still relies on the understanding that tangible objects are goods and intangible objects are services.

In her research[100] Hojnik analyses the approaches to digital goods in different areas of EU law, namely taxation, copyright and consumer protection and finds that those approaches are clearly opposing. In copyright law, the CJEU supports a functional equivalents approach between digital and physical goods;[101] from a taxation standpoint, digital goods are considered as services and more favourable VAT treatment is afforded to traditional paper books and newspapers but not to e-books and e-media;[102] and when it comes to consumer protection, digital goods are neither considered as goods nor as services, but as a *sui generis* 'product'.[103]

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96 Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ECLI:EU:C:2011:631; Hojnik, J., *Digital Content as a Market Commodity Sui Generis: EU Lawyers (Finally) Moving from Newton Physics to Quantum Physics?,* Economic and Social Development: Book of Proceedings, 2017, p. 74.

97 Marked as such by Hojnik, J., *op. cit.*, note 5, p. 1613.

98 Hojnik, J., *loc. cit.,* note 95, p. 74.

99 *Ibid.,* p. 73.

100 *Ibid.*, pp. 73 – 84.

101 Case C-128/11 UsedSoft GmbH v Oracle International Corp ECLI:EU:C:2012:407, para. 47: free movement of goods principles applied although it referred solely to the downloading and storing of software on customers' computers; C-174/15 Openbare Bibliotheken ECLI:EU:C:2016:459, Opinion of AG Szpunar, para. 30: lending of electronic books is a modern equivalent of the lending of printed books.

102 C-479/13 Commission of the European Communities v French Republic ECLI:EU:C:2005:444, C-502/13 European Commission v Grand Duchy of Luxembourg ECLI:EU:C:2017:333: VAT is applied to books, not e-books (digital goods are considerably different from books on physical means of support).

103 For example Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive

Thus, while the new, functional equivalents approach dependent on the medium of the product-service bundle is indeed a departure from the traditional, dominance approach, towards the direction of the servitization movement, however, in different areas of law, different understanding to digital goods applies, which can lead to dispersion of EU law as a whole. Therefore, this article builds on the previously conducted research and stresses the importance of general principles of EU law to solve the question of goods/services dichotomy in the digital age.

5. FUNCTIONAL, NORMATIVE AND CONSTITUTIONAL EVALUATION

As noted, the distinction between goods and services as set out in EU primary law (TFEU) relates to the legal reasons behind the introduction of the distinction. It was also emphasised that in practice the line between goods and services is increasingly blurred. The CJEU has dealt with traditional cases of product-service bundles based on the dominance approach, while in cases brought about digitalisation the CJEU applied the functional equivalents approach. However, we have also seen that the application of the tests varies in different areas of law. With the lack of clear legislation and the disparities within the EU legal order, the CJEU plays an important role in preserving coherence and legal certainty.

To answer the main question of this article, that is how product-service systems should be interpreted under the EU internal market law, a three-fold evaluation is proposed. The first layer relates to the functional aspect, in which the CJEU looks at the characteristics of both freedoms without reference to any legal rules. This layer gathers both the dominance and the functional equivalents approaches since they are based on the examination of characteristics of the bundle (namely which part is predominant or the medium) without considering any rules behind goods and services. This approach offers a possibility to subsume the case under a specific freedom, but as a first step aims to find the relevant connecting factor to the legal rules. This makes the approach of the CJEU more practical and interdisciplinary, and answers the possible critique of the excessive recourse by jurists to abstract legal terms.[104]

The second layer brings about more challenges. It relates to the normative aspect which looks at the relevant rules, namely the substance of the tests applied and

97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22 November 2011, pp. 64–88.

[104] Mańko, R., *The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11),* Law and Forensic Science, Vol. 10, 2015, pp. 7 – 26.

the legal threshold. Here the main question is whether there should be another freedom for product-service bundles with its own rules. In literature there are different opinions that can be summarized into three groups: to maintain (i) separate freedoms and separate sets of rules and subsume product-service systems under one of them, (ii) separate freedoms with another set of rules for product-service systems, and (iii) to introduce a new freedom of movement of product-service systems with its own set of rules.[105]

The prevailing opinion in literature on EU internal market law is that there should be a separate category of product-service systems. Hojnik suggests that in order to avoid oversimplification and improper legal solutions it is safer to treat digital goods as a legal category *sui generis* with specific characteristics and legal consequences rather than classifying them categorically into one or the other group.[106] Luzak supports this categorization and favours the exctinction of goods/services dichotomy when it comes to product-service systems.[107] She explains that the level of consumer protection and legal certainty would drastically increase if we had one framework for trade contracts, encompassing both trade in goods, in services and in digital content, as there would be no reason to first establish which element of the contract was the predominant one in mixed transactions, in order to decide which rules to apply.[108] In respect of the normative layer, the role of the CJEU is limited as the legislature and Member States govern these questions, while the CJEU follows the limits imposed by them in the Treaties, currently in the form of distinction between goods and services under TFEU.

The last layer of the inquiry relates to the constitutional implications of the product-service systems in the EU internal market. In this layer both substantive rules and institutional aspects are analysed. It is in this context worth examining the role of general principles of EU law in the digital internal market.[109] In the current state of EU affairs where old rules are being reconsidered and where fresh rules may be forthcoming as addressed in this paper, reference to general principles becomes omnipresent.[110] One could compare this situation to the story of the

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105 Shin-yi, P., A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods-Services Dichotomy, Journal of World Trade, Vol. 54, Issue 5, 2020, pp. 699 – 726.

106 Hojnik, J., *op. cit.,* note 63, p. 73.

107 Luzak, J., *Digital Age: Time to Say Goodbye to Traditional Concepts*, Journal of European Consumer and Market Law, Vol. 7, Issue 4, 2018, p. 135.

108 *Ibid.*

109 Hatzopoulos, V., *General Principles of EU Law for the Collaborative Economy,* in: Bernitz, U.; Groussot, X.; Paju, J.; de Vries, Sybe A.; (eds.), General Principles of EU Law and the EU Digital Order, Wolters Kluwer, 2020, pp. 133-134.

110 *Ibid.*

fox and hedgehog.[111] During the period when definitions are unclear, but also when technology-neutral solutions are desperately sought, it makes sense to refer to general principles, namely the coherence of EU law, effectiveness of EU law and legal certainty and predictability.[112] The balance of powers under Article 13(2) of the TEU and sincere cooperation under Article 4(3) of the TEU should be examined as well. In this inquiry the role of the CJEU is pervasive as its interpretation of rules furthers coherence of EU law, especially if Member States do not reach a consensus to the definition and legal application of servitization models.

To summarize, product-service bundles should be examined from the perspective of their functional characteristics (if predominant element is not satisfied, other tests apply) together with general principles of EU law to ensure coherence of EU internal market law and legal certainty for consumers and business owners. The second layer is up to the EU legislature and Member States.

6. CONCLUSION

The purpose of this article is not to predict the future application of free movement rules nor to criticize the existing case-law of the CJEU. It is to emphasise the legal gaps that currently exist in the regulation of product-service systems in the EU internal market and to highlight the alternative ways to tackle the issue.

The internal market system is not prone to technological changes. In order to enforce technology-neutral solutions, recourse must made beyond the traditional rules. This article stresses that this is only possible through general principles of EU law and thus the constitutional layer of the EU legal order becomes increasingly important in the digital age. Thus, we can project that with the development of the digital internal market the degree of judicialization will increase. It is still however to be determined the substance of principles when dealing with free movement of product-service systems on a case-by-case basis and to align different areas of EU (secondary) law in this respect. It is with the current state of affairs appropriate to conclude that the issue as multi-layered and complex deserves the attention of both the legislature, Member States and the CJEU. It should be in the spirit of EU integration that all relevant stakeholders apply EU rules with a view on coherence of EU law.

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111 "*The fox knows many things, but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence*". Berlin, I., An Essay on Tolstoy's View of History, The Proper Study of Mankind: An Anthology of Essays, 1997.

112 Shuibhne, NN., *The Coherence of EU free movement law: constitutional responsibility and the Court of justice*, Oxford University Press, 2013; Duić, D., The Concept of Coherence in EU Law, Zbornik Pravnog fakulteta u Zagrebu, Vol. 65, Issue 3-4, 2015, pp. 537 – 553.

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Professional paper

ELECTRONIFICATION OF INSOLVENCY PROCEEDINGS IN THE LIGHT OF THE PROTECTION OF CREDITORS' FUNDAMENTAL RIGHTS

Kateřina Hrabánková, mag. iur.
Pavol Jozef Šafárik University in Košice, Faculty of Law
Kováčska 26, 040 75 Košice, Slovak Republic
katerina.hrabankova@student.upjs.sk

ABSTRACT

The aim of our paper is to focus on the electronicisation of insolvency proceedings through the newly introduced insolvency register, which is supposed to represent a single centralised system for insolvency and liquidation proceedings with an emphasis on the protection of creditors' personal data. The European Union is also currently commenting on several issues in the area of business entities and the transparency of business activities. In the individual sections, we have focused on the approach to the computerisation of insolvency proceedings, the definition of personal data provided in insolvency proceedings by the creditors themselves, the principles of personal data protection, also outlining the case law of the Court of Justice of the European Union dealing with this area. We have also focused on the problems that have arisen in application practice in relation to the disclosure of personal data of individuals. We conclude that the legislator should focus more specifically on the protection of creditors' personal data and tighten up the possibilities of accessing it, but also consider whether its public availability is necessary.

Keywords*: computerisation of insolvency proceedings, Protection of creditors' personal data, insolvency register*

1. THE TREND TOWARDS ELECTRONICISATION DOES NOT BYPASS INSOLVENCY PROCEEDINGS EITHER

Insolvency proceedings are a specific type of court proceeding, the purpose of which is to resolve the unfavourable economic situation[1] of a business entity that

[1] To remain viable and successful on the market, a trading company should be able to properly assess the risks of insolvency in a timely manner. See Didenko, K.; Meziels, J.; Voronova, I. *Assesment of enterpris-*

has fallen into a state of insolvency, taking into account the circumstances of the particular case, such as the person of the debtor, the nature of its liabilities, the number and positions of creditors, the assets subject to the insolvency proceedings and other factors.[2]

Unlike restructuring proceedings, it is characterised by its liquidation character - the company is directed towards the termination of its business activity and its dissolution.[3] Creditors who have entered into various legal relationships with the debtor in good faith, ideally having fulfilled the obligations to which they committed themselves but have not received the agreed consideration from the debtor, have an important position. Not to mention the fact that the claims of the creditors registered in the insolvency proceedings are usually satisfied only in some proportion[4] (if at all).[5]

The year 2023 brought centralization and computerization of preinsolvency, insolvency and liquidation proceedings into the Slovak legal order.[6] This happened with the entry into force of Act No. 309/2023 Coll. on Transformations of Commercial Companies and Cooperatives and on Amendments and Additions to Certain Acts, because of which Act No. 7/2005 Coll. was also amended. on Bankruptcy and Restructuring and on Amendments and Additions to Certain

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3 Ďurica, M., Sprievodca konkurzným právom, pp. 5, 45, [http://bvsp.open.sk/7.semester/Konkurzne_pravo/Sprievodca%20Konkurznym%20Pravom.pdf], Accessed 29 March 2024.

4 Fieden, M.; Wielenberg, S. *Insolvency administrator's incentives and the tradeoff between creditor satisfaction and efficiency in bankruptcy procedures*. In: *Business Research*, No. 4, 2017, p. 160, [https://link.springer.com/article/10.1007/s40685-017-0047-x], Accessed 4 June 2024: "*The objective of a bankruptcy law concerns two primary aspects: first, it should ensure optimal creditor satisfaction by exploiting the remaining assets of a bankrupt firm, and second, it should separate viable from unviable bankrupt firms.*"

5 Resolution of the Supreme Court of the Slovak Republic of 30 November 2011, Case No.: 3 Obo 51/2011: "The object and purpose of the bankruptcy proceedings is to arrange the bankrupt's assets and the proportional satisfaction of creditors. One of the basic effects of declaring bankruptcy on the assets that enable the purpose of bankruptcy to be fulfilled is the extinction of the possibility of individual satisfaction of creditors' claims."

6 The digitalisation of insolvency proceedings also affected other countries, e.g. Croatia, already in 2015. Amendments to the Bankruptcy Act changed the way in which information related to insolvency proceedings is published, in such a way that the publication of such data through the Official Gazette of the Republic of Croatia was replaced by the introduction of the E-Bulletion board which is available on: [https://mpudt.gov.hr/e-services/25459], Accessed 9 June 2024; See Gavric, C., Lončar, P. M., *Digitalisation of insolvency proceedings,* in: Schrönherr, 2023, [https://www.schoenherr.eu/content/digitalisation-in-insolvency-proceedings/], Accessed 9 June 2024.

Acts (hereinafter referred to as the "Insolvency Act"). The newly introduced information system - the insolvency register - is to replace the current register of bankrupts, which until the introduction of the insolvency register was the primary source of information regarding insolvency proceedings. The explanatory memorandum[7] states that the purpose of the insolvency register is to establish a single centralised system for insolvency proceedings, including small insolvency proceedings, (public preventive) restructuring proceedings, insolvency proceedings of natural persons, and liquidation proceedings (including supplementary proceedings), which is interconnected with the Commercial Gazette.

The paper deals with the analysis of the new insolvency register, which is (not only) an information source for insolvency proceedings, and the data published in it. There is a thin and blurred line between the right to (i) privacy and data protection and (ii) transparency of insolvency proceedings ensured through the insolvency register. The aim of this paper is to test the hypothesis: digitalization of insolvency proceedings interferes with the rights of creditors protected by the Charter of Fundamental Rights of the European Union beyond what is necessary. In the different sections of the paper we will focus on the insolvency register, the description of the data publicly available in it and the question of possible interference with creditors' rights in relation to their personal data publicly available in the insolvency register. The author has also considered the recent case law at European level dealing with this issue.

To verify the established hypothesis, we used several scientific methods, in particular the method of analysis, comparison, but also the method of analogy, induction or deduction.

2. THE INSOLVENCY REGISTER AS AN INFORMATION AND DELIVERY SYSTEM

The function of the insolvency register is primarily informative. The insolvency register will record the entire course of the insolvency proceedings. The intention is to record and publish the important facts that follow chronologically in the insolvency proceedings up to and including the end of the insolvency proceedings. This contributes to the transparency of the insolvency proceedings and the virtualisation of key documents related to the insolvency proceedings, such as the list of claims, the list of creditors, etc.[8]

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7 Explanatory memorandum to the government bill amending Act No 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended, and amending and supplementing certain Acts.

8 *Ibid.*

The primary objective of the insolvency register is to ensure a higher level of efficiency and speed of insolvency proceedings through the widest possible computerisation of insolvency proceedings. At the same time, it is to ensure service of process (which is currently linked to the Commercial Gazette), registration and publication of all necessary information, decisions, filings, etc.[9] Thus, a kind of "management" of insolvency proceedings will be created, about which all information will be processed in a single place, which will ultimately contribute to higher awareness not only of domestic, but also foreign entities about the vitality of potential business partners.

An important element of the insolvency register is, inter alia, the aforementioned service of process. In certain cases, the legislator has established the legal fiction of service of documents by means of their publication in the insolvency register. This is the case, for example, if the foreign creditor does not appoint a representative for service in the domestic territory in the application for the claim. He will only be served by publication in the insolvency register (Section 29(8) Insolvency Act). Thus, the insolvency claimant may not be aware of important facts relating to the insolvency proceedings unless he exercises due diligence.

3. PUBLICITY OF THE LODGED CLAIM AND ITS PARTICULARS

The right to satisfaction of a creditor's claim in insolvency proceedings from the proceeds of the realisation of assets[10] is a consequence of the proper filing of a claim.[11]

The creditor files the claim in the insolvency proceedings with the bankruptcy trustee using a designated electronic form. There is a basic deadline for filing claims - 45 days from the date of the declaration of bankruptcy. The legislator does not preclude the filing of a claim after this period (a creditor is entitled to file its claim in the insolvency proceedings in principle until the publication of the administrator's announcement of the intention to draw up a final schedule of the proceeds from the realisation of the estate), but sanctions non-compliance with

9 *Ibid.*

10 One of the basic phases of bankruptcy proceedings is the monetisation of the assets of the company (bankrupt). The proceeds obtained from the realisation of these assets (by converting assets into cash) are intended to satisfy the registered creditors. See e.g. Adamus, R. *Liquidation of the bankruptcy estate in Poland*, in: Bratislava Law Review, Vol. 4, No. 1, 2020, pp. 115-117, [https://blr.flaw.uniba.sk/index.php/BLR/article/view/156/155], Accessed 8 June 2024.

11 Sudzina, M. *Právna úprava konkurzného konania v Slovenskej republike po zmenách vykonaných zákonom č. 309/2023 Z. z.* In: Acta Iuridica Resoviensia, No. 4 (43), 2023, p. 135, [https://journals.ur.edu.pl/zeszyty-sp/article/view/8674/7615], Accessed 23 march 2024.

this period with the impossibility of exercising the voting rights that are otherwise attached to the claim.[12]

In the scope of personal data, the creditor is obliged to provide his/her identification data, which differ depending on whether he/she is a creditor:

- a natural person states his/her name and surname, place of residence;
- a natural person who is an entrepreneur shall indicate his/her business name (including his/her first and last name if different from his/her business name), business registration number or other identification data and place of business; and
- a legal person shall indicate its name, business registration number or other identification number and registered office.[13]

If the creditor's claim is secured by a security right, the creditor is obliged to duly indicate this in the application.[14] Otherwise, the security right shall not be considered, and the creditor's claim shall therefore be satisfied out of the proceeds from the realisation of the assets subject to bankruptcy together with the unsecured creditors, i.e. out of the proceeds from the realisation of the assets of the general estate. The security right shall not be considered even if it is exercised after the basic filing period for filing claims.[15]

The trustee is obliged to properly examine the claim application delivered to the bankruptcy trustee's electronic mailbox and determine its correctness, both formally and in terms of its content (i.e. whether the creditor's claim is justified). In examining the legitimacy of the claim, the trustee shall consider the documents attached by the creditor to the claim application and intended to prove the actual existence of the claim, as well as the bankrupt's accounting or other documentation at his disposal and the list of the debtor's liabilities.[16]

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12 Pospíšil, B. *et al.*, *Zákon o konkurze a reštrukturalizácii: komentár.* 2nd supplemented and revised edition. Bratislava: Wolters Kluwer, 2016, p. 179.

13 Ďurica, M. *Zákon o konkurze a reštrukturalizácii : komentár.* 4th edition. Prague: C. H. Beck, 2021, pp. 251-269.

14 Secured creditors are a special category of creditors. Their position is favoured in the sense that their claim will be satisfied in priority (or separately) from the proceeds obtained from the realisation of the secured asset. On the different types of creditors, see, e.g. Faber, D. *et al. Commencment of insolvency proceedings.* New York: Oxford University Press, 2012, p. 159.

15 *Ibid.*

16 Pospíšil, B. *Zákon o konkurze a reštrukturalizácii : komentár.* Bratislava: Iura Edition, 2012, pp. 138-139.

The trustee is obliged to enter all applications received in the list of claims[17] which will be publicly available in the insolvency register (for the time being still in the register of bankrupts[18]).

The list of claims is perceived as a digitalised list that is publicly available.[19] The insolvency register also records all facts relating to a creditor's claim. In principle, the publicly available information in the insolvency register relating to the registered claims of creditors is all the information that the creditor has indicated and is obliged to indicate in the application in accordance with the statutory requirements for the application to be duly filed with the insolvency administrator.

The insolvency register includes:[20]

(i) the identification of the creditor in the scope of the name, surname and residence, if it is a natural person, or in the scope of the name, registration number and registered office, if it is a legal person;
(ii) identification of the claim - the amount of the claim lodged and the amount of the amount established;
(iii) the legal basis for the claim;
(iv) the security for the claim, if the claim is subject to a security right;
(v) the ranking of the claim - declared and established; and
(vi) an indication of the filing of the claim within or after the basic filing period.

If a creditor in a claim application sent to the administrator's electronic mailbox also provides his or her date of birth or birth number (or other identification data), which are otherwise optional data (the Insolvency Act does not associate with the application the sanction of disregarding the filing in case of failure to

17 Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, § 31(1)

18 Decree of the Ministry of Justice of the Slovak Republic No. 665/2005 implementing certain provisions of Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, § 25a.

19 Explanatory memorandum to the government bill amending Act No 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended, and amending and supplementing certain Acts.

20 The insolvency register in the Czech Republic, which is publicly available at: [https://isir.justice.cz/isir/common/index.do], Accessed 8 June 2024 contains, in addition to detailed data on the specific insolvency proceedings, also scanned documents such as creditors' applications for claims. See Mrázová, I.; Zvirinský, P. *Czech Insolvency Proceedings Data: Social Network Analysis*. In: Procedia Computer Science, Vol. 61, 2015, [https://www.sciencedirect.com/science/article/pii/S1877050915029774], pp. 52-53, Accessed 8 June 2024.

provide such data), these data will automatically be publicly available in the insolvency register as well.

4. ELECTRONICISATION OF PROCEEDINGS WITH IMPACT ON THE FUNDAMENTAL RIGHTS OF CREDITORS

The trend towards digitalisation, the development of the Internet and information technology brings with it the storage of a large amount of data in virtual space, which can be accessed (often in a very simple way).[21] Data relating directly to natural or legal persons are also collected by the State itself, in publicly accessible registers such as the commercial register, the trade register, the register of public sector partners and also the register of bankrupts (which will gradually be replaced by the insolvency register). In response to the extensive publication of personal data, individual pieces of legislation are being adopted to regulate this area.[22] Alvar C.H. Freude and Trixty Freude take the view that privacy is an individual right that deserves protection across the board. The private sphere of individuals can only be interfered with in certain circumstances.[23]

Despite efforts not to interfere with the fundamental rights of individuals, there may indeed be a conflict between the legal regulation adopted by the European Union and the protection of privacy, or the protection of personal data guaranteed by the Charter of Fundamental Rights of the European Union itself. It is precisely because of the European Union's action that transnational regulations are being adopted, among other things, in the business environment, which have an impact on its transparency. Recently, for example, there has been an international interconnection of the various registers (including the insolvency register).[24]

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21 Proposals of the Attorney General of 25 June 2013 in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costei González: "Nowadays, the protection of personal data and the privacy of natural persons is of increasing importance. Any content that includes personal data, whether in the form of texts or audiovisual material, can be made instantly and permanently accessible worldwide in digital format. The Internet has revolutionised our lives by removing technical and institutional barriers to the dissemination and reception of information and has created a platform for a variety of information society services..."

22 Zigo, D. *Limity publicity verejných registrov.* In: ResearchGate, 2023, p. 5., [https://www.researchgate.net/profile/Daniel-Zigo/publication/377435086_LIMITY_PUBLICITY_VEREJNYCH_REGISTROV_-_LIMITS_OF_PUBLIC_ACCESS_TO_STATE_REGISTERS/links/65a69db15582153a682ba9e7/LIMITY-PUBLICITY-VEREJNYCH-REGISTROV-LIMITS-OF-PUBLIC-ACCESS-TO-STATE-REGISTERS.pdf,], Accessed 23 March 2024.

23 Freude, A.; Freude, T. *Echoes of History: Understanding of German Data Protection,* in: Newpolitik, 2016, pp. 85-86, [https://www.astrid-online.it/static/upload/freu/freude_newpolitik_german_policy_translated_10_2016-9.pdf], Accessed 26 March 2024.

24 Zigo, D., *op. cit.,* note 15, p. 6.

Precisely because of the publication of sensitive data, based on which the public can identify the subject whose data have been published, it is necessary to draw attention to their, we would say, "immortalisation" in virtual space. Once the data has been published, it is relatively easy to disseminate, store and make it available to other entities. Therefore, the possibilities of interference with personal data and the impossibility of defending against such interference increase.

The European Union is also aware of the sensitivity of the disclosure of personal data. In response, it is adopting regulatory standards governing this area. Perhaps the most well-known piece of legislation in the area of disclosure, storage, dissemination or access to personal data is 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) (the "GDPR"). The Regulation in question is also referred to as the most controversial law in the history of the European Union, which is the result of many years of intensive negotiations.[25]

The GDPR regulation was adopted because of significant technological development, globalisation and a quantum of cross-border processes, but also because of the extensive publication of data by individuals on websites. It has achieved the unification of data protection rules at European Union level. It replaced the then Directive 95/46/EC, which was not so successful at Member State level - its different implementation by Member States did not achieve even a similar level of protection of personal data across Member States' legal systems.[26] Currently, the GDPR is seen by theorists as the "transnational gold standard of data protection".[27]

GDPR defines personal data as: "any information relating to an identified or identifiable natural person (hereinafter referred to as 'data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online

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25 Powle, J. *The G.D.P.R., Europe's New Privacy Law, and the Future of the Global Data Economy.* In: The New Yorker, 2018, [https://www.newyorker.com/tech/annals-of-technology/the-gdpr-europes-new-privacy-law-and-the-future-of-the-global-data-economy], Accessed 26 march 2024.

26 Mesarčík, M. *Potrebujeme nový zákon o ochrane osobných údajov? (1. časť).* In: Justičná revue. Vol. 73, No. 1, 2021, [https://www.legalis.sk/sk/casopis/justicna-revue/potrebujeme-novy-zakon-o-ochrane-osobnych-udajov-1-cast.m-2312.html], pp. 17-29, Accessed 2 April 2024.

27 Rustad, M.L., Koeing, T.H. *Towards a Global Data Privacy Standard.* In: Florida Law Review, Vol. 71, No. 2, 2019, p. 453. [https://scholarship.law.ufl.edu/flr/vol71/iss2/3/], Accessed 2 April 2024.

identifier, or by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".[28]

With reference to the quoted definition, it is indisputable that the insolvency register contains data which are considered personal data within the meaning of the GDPR.

4.1. Reaction of the Court of Justice of the European Union

Perhaps one of the most famous decisions of the Court of Justice of the European Union in relation to the disclosure of individually identifiable information and the question of interference with fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union was the judgment of 22 November 2022 in the joined cases of WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers. The merits of the litigation were an assessment of the compatibility of access by the public to certain data published in the register of end-users of benefits with the Charter of Fundamental Rights of the European Union as well as with the GDPR Regulation. Put simply, where does the line between privacy and transparency lie?[29]

The protection of privacy and personal data is governed by the Charter of Fundamental Rights of the European Union in:

- Article 7 - "Respect for private and family life": "Everyone has the right to respect for his private and family life, home and communications"; and
- Article 8 - "Protection of personal data", point 1: "Everyone has the right to the protection of personal data concerning him or her."

In addition to the Charter of Fundamental Rights of the European Union, the protection of personal data and the protection of private life is contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Convention understands (also from a systematic point of view) the protection of personal data as one part of the protection of private life and correspondence.[30]

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[28] 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), Art. 4(1).

[29] Mooij, A.M. *Reconciling transparency and privacy through the European Digital Identity.* In: Computer Law & Security Review, Vol. 48, No. 105796, 2023, p. 1, [https://www.sciencedirect.com/science/article/pii/S0267364923000079], Accessed 8 June 2024.

[30] Barancová, H. *Nová európska úprava ochrany osobných údajov ako súčasť práva na súkromný život a korešpondenciu.* In: Sborník příspěvků z mezinárodní konference pracovní právo 2017 na téma ochrana osobních údajů, služební zákon a sociální souvislosti zaměstnávání cizinců, [https://www.law.muni.cz/sborniky/pracpravo2017/files/003.html], Accessed 3 April 2024.

In the present dispute, the court dealt with the amendment of Directive (EU) 2015/849[31] on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, which required Member States to ensure that information on the ultimate beneficial owner is made publicly available in each case, to any member of the general public[32], at least to the following extent: name, month and year of birth, country of residence and nationality (data relating to the identity of the ultimate beneficial owner), nature and extent of the beneficial owner's shareholding (data relating to the beneficial owner's financial situation).

In paragraph 38 of the judgment under review, the Court of Justice held that, since the data provided within the meaning of that directive contain information on identified natural persons (the final beneficiaries), access to that data by any entity constitutes a disproportionate interference with the fundamental rights protected by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union:[33] *"Access by the general public to information on the end beneficiaries, as provided for in Article 30(5) of Directive 2015/849, as amended, therefore constitutes an interference with the rights guaranteed by Articles 7 and 8 of the Charter."*[34] It is irrelevant whether the information relating to private life is of a sensitive nature or whether, as a result of its disclosure, it has caused adverse consequences in relation to the identified natural person.

4.2. Principles of data protection according to the practice of the European Court of Human Rights

In the above-mentioned decision, the Court of Justice held that the publication of personal data on identifiable subjects (in this case, the end-users of the benefits)

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31 Directive (EU) 2015/849, as amended by Directive (EU) 2018/843.

32 See e.g. Kubinec, M.; Ušiaková, L.; Dzimko, J.; Krištiaková, K. *Vplyv rozhodnutia Súdneho dvora Európskej únie vo veci plošného odhaľovania informácií o konečných užívateľoch výhod na právny poriadok Slovenskej republiky,* in: Právny obzor. Vol. 106, No. 5, 2023, [https://www.legalis.sk/sk/casopis/pravny-obzor/vplyv-rozhodnutia-sudneho-dvora-europskej-unie-vo-veci-plosneho-odhalovania-informacii-o-konecnych-uzivateloch-vyhod-na-pravny-poriadok-slovenskej-republiky.m-3717.html], pp. 447-460, Accessed 3 April 2024.

33 See e.g. Brewczyńska, M. *Privacy and data protection vs public access to entrepreneurs' personal data. Score 2:0,* in: EUROPEAN LAW BLOG. No. 54, 2022, [https://europeanlawblog.eu/2022/12/15/privacy-and-data-protection-vs-public-access-to-entrepreneurs-personal-data-score-20/], Accessed 3 April 2024 or Ľuptáková, T.; Führich, P. *Pozastavil Súdny dvor Európskej únie cestu za transparentnosťou?* [https://www.skubla.sk/clanky/pozastavil-sudny-dvor-europskej-unie-cestu-za-transparentnostou], Accessed 3 April 2024.

34 The Court also referred to its judgment of 1 August 2022 in Case C-184/20 Vyriausioji tarnybinės etikos komisija, paragraph 105.

in public registers constitutes an interference with their personal data. Nor is the argument that the data is collected in the commercial sphere relevant.[35] However, it is now appropriate to examine whether the interference is justified.

In relation to the protection of personal data (undoubtedly of creditors) in public registers in general, the principles of protection of personal data in public registers have evolved from Article 5 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Notice of the Ministry of Foreign Affairs of the Slovak Republic No. 49/2001 Coll.), which, according to the legal opinion of the European Court of Human Rights, includes:

(i) purpose limitation principle - the essence is a sufficiently defined purpose based on which personal data may be disclosed and its interpretation in a highly restrictive manner - the application of an expansive interpretation could result in an interference with the right to private life guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; [36]

(ii) the principle of data minimisation - the right to private life is violated even when information is provided to the public beyond the defined purpose;

(iii) the principle of accuracy of data - disclosure of inaccurate or even false information may result in damage or harm to the reputation of the data subject, and it should therefore be possible to retrospectively modify (correct) the disclosed data; and

(iv) the principle of retention restriction - its essence is to prevent the public availability of such data in public registers whose publication for the purpose of their processing has expired.[37]

Any interference with personal data must be in accordance with the above principles. At the same time, there is the requirement, given by the Charter of Fundamental Rights of the European Union, that any interference with protected rights must be (i) legislatively based, proportionate, necessary, consistent with the objectives of general interest recognised by the European Union, or (ii) justified by the protection of the rights and freedoms of others.[38]

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35 Mooij, A.M. *op. cit.,* note 26, p. 5.

36 Convention for the Protection of Human Rights and Fundamental Freedoms "Everyone has the right to respect for his private and family life, home and correspondence.", Art. 8(1).

37 Svák, J. *Osobné údaje v pasci verejných registrov.* In: Justičná revue, Vol. 74, No. 5, 2023, [https://www.legalis.sk/sk/casopis/justicna-revue/osobne-udaje-v-pasci-verejnych-registrov.m-3489.html], Accessed 23 March 2024.

38 Charter of Fundamental Rights of the European Union, Article 52(1).

However, going back to the disclosure of creditors' personal data, we should define, in the light of the above principles, whether their disclosure in the insolvency register is consistent with the above-mentioned principles on the protection of personal data, which have evolved from the practice of the European Court of Human Rights.

First of all, it is necessary to determine the purpose of the introduction of the insolvency register and the purpose of the publication of creditors' data in it. The purpose of introducing the insolvency register can be seen from the explanatory memorandum - it is to computerise the entire insolvency procedure and to relieve the trustee, the court or other parties from excessive administrative burdens. The list of claims or the list of creditors, which was previously kept by the administrator in paper form, is now kept electronically, in the insolvency register, which is an automated system containing the data relating to the insolvency proceedings. In the same way, when assessing the purpose of the publication of creditor data in the insolvency register, we consider the need to electronicise the lists previously kept by the trustee or the court in paper form.[39] But is this purpose, as stated, sufficient? That is to say, is it a purpose which corresponds to the objectives of general interest recognised by the European Union?

The data minimisation principle is about disclosing as little data as possible or as much personal data as is necessary. The question is whether the insolvency register meets this condition. As we have mentioned, personal data of creditors are disclosed to the extent that such identification is required by the Insolvency Act - these are essential elements of the application which the creditor is obliged to disclose in the application under pain of disregarding the filing. If the creditor chooses to include optional information (such as the date of birth of the creditor - natural person), the insolvency register will automatically overlay and include this information from the application. We consider that the necessary disclosure is fulfilled if only the mandatory elements of the application are disclosed. There is no interference with the creditor's personal data by disclosing the optional particulars, since the creditor has chosen to disclose them voluntarily, thereby giving implied consent to their disclosure.

Another condition is the accuracy of the data. We consider that the guarantee of the accuracy of the data is given by the mere fact that the creditor himself (or his representative), who has an interest in the correctness of his personal data, declares his claim on the designated electronic form. Should there be an error in the ap-

[39] Explanatory memorandum to the government bill amending Act No 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended, and amending and supplementing certain Acts.

plication form, the deficiencies can be corrected by the insolvency administrator via the insolvency register.

The fulfilment of the last data protection principle, namely the retention limitation principle, may be questionable. Data published in the insolvency register are 'immortalised'. The insolvency register also keeps publicly available the data of insolvency proceedings that have already been closed. The legislator does not specifically address this issue.

In practice, we have encountered a case where creditors requested the removal of their personal data by the insolvency administrator, which had been published in the insolvency register. We consider that the trustee is entitled to remove the creditor's personal data published in the insolvency register at the creditor's request, but only to the extent corresponding to the optional data which the creditor has provided in the application for claim more than the requested scope. The administrator shall be obliged to keep the mandatory data provided in the application for a claim public. Otherwise, the list of claims and the list of creditors would not comply with the statutory requirements.

Another case is when a creditor seeks complete removal of his status as a creditor in the insolvency register and argues that his status as a party to the insolvency proceedings has ceased for the reason set out in section 27(1) of the Insolvency Register, citing section 27(2) of the Insolvency Act (namely the second sentence thereof) as the reason for the complete removal of his status as a creditor of the insolvent in the public register, pursuant to which: "A creditor is obliged to inform the trustee in writing without undue delay of any fact which may give rise to the termination of his participation. The administrator shall adjust the list of claims in the register of bankrupts in accordance with such fact." The obligation of the administrator to adjust the list of claims, if the creditor's status as a party to the insolvency proceedings has ceased, conflicts with the obligation of the administrator to keep a list of claims within the meaning of Section 31(1) of the Insolvency Act, in which the registered claims are to be entered on an ongoing basis. Thus, if the trustee, at the request of a creditor, were to delete its registered claim on the ground that the creditor's status as a party to the proceedings had ceased, it would then be difficult to prove compliance with the obligation to enter that claim in the list of claims. Based on the foregoing, we consider that the administrator will not delete such a claim to exercise caution and to avoid possible liability for failure to comply satisfactorily with the obligations imposed by law. At the same time, in our opinion, he is obliged to make a note in the insolvency register for the creditor in question that his status as a party to the proceedings has ceased.

5. (IN)LEGITIMACY OF INTERFERENCE WITH CREDITORS' PERSONAL DATA?

To conclude this paper, it is necessary to ask whether the interference with creditors' personal data or privacy is justified, proportionate and purposeful. In the previous section, we have defined the different privacy principles and discussed each principle and attempted to apply it to the interference with creditors' personal data in the context of the electronic maintenance of the list of claims and the list of creditors in the insolvency register. Apart from the question of a sufficiently defined purpose to justify the interference with an individual's personal data, which we have left open, we have not concluded that any of the principles should be infringed.

As we have mentioned, the purpose of the introduction of the insolvency register is to create a single automated system. It is also intended to contribute to the computerisation of insolvency proceedings. This stated purpose does not extend to the publication of the individual documents that are part of the processes referred to above. Already at present, resolutions of the competent bankruptcy court (on the opening of bankruptcy proceedings, on the declaration of bankruptcy, on the extension of the time limit for contesting claims, on the dismissal of the trustee, etc.), an inventory of assets subject to bankruptcy, notices relating to the monetisation of assets subject to bankruptcy, notices on the convening of a creditors' meeting, etc. are published in the register of insolvency. In the same way, a list of claims is published in the register of bankrupts, which will also be published in the insolvency register.

We believe that the legislator proceeded to the introduction of computerisation of insolvency proceedings also for the sake of greater transparency of their course and perhaps also for the sake of control by the disinterested public.

In the past, the list of claims, in which the personal data of creditors are published, was kept in paper form at the administrator's office or at the court. We assume that it was accessible only to the parties to the proceedings (the insolvency court, the trustee, the creditors of the registered claims). At the request of an entity which was not a party to the insolvency proceedings, the trustee was apparently under no obligation to make the list of claims available to it, precisely because of its external position. In that way, the protection of creditors' personal data was probably better ensured.

In another decision, *L.B. v Hungary*, 9 March 2023, no. 3635/16,[40] the Grand Chamber of the European Court of Human Rights addressed the balance between

[40] Ján Svák also referred to this decision in his publication. In relation to the disclosure of a tax debtor's residential address (as personal data) in public registers, he expressed the opinion that this data is indeed capable of causing a threat to the security of the subject. See Svák, J., *op. cit.,* note 28.

the public interest and the individual's interest in the protection of personal data. The Court reasoned that it is necessary to assess in each individual case the extent to which the disclosure of personal data is necessary to achieve the purpose of its collection. The above-mentioned decision implies a warning against the ill-considered (duly unjustified) publication of personal data in public registers. At the same time, consideration should be given to whether personal data should only be disclosed to selected individuals (as it has been in the past) - hence the requirement to tighten access to it, for example in terms of the need for a subject to register with a particular public register, properly identifying themselves and demonstrating a legitimate interest in having other subjects' personal data disclosed.

The key question to be answered is to whom are the personal data of creditors published in the insolvency register addressed? We consider that only to the trustee, the insolvency court or other parties to the insolvency proceedings. The personal data are necessary for the purpose of proper identification of the creditor of the bankrupt (e.g. for the purpose of being able to deny his claim by another creditor). However, is it appropriate that this data should be made available to the general public? Clearly not. The new insolvency register should therefore serve truly as an information portal, but only to a limited extent providing information to the uninterested public. The solution, in our view, is to create a system that would require proper identification (e.g. login in the form of a name and password) of the subject to provide personal data - this would legitimise the subject in question. At the same time, we consider that such access should be granted exclusively to the parties to the insolvency proceedings in question - i.e. the court, the insolvency administrator and the registered creditors.

We consider that the stated hypothesis, i.e. that the trend towards digitisation of insolvency proceedings interferes with the rights of creditors protected by the Charter of Fundamental Rights of the European Union beyond what is necessary, has been confirmed by the above-mentioned analysis. The public availability of data to an unlimited number of subjects is not necessary and may have more negative consequences than positive ones. *De lege ferenda*, we would suggest limiting the accessibility of the data published in the insolvency register to the circle of subjects involved in the insolvency proceedings. This will prevent possible unwarranted interference in the private sphere of creditors. The transparency of the insolvency proceedings will be affected, but only as to the identification of the creditors of a particular debtor. In our opinion, this will have no impact on the availability of information whose disclosure is necessary.

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Review article

ABUSE OF A DOMINANT POSITION ON THE DIGITAL MARKETS – CASE META VS. BUNDESKARTELLAMT*

Simona Rudohradská, PhD
Pavol Jozef Šafárik University in Košice, Faculty of Law
Kováčska 26, 040 75 Košice, Slovakia
simona.rudohradska@upjs.sk

ABSTRACT

During the previous years of the ECLIC conference series, the case of Facebook (Meta), which started at the German national competition authority Bundeskartellamt, was analysed by our (broader or narrower) author team, from different perspectives. At issue was primarily the question that links the areas of data protection and competition - and thus whether the use and linking of personal data from this social network and from third parties can be considered an abuse of a dominant position in light of the fact that the collection of this data is a condition for the use of the platform. The legal case was transferred from the administrative phase, to the German national court, which referred the case to the Court of the Justice of European union (hereafter also as "CJEU") for a preliminary ruling. Advocate General Athanasios Rantos also submitted his opinion in the case, and the CJEU in its judgment of 04 July 2023, answered the questions referred for a preliminary ruling. By answering the questions referred for a preliminary ruling in case C-252/21, CJEU drawed conclusions both in relation to the principle of sincere cooperation under Article 4(3) TEU between the competent data protection and competition authorities, and in relation to the regulation of personal data and competition. From a methodological point of view, the analysis will focus in particular on the decision in the case (C-252/21), taking into account the findings presented in professional literature with emphasis on the abuse of dominant position. The aim of this paper is to select the most relevant generally applicable conclusions of the judgement of 04 July 2023 for the application of the abuse of dominance in the context of extensive data collection.

Keywords*: Meta, Google, Bundeskartellamt, data protection, competition, abuse of dominant position*

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1. INTRODUCTION

In recent years, we have witnessed a rapid increase of market power of the digital giants. Their position is consolidating with an ever-expanding user base, and the data generated by these users are increasing exponentially every day. The innovations brought by these technological giants strengthen and stabilize their market position. With some platforms it may even appear, that it is practically impossible for them to have any relevant competitor. Naturally, the acquirement of a dominant position by deliberate business steps is not prohibited within the framework of competition, either through the standards of European law or national (Slovak) law. Ultimately, it would contradict the basic principles and rules of the competition. We generally consider abuse of a dominant position to be contrary to the law. Based on the premise that the competition itself should benefit from the competition (as a certain regulated public good, the collusion of supply and demand), at the same time, it should create natural pressure on competitors to innovate and produce the best possible products at the lowest possible prices, and finally, all of the above should be for the benefit of the consumer, who can choose the most suitable product at the best price. Naturally, in the case of free services, the typical providers of which are primarily social networks, internet browsers or comparison platforms, the determinant of choice is not the price, since it is absent, but the conditions under which the given service is provided. The pleasantness and accessibility of the user interface or the trustworthiness of a large user base can also be important for the end users. In the decision-making activities of competition authorities as well as judicial authorities, both at the national and European level, we observe several actions of online platforms that have committed restrictions on competition. For the purposes of this post, selected aspects of the Meta Platforms case will be analysed. These proceedings were initiated by the national German competition authority (Bundeskartellamt), against which the platform appealed. The preliminary national court decision essentially countered the decision of the competition authority, and finally the national court referred preliminary questions to the CJEU. In the analysed case C-252/21, the Advocate General's proposals dated September 20, 2022, as well as the judgment dated July 4, 2023, were issued. The aim of this article is the analysis of the most fundamental attributes of the decision of the Court of Justice of the EU, which intersect in the field of competition, specifically the abuse of a dominant position in the light of personal data protection, which are regulated by the GDPR regulation. From a methodological point of view, the contribution was processed primarily using the analysis of relevant legal documents in the form of decisions of competition authorities or judicial authorities, both at the national and EU law levels. In order to draw conclusions and confront the acquired knowledge with the legal doctrine

presented so far in the defined area, professional literature focusing on the defined goal of the contribution was also used.

2. TO THE GENERAL QUESTIONS OF THE REGULATION OF THE PROHIBITION OF ABUSE OF A DOMINANT POSITION

Abuse of a dominant position (Article 102 of the TFEU) is prohibited restriction of competition. Together with agreements restricting competition (Art. 101 TFEU), it represents the institute of competition law, which is incorporated into the primary law of the EU. Within the framework of the legal order of the Slovak Republic, the area of illegal restriction of competition is governed by Act No. 187/2021 Coll. Act on the Protection of Competition.[1] In the conditions of the Slovak Republic, the regulation of competition underwent a more significant change in 2021, when the original Act on the Protection of Competition (No. 136/2001 Coll.) was replaced by Act No. 187/2021 Coll. This change occurred as a result of the need to transpose the ECN+ Directive[2] into the legal system of the Slovak Republic. Instead of amending the original Act No. 136/2001 Coll., the Slovak legislator chose the path of adopting new legislation, in the form of a new Act. There is no doubt, that the Directive 2019/1 is intended to strengthen the position of national competition authorities, while the preamble of this legal act also emphasizes the factor of digital environment. As stated in the non-binding part of the Directive 2019/1 "the resulting ineffective enforcement distorts competition for law-abiding undertakings and undermines consumer confidence in the internal market, particularly in the digital environment."[3] The impact of digitalisation on competition law is further highlighted emphasising the need to extend competences of the NCAs to respond to the challenges of the digital environment including digital markets, specifically "the investigative powers of national administrative competition authorities should be adequate to meet the enforcement challenges of the digital environment, and should enable NCAs to obtain all information related to the undertaking or association of undertakings which is subject to the investigative measure in digital form."[4]

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1 Unofficial translation by the author.

2 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33 (hereafter also as "Directive 2019/1").

3 *Ibid*., point 7 of Preamble.

4 *Ibid*., point 30 of Preamble.

From the preliminary analysis of the wording of the individual key pillars of competition, to which we include agreements restricting competition, abuse of a dominant position and control of concentrations, it is possible to specify, that the institutes in question have preserved their conceptual features and have not undergone significant changes by transposing the Directive 2019/1. With regard to the thematic focus of this contribution, we state that, in our opinion, the abuse of a dominant position did not undergo any change in the transposition of the ECN+ directive into the legal order of the Slovak Republic (comparing § 8 of Act No. 136/2001 Coll. and § 5 of Act No. 187/2021 Coll.). The process of implementing the ECN+ Directive into the legal order of the Slovak Republic was analysed and subsequently summarized by *Patakyová,* who characterized this process as turbulent. [5]

Abuse of a dominant position can be described as a standard institute of competition law. The generality of the concept of the general clause on the abuse of a dominant position (§5 para. 2 of Act No. 187/2021 Coll. and Article 102 of the TFEU), as well as a demonstrative calculation of distinctive practices (§5 para. 3 of Act No. 187/2021 Coll. and Article 102 letters a) to d) TFEU), which may represent an abuse of a dominant position allows to "capture" the sophisticated practices of technological giants. This is also shown by the decision-making practice of competition authorities at the national level (the Meta Platforms case itself assessed by the German national competition authority), as well as at the EU level (for example, the decision of the European Commission in the case of Google Shopping). The case of abuse of a dominant position by Google was analysed by Kostecka-Jurczyk, who pointed out, among others, that there is radically different approach of the European Commission and the American Federal Trade Commission.[6] Problematic, "neuralgic point" is when the platform has a strong market position and represents a kind of gateway of access on a specific relevant market, but from the point of view of competition law, it does not meet the criteria of a dominant position on the relevant market. In the absence of a dominant position, the application of provisions on the prohibition of abuse of a dominant position is excluded for logical reasons.

As part of the decision-making process of the competition body, it is a rule that in order to determine whether a specific subject (enterprise) is abusing a dominant

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5 Patakyova, Maria T., Patakyova, M., *Country Report on the Implementation of Directive (EU) 2019/1– Slovak Republic. Implementation of the ECN+ Directive-Slovak Republic will the new APC improve the enforcement of competition law*, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, p. 310.

6 Kostecka-Jurczyk, D., *Abuse of dominant position on digital market: is the European Commission going back to the old paradigm?*, European Research Studies Journal. Volume 24, Special Issue 1, 2021, p.121

position, it is necessary to first define the relevant market and then determine whether the entrepreneur has a dominant position on them. According to the Commission Notice on the definition of the relevant market „market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that involved undertakings face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85."[7] The cited provisions of the Commission's Notice also emphasize that, although market share is an important figure for assessing dominance, it is not the only or decisive figure. This fact supports the claim that, despite a higher market share, the platform does not automatically have a dominant position in terms of competition rules. National competition authorities follow in the same way when defining the relevant market, for example, the Slovak anti-monopoly authority refers to the relevant provision of the Commission's Notice in the justification of the decision, from which, among other things, implies that the relevant competition authority justified its decision by national § 5 par. 3 as well as 102 TFEU.[8]

2.1. Specifics of digital markets

Just as we distinguish relevant markets within the offline space, we also distinguish relevant markets in the online environment. The main difference between the services provided in the offline space and the online space represents that in the online space, services are (usually, but not necessarily) free of charge. Of course, this distinction can not be applied to every platform, as many services provided online are provided for a financial compensation. Despite the above, taking into account the platforms with the most significant influence in the online environment, it can be concluded that a significant part of these services is provided free of charge. We can mention, for example, the Internet search engine Google, the social network

7 Commission Notice on the definition of relevant market for the purposes of Community competition law, (OJ C 372, 9.12.1997, p. 5–13), point 2.

8 Antimonopoly Office of the Slovak republic, Slevomat.cz, s.r.o. Praha, Česká republika, available at: [https://www.antimon.gov.sk/data/att/7a6/4010.3c22fc.pdf?csrt=5775307945255658617], Accessed 4 May 2024, p. 4 and 15.

Facebook or Instagram (which still have their unpaid versions available for their end users) or TikTok. These platforms may operate free of charge to end-users due to the fact that the commercial users of these online platforms pay for the placement of advertisements to the end-users of these platforms. Naturally, the platform that collects user data and is therefore able to target advertising effectively has the best information about the most appropriate profiling of advertising (in order to sell as many goods or services as possible). Lastly, within journalistic sources, we find the statement that the paid version of Facebook and Instagram, the social networks operated by Meta, was their response to the judgment of the Court of Justice of the EU of 04.07.2023.[9]

Markets with intermediary services are also referred to as so-called multi-sided markets. These markets are often composed by legal relations between commercial users, or business partners (B2B level), as well as relations towards end users, or to consumers (B2C). At this point, the question arises whether, for the specific purposes of defining the relevant market, it would not be necessary to define a separate relevant market for the relationship between the platform and the trader and a separate relevant market for the relationship between the platform and the end user. Naturally, the answer to this question can only be answered when assessing a specific case, and it is not possible to take an unequivocal position except for specific factual circumstances. The reasoning behind the decision of the Slovak national competition authority in the case of Slevomat.cz, s.r.o. led to consideration to not divide the relevant market into two separate levels. In this case the acting authority ultimately did not divide this market for the purposes of defining the relevant market, stating that "for the purposes of the administrative procedure in question, the office preliminarily defines the relevant market as the market of online intermediary services on discount portals in the Slovak Republic for business partners and their customers. If the authority were to divide the given market into two separate markets according to the individual parties of the online portal, i.e. separately in relation to business partners and separately in relation to end customers, this would not, according to the preliminary conclusions of the authority, have an impact on the preliminary finding of the existence of a dominant position of the participant in the proceedings in relation to business partners against whom anti-competitive proceedings may be applied in the matter in question."[10] This

[9] The Guardian, Facebook and Instagram could charge for ad-free services in EU, available at: [https://www.theguardian.com/technology/2023/oct/03/facebook-instagram-charge-ad-free-eu-meta-mobile-desktop], Accessed 5 April 2024.

[10] Antimonopoly Office of the Slovak republic, Slevomat.cz, s.r.o. Praha, Česká republika, available at: [https://www.antimon.gov.sk/data/att/7a6/4010.3c22fc.pdf?csrt=5775307945255658617], Accessed 5 April 2024, p. 27-28.

essentially confirms the consideration that the division of the relevant market into two levels may not be decisive for assessing whether there has really been an abuse of a dominant position on the relevant market from the perspective of the impact of such an action.

Aware of the fact that for entities operating in the technological segment, it can be problematic when a specific platform does not have a dominant position on a specific relevant market,[11] the European legislator adopted the Digital Markets Act, which is already valid and effective at that time. It imposes specific obligations on technology giants fulfilling the qualitative and quantitative criteria, which are not in the nature of *ex post* sanctions, as in sanctioning their actions through the abuse of a dominant position, but gatekeepers must apply them automatically and their effect works *ex ante*. For this reason, it can be assumed that DMA regulation can serve as an effective means against restricting competition in digital markets. However, in our opinion, it will be possible to evaluate the very effectiveness of this regulation only certain time after its full application.

3. ABUSE OF A DOMINANT POSITION - THE CASE OF BUNDESKARTELLAMT VS. META

3.1. Case of Meta at Bundeskartellamt

As stated in the judgment of the CJEU The Federal Cartel Office brought proceedings against Meta Platforms, Meta Platforms Ireland and Facebook Deutschland, as a result of which, by decision of 6 February 2019, based on Paragraph 19(1) and Paragraph 32 of the GWB[12], it essentially prohibited those companies from making, in the general terms, the use of the social network Facebook by private users resident in Germany subject to the processing of their off-Facebook data and from processing the data without their consent on the basis of the general terms. In addition, mentioned decision required them to adapt those general terms in such a way that it is made clear that those data will neither be collected, nor linked with Facebook user accounts nor used without the consent of the user concerned, and it clarified the fact that such a consent is not valid if it is a condition for using the social network.[13]

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[11] In this regard, we refer to Art. 5 Preambles of the Digital Markets Act.

[12] Abbreviation from original Germanl wording „Gesetz gegen Wettbewerbsbeschränkungen," as Act against Restraints of Competition, German national competition Law – translation by the author.

[13] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 29.

3.2. Proceedings at national German court Oberlandesgericht Düsseldorf

On February 11, 2019, a complaint was filed to the Oberlandesgericht Düsseldorf against the Bundeskartellamt's administrative decision concerning Facebook, shifting the legal case from the administrative level to judicial proceedings. German judicial authority has clearly stated that the administrative decision issued by the Bundeskartellamt will most likely be overturned because the court did not agree with its conclusions. As the court emphasized: "...there are serious doubts about the legality of this decision by the Bundeskartellamt."[14] Currently, the aspect of doubts about the legality of the administrative decision entitles the acting court to comply with the petitioner's proposal to grant a suspensive effect. Second, the court also commented on data processing issues when it stated that "*…the data processing by Facebook does not cause any relevant competitive harm or any adverse development of competition. This applies both to exploitative abuse at the expense of consumers participating in the social network Facebook, and with regard to exclusionary abuse at the expense of an actual or potential competitor of Facebook.*"[15] However, the competent German judicial authorities have not yet issued a final decision on the merits of the case, and the decisions issued so far have been of a preliminary nature. After the hearing, which took place on 24th of March 2021, the court decided to stop the proceedings and submit preliminary questions to the CJEU pursuant to Art. 267 of the TFEU. The Oberlandesgericht Düsseldorf submitted a total of 7 questions to the CJEU, some of which consist of several partial sub-questions. According to *Graef*, it seems that the Düsseldorf Court has little room to still conclude that the Bundeskartellamt's decision should be quashed.[16]

3.3. Fundamental conclusions of the CJEU in case C-252/21

The decision of CJEU in case C-252/21 is of indisputable importance not only in terms of competition and personal data protection, but also in terms of defining the relationship between national competition law and European regulation. Professional literature concludes that the Bundeskartellamt vs. Meta Platforms case was a missed opportunity to define the relationship between the EU competition law and national (competition and other) law, as codified in Article 3 of Regula-

[14] Unofficial translation of the decision - Facebook. /. Bundeskartellamt The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6-7.

[15] *Ibid.*

[16] Graef, Inge. Meta platforms: How the CJEU leaves competition and data protection authorities with an assignment. *Maastricht Journal of European and Comparative Law*, 2023, Volume 30, Issue 3, p.334

tion 1/2003.[17] The case of Meta (Facebook) was also pointed as the case, where stricter national rules on abuse of dominant position was used, instead of art. 102 TFEU.[18]

Firstly, the original administrative procedure started at the German competition authority as early as 02 March 2016. In a preliminary decision on 19 December 2017, the competition authority provisionally decided that Facebook was abusing its dominant position, by the imposition of "misleading" privacy policies regarding data collected from third-party websites.[19] However, we hold the opinion, that despite the considerable time lag between the initiation of the initial national administrative proceedings and the final decision of the German national court, the CJEU's decision is of particular importance for the legal doctrine in the related field of law. Also reflecting the fact that Facebook (Meta) has already taken several steps to align its practices with valid and effective law (for example multiple changes of the general terms and conditions of use of the platform, the introduction of paid versions of the platforms, etc.).

With regard to the goal of the article formulated in the abstract and specified in the introduction of this article, we will further focus on the first and seventh and then on sixth prejudicial questions, which in our view are most related to the institution of abuse of a dominant position in digital markets.

3.3.1. Regarding the first and seventh preliminary questions

The CJEU considered the first and seventh preliminary questions together. With its questions, the national German court essentially asked whether the competition authority assessing the abuse of a dominant position on the relevant market has the competence to state that the general conditions of use of the platform are not in accordance with the GDPR. Following the principle of loyal cooperation incorporated in Art. 4 par. 3 TEU, the national court also asks whether this competence of the competition authority is preserved even if the supervisory authority operating in the field of data protection simultaneously investigates these

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17 Brook, Or; Eben, Magali. Another Missed Opportunity? Case C-252/21 Meta Platforms V. Bundeskartellamt and the Relationship between EU Competition Law and National Laws. *Journal of European Competition Law & Practice,* 2024, Vol. 15, No. 1, p.25

18 Mota Delgado, Miguel; Petit, Nicolas. Article 3 of Regulation 1/2003 and the Doctrine of Pre-emption. The Transformation of EU Competition Law–Next Generation Issues'(Adina Claici, Assimakis Komninos and Denis Waelbroeck, eds.), Wolters Kluwer, 2023., p. 129

19 Bundeskartellamt,, Preliminary Assessment in Facebook Proceeding: Facebook's collection and use of data from third-party sources is abusive, available at: [http://www.bundeskartellamt.de/ SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3], Accessed 5 April 2024, p. 1.

conditions. Even before the analysed decision was issued, we encounter with the statement that regulating the activities of major digital platforms requires an interdisciplinary and interinstitutional approach. To this end, competition and privacy agencies should establish a system of regular dialogue and cooperation.[20]

In this context, the Court of Justice of the EU emphasized that it is necessary to differentiate the powers entrusted to the national supervisory authority and the leading supervisory authority, whose cooperation is governed by the GDPR regulation in question. As it is further emphasized: „neither the GDPR nor any other instrument of EU law provides for specific rules on cooperation between a national competition authority and the relevant national supervisory authorities concerned or the lead supervisory authority. Furthermore, there is no provision in that regulation that prevents the national competition authorities from finding, in the performance of their duties, that a data processing operation carried out by an undertaking in a dominant position and liable to constitute an abuse of that position does not comply with that regulation.[21] Both the competition rules and the GDPR regulations themselves do not explicitly define special rules for cooperation between the competition authority and the GDPR supervisory authority.

Despite the absence of explicit rules for the cooperation of these authorities, the Court of Justice of the EU states that „it follows that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR."[22] Incidental determination by the competition authority that the actions of the platform are in conflict with the GDPR regulation does not mean that this authority replaces the competences of the supervisory authority in the field of data protection. According to Martínez "not every intervention on the side of a competition authority considering the application of the GDPR may be justified on the basis of the ruling. The interplay is only allowed in a narrow set of cases: those where it may be necessary for the competition authority to examine in the context of an abuse of a dominant position whether the undertaking's conduct complies with rules other than those relating to competition law (para 48). Even in these cases, the competition authority's de-

[20] WITT, Anne. Facebook v. Bundeskartellamt – May European Competition Agencies Apply the GDPR? In: *Bundeskartellamt–May European Competition Agencies Apply the GDPR*, 2022., p. 9

[21] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 43

[22] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 48

cisions do not replace nor bind the investigations and findings of data protection supervisory authorities regarding the same set of facts (para 49)."[23]

As stated by the CJEU pointing to the findings of the European Commission and as emphasized in several parts of this contribution, personal data (and data in general) essentially represent one of the most important assets of online platforms. According to Kerber and Zolna from an economic angle, all negative effects on privacy can be considered in competition law as long as they can also be interpreted as a reduction of consumer welfare (consumer welfare standard).[24] Given the fact that data is a key element in the financing of online platforms, compliance with the rules of their regulation cannot be excluded from the assessment activity of the competition authority, the CJEU specifically states in this regard "as pointed out by the Commission, *inter alia*, access to personal data and the fact that it is possible to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union."[25] As mentioned above, business models of the 21st century inherently link the use of personal data to their operations. Current practice shows that either it is possible to use the platform free of charge under the current consensus with the use of a wider range of user data, which will also allow them to "monetize", or the platform is available in paid version, where the use of personal data is limited only to the necessary extent. As emphasized by the Court of Justice of the EU, the remuneration should be proportionate.[26] Further therein, the CJEU states that if the competition authority wants to comment on the compliance of the platform's actions with the personal data protection legislation, their mutual cooperation is essential.

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[23] MARTÍNEZ, Alba Ribera, A THRESHOLD CAN TAKE YOU FURTHER THAN A STATEMENT – THE COURT OF JUSTICE'S RULING IN META PLATFORMS AND OTHERS (CASE C-252/21), available at: https://www.diritticomparati.it/a-threshold-can-take-you-further-than-a-statement-the-court-of-justices-ruling-in-meta-platforms-and-others-case-c-252-21/, visited: 20.05.2024, p. 2

[24] KERBER, Wolfgang; ZOLNA, Karsten K. The German Facebook case: The law and economics of the relationship between competition and data protection law. *European Journal of Law and Economics*, 2022, Vol. 54, No. 2, p. 231

[25] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 51

[26] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 150

At the same time, the Court of Justice emphasizes that the competition authority must consider the decision of the supervisory authority, the leading authority or the Court of Justice of the EU when making a decision, while it is not excluded that it may draw its own conclusions from this decision for them in order to apply competition law. CJEU indicated, that "it follows that, where, in the context of the examination seeking to establish whether there is an abuse of a dominant position within the meaning of Article 102 TFEU by an undertaking, a national competition authority takes the view that it is necessary to examine whether that undertaking's conduct is consistent with the provisions of the GDPR, that authority must ascertain whether that conduct or similar conduct has already been the subject of a decision by the competent national supervisory authority or the lead supervisory authority or the Court. If that is the case, the national competition authority cannot depart from it, although it remains free to draw its own conclusions from the point of view of the application of competition law."[27]

By contacting the national German authority for data protection and freedom of information, [28] Commissioner for Data Protection and Freedom of Information in Hamburg, Germany [29] having remits in relation to Facebook Deutschland and the data protection authority, Ireland [30] fulfilled its duty of loyal cooperation with the concerned national supervisory authorities as well as the leading supervisory authority. At the same time, the CJEU emphasizes that the competition authority must take into account the decision of the supervisory authority, the leading authority or the Court of Justice of the EU when making a decision, while it is not excluded that it may draw its own conclusions from them for the application of competition law. From our point of view, this means that even if the authority exercising competences in the field of personal data protection decides that the platform has committed an act in violation of the GDPR regulation, this does not automatically mean (if it has a dominant position) that it has also committed an abuse of a dominant position. At the same time, the decision that the platform did not violate the GDPR does not automatically lead to the result that it did not abuse a dominant position.

3.3.2. Regarding the sixth preliminary question

With the sixth preliminary question, the national German court asked whether the consent given to a platform that has a dominant position on the relevant market can be considered valid, taking into account the conditions set by the GDPR

27 Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 56

28 Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (BfDI)

29 Hamburgische Beauftragte für Datenschutz und Informationsfreiheit

30 Data Protection Commission (DPC), Ireland

regulation in Art. 4 point 11. Significant factor is, above all, whether such consent can be considered freely given.

First of all, it is necessary to point out that according to the conclusions of the Court of Justice of the EU, the fact that the subject has a dominant position does not prevent the consent to the processing of personal data from being validly granted, specifically "in that regard, it should be noted that, admittedly, the fact that the operator of an online social network, as controller, holds a dominant position on the social network market does not, as such, prevent the users of that social network from validly giving their consent, within the meaning of Article 4(11) of the GDPR, to the processing of their personal data by that operator." [31]

In our opinion, one of the key points of the decision is that CJEU *de facto* laid the foundation for paid versions of platforms, stating that "thus, those users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, *if necessary for an appropriate fee*, an equivalent alternative not accompanied by such data processing operations."[32]

In summary the CJEU concluded that "in the light of the foregoing, the answer to Question 6 is that point (a) of the first subparagraph of Article 6(1) and Article 9(2)(a) of the GDPR must be interpreted as meaning that the fact that the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent, within the meaning of Article 4(11) of that regulation, to the processing of their personal data by that operator. This is nevertheless an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove."[33]

4. CONCLUSION

There can be no doubt that the decision of the Court of Justice of the EU in question is of fundamental importance for the development of legal doctrine for the

[31] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 147

[32] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 150

[33] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 154

field of competition in the digital market. CJEU highlights on several places of the decision (for instance point 51 reffering to the European Commission) that the processing of personal data cannot be excluded from the competition law framework as it would not reflect the realities of the business model on which platforms such as Facebook are built. Firstly, we consider the finding of the CJEU to be particularly interesting, stating that platform users should be able to refuse consent to specific operations, unless they are necessary for the performance of the contract, or offer the user an equivalent alternative for a reasonable fee that does not involve such data processing operations. Apparently, this statement also led to the introduction of paid versions of online platforms. Secondly, from the point of view of competition law, we consider it a fundamental conclusion, that even if the platform has a dominant position in the online social network market, this does not prevent the users of such a network from validly giving their consent to the processing of their personal data in accordance with the GDPR regulation, however, the fact that the platform has a dominant position is a consistent attribute for assessing whether the consent was actually granted validly and freely, with the operator bearing the burden of proof. Thirdly, in the same way, the competition authority is entitled, as part of the review process of the abuse of a dominant position, to state that the general conditions of use are not in accordance with the GDPR, as long as it is necessary for proving the abuse of dominant position. The last fourth essential point, in our opinion constitutes defining the boundaries between the competences of data protection supervisory authorities and competition authorities supervising competition - or, better said, defining the framework for their cooperation. Taking into account the obligations of sincere cooperation with the supervisory authorities, the competition authority of a Member State may, in the context of an examination of whether there has been an abuse of a dominant position by an undertaking within the meaning of Article 102 TFEU, find that the general conditions of use drawn up by that undertaking relating to the processing of personal data and their implementation are not in conformity with the GDPR, if such a finding is necessary to establish the existence of an abuse.

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Chapter 4

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Original scientific paper

THE RIGHT OF CHILDREN TO BE HEARD IN CROATIAN CIVIL LAW*

Katarina Knol Radoja, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31 000 Osijek, Croatia
kknol@pravos.hr

Dinka Šago, PhD, Associate Professor
Faculty of Law in Split
Domovinskog rata 8, 21 000 Split, Croatia
dsago@pravst.hr

ABSTRACT

The active involvement of a person in court proceedings is essential for his effective participation and is a reflection of his right to be heard. The right to be heard is one of the basic procedural rights, which implies that a person should be allowed to express his concerns as well as his experience that what he said has be taken into account in the decision-making process. Competent authorities are obliged to listen to the participants in the procedure and talk with them, not about them. Although in some situations this will be difficult and incomprehensible, especially in relation to children or persons deprived of legal capacity, everyone capable of expressing their will and preferences in some way needs support to facilitate that expression. That is, to every person should be made possible to participate in court proceedings in such a way that they can influence its outcome by articulating their will. In this paper, we will analyze the child's right to be heard and express his opinion, and in this regard, we will warn about the inconsistency of the provisions of the Croatian general procedural regulation - the Law on Civil Procedure with the provisions of the Croatian Family Law, as well as international regulations and practice. We will refer to the question of the procedural legitimation of the child in court proceedings in which his rights are decided. Also, we will analyze the issue of the procedural legitimation of a child in family law disputes, in which the individual rights of the child are adhesivelly decided in accordance with the principle that everyone should have the opportunity to actively participate in the litigation that is conducted about his rights and interests.

Keywords: *child in court proceedings, procedural legitimation of the child, right to a fair trial, right to be heard*

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1. INTRODUCTION

Modern regulations require that the child's point of view be respected in accordance with his or her age and degree of maturity, whereby the child's active participation in the proceedings is the basis for strengthening his or her procedural position.[1] The child's right to be informed and heard is a prerequisite for the correct assessment and protection of the child's best interests.[2] Therefore, in all proceedings concerning the rights or interests of the child, the child has the right to be adequately informed about the relevant circumstances of the case and to express his or her views. This article analyses the international regulations and case law of the European Court of Human Rights, the Court of Justice of the European Union, and the Constitutional Court of the Republic of Croatia, as well as the regulations of the Republic of Croatia on the child's right to be heard and to express his or her opinion.

2. GENERAL INFORMATION ON THE RIGHT TO BE HEARD

The European Convention for the Protection of Human Rights and Fundamental Freedoms[3] is an international agreement that was adopted on 4 November 1950. The Republic of Croatia has also been a signatory to the Convention since 1997. In addition to a number of basic human rights, it also guarantees the basic procedural right, the right to a fair trial, which is guaranteed in Article 6(1). In the Republic of Croatia and on the basis of Article 29(1) of the Constitution of the Republic of Croatia[4], everyone has the right to have their rights and obligations decided fairly and within a reasonable time by a court. Notwithstanding the fact that the right to a fair trial is a fundamental human right, the European Court of Human Rights has recognised that it is not absolute and may be subject to restrictions. The basic assumptions of possible restrictions were first expressed in the judgements *Golder v United Kingdom* and *Kreuz v Poland*.[5] These judgments emphasise that the restrictions imposed are only in conformity with the Convention if they pursue a legitimate aim which is proportionate to the restrictive measures applied (*Golder v United Kingdom*, § 37; *Kreuz v Poland*, § 55).

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1 Lowe, N.; Douglas, G., *Bromley's Family Law,* Tenth edition, Oxford University Press, 2007, p. 481.

2 Rešetar, B., *Komentar Obiteljskog zakona – I. Knjiga*, Organizator, Zagreb, 2022, p. 349.; Lucić, N., *Child's special guardian – International and European expectations and Croatian reality*, Balkan Social Science Review, 2021/17, p. 112.

3 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International treaties, No. 18/97., 6/99., 14/02., 13/03., 9/05., 1/06., 2/10.

4 Constitution of the Republic of Croatia, Official Gazette No. 85/10., 05/14.

5 For more see: Brems, E., *Human Rights: University and Diversity*, Hague: Kluwer Law International, 2001.; Van Dijk, P.; Van Hoof, G. J. H., *The margin of appreciation, Theory and Practice of the European Convention on Human Rights*, Haag, Kluwer Law International, 1998.

The right to a fair trial encompasses several aspects, namely the right to a court established by law, independence and impartiality in the trial, access to the court, public and adversarial trial, legal aid, procedural equality, hearing, evidence, public disclosure of judgements, trial within a reasonable time, prohibition of arbitrary treatment, effective enforcement of judgements and the right to legal certainty.[6] Among these rights, the right of access to justice and the right to be heard stand out, as they are fundamental rights that enable the fulfilment of other guarantees. In order for any person, including a child and a person deprived of legal capacity[7], to fully exercise their right to a fair trial, they must be able to participate in the entire process on an equal footing and argue their case in an adversarial manner.

2.1. A child's right to be heard

Thanks to the adoption of the UN Convention on the Rights of the Child[8] in 1989, the idea developed that children have special rights that differ from the rights of adults due to their dependence on adults, their vulnerability and their immaturity.[9] With regard to the rights of children in court proceedings, this fundamental international legal instrument, the Convention on the Rights of the Child, stipulates that a child who is capable of expressing his or her opinion should be given the opportunity to be heard. Article 12 of the Convention on the Rights of the Child stipulates the following: "1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a represen-

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6 Uzelac, A., *Pravo na pošteno suđenje: opći i građanski aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda,* in: I. Radačić (ed.), Usklađenost zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Zagreb: Centre for Peace Studies *(Centar za mirovne studije)*, 2011, pp. 89-125.

7 On people with disabilities' right to be heard, see Knol Radoja, K.; Fegeš, M., *Pravo osoba s duševnim smetnjama na saslušanje kao pretpostavka ostvarenja njihovog prava na pristup sudu*, Osobe s invaliditetom u umjetnosti, znanosti, odgoju i obrazovanju, Zbornik radova s 1. Međunarodne umjetničke i znanstvene konferencije, Bilić, A.; Bertok-Zupković, T.; Ileš, T. *et al.* (ed.). Osijek: Academy of Arts and Culture of the Josip Juraj Strossmayer University in Osijek; Croatian Academy of Sciences and Arts (*HAZU*), 2021, pp. 529-546.

8 United Nations Convention on the Rights of the Child from 1989, Official Gazette of the SFRY, 15/90; Official Gazette of the Republic of Croatia – International treaties, 12/93.

9 Hrabar, D., *Postmoderno doba kao predvorje negacije dječjih prava*, Zbornik Pravnog fakulteta u Splitu (Collected Papers of the Faculty of Law in Split), Vol. 57, No. 3, 2020, pp. 657–688, 658; Tobin J., *Justifying Children's Rights*, in: The Future of Children's Rights, Michael Freeman (ed.), Brill – Nijhoff, Leiden – Boston, 2014, pp. 296.

tative or an appropriate body, in a manner consistent with the procedural rules of national law".[10] The right under Article 12 is closely linked to the right to protection of the best interests of the child under Article 3 of the Convention.[11] Hrabar defines the best interest of the child as acting or making a decision in accordance with what the child would decide if it were capable of doing so.[12] It is important to emphasise that the Convention does not place any limits on the child's right to express their opinion freely with the terms "the best interests of the child" and "the child's ability to form their own opinion", but on the contrary presupposes that the child is able to form their own opinion and express it, not necessarily verbally, but through play, drawing, body language, facial expressions.[13] According to the Committee on the Rights of the Child,[14] the child decides whether and how he or she wishes to be heard. In any case, the Committee recommends that the child be given the opportunity to be heard directly whenever possible. It is therefore primarily up to the child to decide whether he or she wishes to be heard directly or through a representative, and it is up to the court or other authority involved in the proceedings to enable him or her to do so. The competent authorities are obliged to inform the child about the right to express his or her views and the right to be heard directly or through a representative in all proceedings concerning him or her, as well as about the influence of the views expressed on the final outcome of the decision.[15] If the child decides to express him or herself through a representative, the representative must act in such a way that he or she exclusively represents the child's interests, accurately reflects the child's views and has sufficient knowledge and understanding of the various aspects of the decision-making process as well as experience in working with children. In addition, the Committee warns

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10 The County Court in Zagreb upheld the first instance decision on the interim measure and at the same time rejected the request for a direct hearing of a minor child older than 14 years, as it considered that, in accordance with the provisions of Art. 12 of the Convention on the Rights of the Child, the minor child was given the opportunity to express his opinion through the professional staff of the Social Welfare Centre and the special guardian, and in this way his opinion was heard and determined in the specific legal matter, and since it follows from the statements of the special guardian, that he does not wish to come to court and testify, that forced bringing of a minor child would be contrary to his interests and welfare and to the principles of the Convention on the Rights of the Child, and the refusal to hear a minor child directly is in accordance with Art. 360 of the Family Act. County Court in Zagreb, Gž Ob-1049/16.

11 For more see Rešetar, B., *op. cit*., note 2, 2022.

12 Hrabar D., *The Legal Protection of the Best Interests of the Child*, in: European Training on the Convention on the Rights of the Child, ed. Rädda Barnen/Swedish Save the Children & Centre for Social Policy Initiative, Zagreb, 1998, p. 27.

13 Hrabar, D. (2020), p. 664.

14 UN Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard, UN Doc. CRC/C/GC/12.

15 *Ibid*.

that in many cases there may be a conflict of interest between the child and their representative (e.g. parent).[16] A particular problem in Croatian practise is also the fact that the number of children represented per representative is far higher than it should be because there are not enough representatives.[17] For example, the annual report of the Croatian Ombudsman for Children for 2021 cites figures of 5,274 children represented, while the number of special guardians was 18, which corresponds to an average of 293 cases per special guardian.[18] Šimović warns that the representation of children by a special guardian is therefore often reduced to a mere formality in practise and calls into question the quality of the conduct of the proceedings in the best interests of the child.[19]

In addition to analysing the above conclusions of the Committee, the European Court of Human Rights in the case of *M. and M. v. Croatia* concluded that the applicants' complaints that the domestic authorities ignored the child's wish to live with the mother and that she had not yet been heard in civil proceedings called into question the issue relating to the right to protection of private and family life. The court is particularly surprised that, after four years and three months, the child has not yet been heard in civil proceedings for a decision on parental responsibility and has therefore not had the opportunity to express her opinion on which parent she wishes to live with. The findings and opinions of the psychiatric and psychological experts showed that the child wanted to live with the mother. At the time the civil proceedings in question were initiated, the second applicant was 9 years old, an excellent student with above-average intellectual abilities. Therefore, the claim that she was not capable of developing and freely expressing her opinion given her age and level of maturity is unjustified. The court therefore concluded that the second applicant's right to a private and family life had been violated because the domestic authorities did not take into account her wish to live with her mother.[20] Likewise, in another case against the Republic of Croatia, *C v Croatia,* the Court concluded that the combination of flawed representation and the failure to properly present and hear the applicant's opinion in the proceedings irreparably compromised the decision-making process in this case.[21]

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16 *Ibid*.

17 Lucić, N., *op. cit.,* note 2, 2021, p. 108.

18 Annual Report of the Croatian Ombudsman for children (2021), Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ_PRAVOBRANITELJ_DJECA_2021.pdf], p. 104.

19 Šimović, I., *The right of the child to be heard in the Croatian family law system*, European Integration Studies, 19 (1). (2023).

20 Case of *M. and M. v Croatia*, Application no. 10161/13, judgement of 3 September 2015.

21 Case of *C v Croatia*, Application no. 80117/17, judgement of 8 October 2020, para. 81.

The courts are therefore obliged, whenever possible, to give the child the opportunity to express his or her opinion and to listen to him or her. With regard to the best interests of the child, situations must be avoided in which others make decisions instead of the children without them having the right to express their opinion, because this can cause children to develop attachment issues and feelings of powerlessness.[22] The Convention on the Rights of the Child confirms that children are not only subjects of protection, but also subjects of human rights. This created a direct link between the state and children, without the need for an intermediary such as parents or guardians.[23] However, the perspective of the best interests of the child sometimes requires the rejection of the child's wishes, so that the hearing of the child before the judge should not be insisted upon at all costs.[24] This was established by the European Court of Human Rights[25] (hereinafter: ECHR) in the case of *Sahin v Germany*.[26] In this case, the ECHR relied on the statement of an expert heard by a court in Germany, who made a decision without hearing the child about their wish to see their father. After several meetings with the parties and the child, the expert concluded that questioning the child in court would pose a risk that could not be avoided even by a special organisation in court.[27] It states that the national court had not exceeded its discretion in relying on the expert's findings, even though it had not asked direct questions about the child's relationship with the parent.[28] The court therefore concluded that, in these circumstances, the procedural condition of hearing the child does not require the

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22 Hemrica, J.; Heyting, F., *Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making Regarding Arrangements in Case of Parental Divorce*, Childhoods, Vol. 11, No. 4, 2004., p. 462.; Knol Radoja, K., *Pravo na saslušanje i izražavanje mišljenja u posebnim ovršnim postupcima radi predaje djeteta i ostvarivanja osobnih odnosa s djetetom*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law in Rijeka), Vol. 42, No. 1, 2021, p. 171.

23 Couzens, M., *Autonomy rights versus parental autonomy*, in: The UN Children's Rights Convention: theory meets practice, André Alen. *et al.* (eds.), 2nd ed., Antwerpen; Oxford, Intersentia, 2007, p. 407.

24 Poretti, P., *Pristup pravosuđu za djecu*, in: Prekogranično kretanje djece u Europskoj uniji, Župan, M. (ed.), Osijek, J. J. Strossmayer University in Osijek, Faculty of Law 2019, p. 78; Korać Graovac A., Eterović, I. *Pravo djeteta na izražavanje mišljenja,* in: Vodič za ostvarivanje prava djeteta na: – informacije, – izražavanje mišljenja, – zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi*,* Slađana Aras Kramar *et al.* (ed.), Zagreb, Hrvatski pravni centar, 2015, p. 40; Majstorović, I., *The Realisation of the right of the child to express his/her views – How "visible" are children in Croatian family judicial proceedings?,* Ljetopis socijalnog rada, Vol. 24. No. 1, 2017, p. **65.**

25 For ECHR jurisprudence relating to the child's right to express an opinion, see, e.g. *Kutzner v Germany*, Application No. 46544/99, judgment of 26 February 2002; *Sahin v Germany* [GC], Application No. 30943/96, judgment of 8 July 2003; *Sommerfeld v Germany* [GC], Application No. 31871/96, judgment of 8 July 2003.

26 *Sahin v Germany* [GC], Application no. 30943/96, judgment of 8 July 2003.

27 *Sahin v Germany* [GC], para. 74.

28 *Sahin v Germany* [GC], para. 75.

child to be questioned directly.[29] That in certain circumstances it is still justified not to give the child the opportunity to be heard in accordance with his or her best interests was also confirmed in the *Sommerfeld v Germany* case. In this case, the ECHR states that in determining whether the denial of access was "necessary in a democratic society", it is necessary to examine whether the reasons put forward to justify this measure are relevant and sufficient in the light of the case as a whole within the meaning of Article 8(2) of the European Convention on Human Rights. Consideration of the best interests of the child is crucial in every case of this kind.[30] Furthermore, the Court emphasises the fact that the child has already been questioned in court and considers that the procedural requirements of Article 8 of the European Convention on Human Rights have been met.[31]

Similarly, in *Zarraga v Simone Pelz*, the EU Court of Justice concludes that conflicts and tensions arising in custody proceedings lead to situations where hearing the child could be inappropriate and even harmful to the child's mental health. Therefore, according to Article 24(2) of the Charter of Fundamental Rights, hearing the child cannot therefore be an absolute obligation, but its possibility is assessed on a case-by-case basis according to the best interests of the child.[32]

A kind of supplement to the European Convention on the Exercise of Children's Rights is the Convention on the Rights of the Child, that has been in force in the Republic of Croatia since 2010. This Convention protects children's procedural rights; such as the right of the child to receive all relevant information, to be consulted and express his or her views and to request a special representative in proceedings before the competent authorities.[33] Under Art. 3 "children considered by internal law as having sufficient understanding are entitled to request relevant information, to be consulted and to express their views and to be informed of the possible consequences of compliance with their views or of any decision." As the Explanatory Report to the European Convention on the Exercise of Children's Rights states, this article guarantees a number of procedural rights to children who have a sufficient level of understanding. These rights are not mutually exclusive, so even if the child does not request information, he or she must be informed of the right to express his or her opinion and the possible consequences.[34] Internal law

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29 *Sahin v Germany* [GC], para. 77.

30 *Sommerfeld v Germany* [GC], Application No. 31871/96, para. 62. and 88.

31 *Sommerfeld v Germany* [GC], para. 72.-74.

32 Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, para. 64.

33 European convention on the exercise of children's rights, Official Gazette – International treaties no. 1/10.

34 Council of Europe (1996). *Explanatory report to the European convention on the exercise of children's rights*. Retrieved from:

determines whether the child is represented or participates directly, but whenever possible, the views of the child involved in the proceedings should be presented.[35]

In addition, there are several other international documents that guarantee children the right to be heard and to express their views in various proceedings. For example, Resolution (77) 33 of the Committee of Ministers of the Council of Europe on the placement of children recommends governments of member States to incite the participation of children and to give them the opportunity to discuss their situation gradually as they mature in understanding. Recommendation No. R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities prescribes: "when the competent authority is required to take a decision relating to the attribution or exercise of parental responsibilities and affecting the essential interests of the children, the latter should be consulted if their degree of maturity with regard to the decision so permits". Recommendation No. R (87) 6 on foster families prescribes that, before making a decision concerning the grant of certain parental responsibilities "the child should be consulted if his degree of maturity with regard to the decision so permits".[36] The fundamental piece of legislation that protects children's right to be heard at EU level is the Charter of Fundamental Rights of the European Union[37] which in Art. 24 paragraph 1 stipulates: "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." The above provision imposes a clear obligation on Member States to ensure that children have the opportunity to express their opinions and that their opinions are taken into account. Deviations from the rules are possible depending on the age and maturity of the child.

3.1.1. The right of the child to be heard in the Republic of Croatia

In the Republic of Croatia, Articles 86 and 360 of the Family Act[38] stipulate the explicit right of the child to express his or her opinion. It is important to emphasise that it is fully about the child's possibility to express his or her opinion, and not about the obligation to do so.[39] The child can also decide at any point in the

[https://rm.coe.int/16800cb5ee], Accessed 12 February 2024.

35 *Ibid*.

36 *Ibid*.

37 Charter of fundamental rights of the European Union (2012), Official Journal of the European Union, C 326, 26 October 2012.

38 Family Act, Official Gazette No. 103/15., 98/19., 47/20., 49/23., 156/23.

39 Majstorović, I., *op. cit.,* note 24, p. 66.

process not to participate anymore.[40] On the basis of these articles, a great step forward has been made in recognising the child's right to participate in court proceedings in the Republic of Croatia.[41]

Article 86 of the Family Act emphasises the duty to take the child's opinion into account according to his or her age and maturity. According to this article, in all proceedings in which the rights or interests of the child are decided, the child has the right to be adequately informed of the important circumstances of the case, to be consulted and to express his or her opinion and to be informed of the possible consequences of taking his or her opinion into account.

In accordance with Article 360, the court is required to give the child the opportunity to express his or her views in proceedings concerning the child's personal and property rights and interests, unless the child objects to this. The court shall make it possible for the child to express his or her opinion in an appropriate place and in the presence of an expert if it deems this necessary in view of the circumstances of the case. The court shall make it possible for the child to express his or her opinion in accordance with the Regulation on the method for assessing the child's opinion.[42] The child shall always express his or her views without the presence of the parents or guardian or other person caring for the child (Article 4 of the Regulation).

The Regulation prescribes the conditions under which a place can be considered suitable for the examination of a child's opinion. This place should ensure the privacy and safety of the child. In addition to the premises of the court, this may also be special premises of a social welfare centre, a centre for special guardianship or other suitable premises designated by the court (e.g. parental home, foster family, etc.). Provided that the technical possibilities allow it, the expression of the child's views can also be made possible by video link (Article 5 of the Regulation). However, as far as suitable premises are concerned, the Republic of Croatia does

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40 Hrabar, D. (2020), p. 663.

41 Hrabar, D. *Europska konvencija o ostvarivanju dječjih prava – Poseban zastupnik djeteta,* in: Filipović, G., Osmak- Franjić, D. (eds.), Dijete u pravosudnom postupku – Primjena Europske konvencije o ostvarivanju dječjih prava. Zagreb: Ombudsman for children, 2012, pp. 103-116. Data from court practise show just how bad the situation was. Radina presents unbelievable information about how not a single child was heard in a representative sample of 79 cases at the Split City Court between 2009 and 2011, Radina, A., *Praksa suda i posebnog skrbnika u postupcima radi odlučivanja o mjerama zaštite osobnih prava i dobrobiti djeteta*. in: Rešetar, B.; Aras, S. (eds.), Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta – Interdisciplinarni, komparativni i međunarodni osvrti, Osijek, J. J. Strossmayer University in Osijek, Faculty of Law, 2014, pp. 23-39.

42 Regulation on the method for assessing the child's opinion, Official Gazette No. 123/15.

not yet have a sufficient number of such premises in which the implementation of this right would be possible without hindrance.[43]

The court's obligation to give the child the opportunity to express his or her views is laid down in Article 360 of the Family Act and applies to all proceedings concerning the child, regardless of the child's age. The exceptions provided for therein are that the child objects to this (Art. 360(1) of the Family Act), the delivery of the child's opinion in an appropriate place in the presence of an expert (Art. 360(2) of the Family Act) and that there is a particularly justified reason for not determining the child's opinion (Art. 360(3) of the Family Act), for which the judge needs to provide an explanation. However, the law does not define what this "particularly justified reason" could be, so that the judge has a wide margin of manoeuvre to take into account different life situations. This will be the case, for example, if the child is exposed to a conflict of loyalty or a high level of stress or manipulation (by parents or third parties). Also, the Constitutional Court of the Republic of Croatia in his judgment stipulates that the child has the right to freely express his/her views, but during the proceeding it was unequivocally established that in this particular case the child cannot freely express his opinion because the mother constantly exerts a negative influence on the child.[44]

Until the recent amendment to the Family Act in 2023, this act provided for another exception to the obligation to directly determine the child's opinion, which concerned children under the age of fourteen, in such a way that they were allowed to express their opinion through a special guardian or expert (Art. 360 of the Family Act 2015). This exception was repealed by the decision of the Constitutional Court of the Republic of Croatia from 18 April 2023[45] due to incompatibility with Article 3[46] of the Constitution of the Republic of Croatia. As the Constitutional Court points out, the above-mentioned legal provision does not impose any legal restrictions on the age of the child but allows the court to make it possible

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43 Majstorović, I., *op. cit.* note 24, p. 65; Rešetar, B., Lucić, N., *Child Participation in Family Law – Croatia,* in: Schrama W.; Freeman, M.; Taylor, N.; Bruning, M. (eds.), International Handbook on Child Participation in: Family Law, Mortsel, Cambridge, Intersentia, 2021, pp. 143–155, 154.

44 Constitutional Court of the Republic of Croatia, U-III/1525/2015, judgment from 17 July 2015, par. 12.

45 Decision of the Constitutional Court of the Republic of Croatia U-I/3941/2015 from 18 April 2023.

46 Freedom, equality, national equality and gender equality, peacekeeping, social justice, respect for human rights, inviolability of property, preservation of nature and the human environment, the rule of law and the democratic multi-party system are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution (Art. 3 of the Constitution of the Republic of Croatia, Official Gazette No. 56/90., 135/97., 8/98. – official consolidated text, 113/00., 124/00. – official consolidated text, 28/01., 41/01. – official consolidated text, 76/10., 85/10. – official consolidated text, 5/14.).

for the child to express their opinion in the presence of an expert in order for the expert to help the child express his or her opinion with his or her knowledge and expertise. When this will be necessary is for the court to decide, as it knows best the facts and circumstances of the case, and its judgement may or may not include the age of the child. It therefore remains completely unclear why the legislator, by providing for the already prescribed exception to paragraph 2 of Article 360 of the Family Act, which in the opinion of the Constitutional Court sufficiently ensures that the child will actually be able to express his or her opinion under appropriate conditions and with appropriate assistance, has provided for an exception to the exception that is no different in nature from that provided for in paragraph 2 of the same Article of the Family Act, except that it refers to the age limit of 14 years and provides for the provision of an opinion by a special guardian in addition to an expert. At the same time, the legislator has not provided any explanation as to why the opinion of a special guardian has a special quality.[47]

In addition to the child's right to express their opinion, the Family Act also provides for the obligation to inform the child of the subject matter, course, and possible outcome of the proceedings in a manner appropriate to the child's age and maturity and if this does not jeopardise the child's development, upbringing, and health. The obligation to inform the child within the meaning of paragraph 4 of this Article shall be incumbent on the special guardian of the child, the court, or an expert of the Croatian Institute of Social Work, depending on the circumstances of the case, which the court shall take into account (Article 360(4) and (5) of the Family Act).

A particular problem that we encounter in the Family Act concerns the disproportionate regulation of the child's right to express his or her views in enforcement proceedings for the purpose of surrendering the child and in proceedings for personal contact with the child due to an excessive insistence on the exercise of this right in enforcement proceedings for the purpose of personal contact with the child. The doctrine therefore proposes that the provision on the hearing in proceedings for the purpose of establishing personal contact with the child be amended so that the enforcement court can hear the parties and give the child the opportunity to express his or her opinion, all in order to protect the interests and welfare of the child.[48] According to the Family Act,[49] the court is obliged to give the opportunity to be heard to the parties and the child in enforcement proceed-

47 Decision of the Constitutional Court of the Republic of Croatia U-I/3941/2015 from 18 April 2023., par. 78.

48 More in Knol Radoja, K., *op. cit*., note 22, p. 168.

49 Family Act, Official Gazette No. 103/15., 98/19. (hereinafter: Family Act).

ings in order to establish personal relations with the child. On the other hand, in enforcement proceedings for the purpose of surrendering a child, the same law prescribes the hearing of the person against whom enforcement is being carried out and the referral of the child for an interview with an expert only as a possibility. The insistence on the possibility and not the obligation of the court to hear the child in this case arises from the fact that all parties, including the child, would already have had the opportunity to present their arguments during the proceedings preceding the enforcement proceedings for the purpose of the surrender of the child and the establishment of personal relations with the child. If the parties and the child have already exercised their right to be heard in extrajudicial or civil proceedings preceding the enforcement proceedings, in order to simplify the enforcement proceedings, prevent their prolongation and reduce the emotional burden that undoubtedly exists, Knol Radoja points out that the right to be heard and to express one's opinion in both enforcement proceedings should be left to the discretion of the judge who is best placed in a given situation to weigh up the justification for taking these procedural actions, in accordance with the best interests of the child.[50]

However, the most problematic aspect of the child's right to be heard and to express his or her opinion is the incompatibility of general Croatian civil law – the Civil Procedure Act[51] with the court's duty under family law to allow the child to express his or her opinion in an appropriate place and in the presence of an expert. As far as the independent performance of acts in the proceedings is concerned, the Civil Procedure Act provides for this possibility only for a party with full legal capacity, and a person without litigation capacity is represented by his or her legal representative (*arg. ex.* Article 80(1) of the Civil Procedure Act). Pursuant to Article 267 of the Civil Procedure Act, for a party lacking litigation capacity, their legal representative shall be heard. The court may decide to hear the party itself instead of the legal representative or in addition to the legal representative if the hearing of the party is possible. Therefore, the hearing of the party itself, instead of or in addition to the legal representative, is prescribed only as a discretionary option, not as a duty of the court. This act thus derogates the child's right to express their opinion before the court, whereby it is particularly questionable whether the child even had the opportunity to indicate whether they wished to be heard directly or through a representative. In practise, this leaves children powerless and deprives them of the opportunity to participate in the decision-making process

50 Knol Radoja, K., o*p. cit.* note 22, p. 169.

51 Civil Procedure Act, Official Gazette No. 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 148/11 – official consolidated text, 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.

that could potentially change their lives.[52] An acceptable exception to the court's obligation to allow the child to express his or her opinion is when the child has no objection to doing so. The next exception to the court's obligation to allow the child to express his or her views is for the court to allow the child to express his or her views, but not in court, but in another appropriate place and in the presence of an expert, if it considers this necessary in the circumstances of the case. Finally, the court conducting the proceedings is not obliged to ascertain the child's opinion if there are particularly justified reasons for doing so, which must be explained in the decision.[53] As already mentioned, in the opinion of the Constitutional Court of the Republic of Croatia, these exceptions provided for by the Family Act sufficiently ensure that the child can actually express its opinion.[54] Furthermore, according to the interpretation of the Committee on the Rights of the Child, despite the fact that the Convention on the Rights of the Child provides for the possibility for the child to be heard not only directly but also through a representative, the child must be given the opportunity to be directly heard in any proceedings and the child chooses how they want to be heard.

4. CAPACITY TO CONDUCT PROCEEDINGS AND LEGAL ACTIONS OF THE CHILD

4.1. Capacity to be a party, legal, and litigation capacity

The child is a party in all court proceedings in which his or her rights and interests are decided (Art. 358 Family Act).[55] The position of the child as a party is also laid down in certain provisions relating to certain family and civil court proceedings. For example, the child is a party to proceedings in which it is decided which parent the child will live with, how parental custody, personal relationships with the other parent and child maintenance are to be regulated, which are decided in separate proceedings or in addition to a matrimonial, maternity, or paternity dispute. The child is also a party to simplified proceedings to determine child maintenance,

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52 James, A. L.; James, A.; McNamee, S., *Turn down the volume? – Not hearing children in family proceedings*, Child and Family Law Quarterly, Vol. 16, No. 2, 2004, pp. 189-207, 193.

53 The Zagreb County Court upheld the first instance decision on the family protection measure issued and stated that the opinion of the child is a relevant circumstance when it comes to decisions on the personal rights and interests of the child, but this opinion is not the only decisive factor, but the court also makes its decision on the basis of other relevant established facts. County Court in Zagreb, Gž Ob-480/17.

54 Decision of the Constitutional Court of the Republic of Croatia U-I/3941/2015 from 18 April 2023., par. 78.

55 In general, on the party capacity of legal entities, see Triva, S.; Dika, M., *Građansko parnično procesno pravo*, 7th ed., Narodne novine, Zagreb, 2004.

special extrajudicial proceedings to obtain parental custody and personal relations with the child, proceedings to determine measures to protect the rights and welfare of the child and proceedings to replace consent to the adoption of a child. The child is also a party to the parents' agreement on certain aspects of parental care and its implementation (joint parental care plan, agreement on personal contact with the child, maintenance agreement), represented by both parents.[56]

As holders of subjective rights, children should be able to initiate proceedings themselves in order to protect or exercise their rights. However, more often than not, children are "dragged" into proceedings initiated by their parents in relation to certain rights of the child, e.g. in relation to certain contents of parental care, or by a social welfare centre in the exercise of its powers and duties in the field of public protection of children.

In the Croatian legal system, there is an institute of categorising the legal capacity of natural persons, thus we distinguish between three degrees: full legal capacity, limited legal capacity and legal incapacity. The degrees of legal capacity and their effects on the litigation capacity are also important from the point of view of the child as a specific subject of legal proceedings.[57]

Since children before the age of eighteen generally do not have legal capacity, they also do not have litigation capacity in the area of legal disputes. Therefore, the child cannot initiate court proceedings with procedural legal effect nor take any further action in the proceedings, but rather the child's legal representative initiates proceedings on behalf of the child and represents the child in the proceedings.[58] As a rule, the parents act as legal representatives of the children. However, the situation is different in divorce proceedings, in which decisions are made about certain aspects of parental custody, as well as in independent parental custody proceedings. In these proceedings, there is usually a conflict of interest both between the parents and between the child and the parent or parents. For this reason, the child is represented by a special guardian in court proceedings in which there is a conflict of interest between the child and its parents, e.g. in divorce and parental custody proceedings.[59]

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[56] Aras Kramar, S., *Komentar Obiteljskog zakona*, *II. knjiga, Postupak pred sudom i prijelazne i završne odredbe, sa sudskom praksom, literaturom i stvarnim kazalom*, Organizator, Zagreb, 2022, pp. 97-98.

[57] Hrabar, D., *Obiteljskopravni odnosi roditelja i djece*, in: Hrabar, D.; Hlača, N.; Jakovac Lozić, D.; Korać Graovac, A.; Majstorović, I.; Čulo Margaletić, A.; Šimović, I., *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 194.

[58] Opširnije Hrabar, D., *Zastupanje djece i postupovna prava djeteta pred sudskim i upravnim tijelima u obiteljskopravnim stvarima*, Hrvatska pravna revija, No. 10., 2002, pp. 46 – 53.

[59] See also Bošnjaković, L., Kokić, T., Kako ubrzati postupak u obiteljskim sporovima, Priručnik za polaznike/ice, Judicial Academy *(Pravosudna akademija),* Zagreb, April 2022, p. 14.

Children who have reached the age of 15 and are independent earners have limited legal capacity[60] as do children who have reached the age of 16, fulfil the legal requirements and can independently give their consent to examinations, tests, or medical interventions. Their limited legal capacity in legal transactions is reflected in the fact that they can independently represent some of their own property rights, i.e. the personal rights of underage patients. The above-mentioned categories of children therefore have litigation capacity within the limits in which they are recognised as having legal capacity, i.e. they have litigation capacity in proceedings relating to acts, rights, and obligations for which they are recognised as having legal capacity, whereas they would not have litigation capacity in all other proceedings.[61]

4.2. Procedural legitimation of a child

In contrast to the capacity to be a party to proceedings and litigation capacity, which exists independently of the specific legal dispute, procedural legitimation is a quality that entitles a particular person to be a party to a particular legal proceeding. When we talk about the procedural legitimation of a child in family court proceedings, we distinguish between the following situations:

a) when the child has acquired full legal capacity before reaching the age of majority by entering into a marriage and thus also the procedural capacity;

b) when the Family Act recognises the legitimacy and the special procedural capacity of the child to initiate certain proceedings and to perform acts in these proceedings; 1. in proceedings for the granting of a marriage licence, a child who has reached the age of sixteen independently makes an application in an extrajudicial proceeding;[62] 2. a minor parent independently submits a proposal to the court to make a decision as to who should represent the child in relation to decisions that are important to the child under Article 108 of the Family Act in the event of disagreement between the minor parent and the other parent or guardian of the child; 3. a child who has reached the age of 14 independently applies for the court to recognise him or her as

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60 On the legal and litigation capacity of an employed minor, see more in Šimović, I., *Utjecaj dobi na poslovnu i parničnu sposobnost*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 61. No. 5, 2011, pp. 1633 – 1636.

61 Hrabar, D., *Obiteljskopravni odnosi roditelja i djece*, in: Hrabar, D.: Hlača, N.; Jakovac Lozić, D.; Korać Graovac, A.; Majstorović, I.; Čulo Margaletić, A.; Šimović, I., *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 195.

62 Šimović, I., *Utjecaj dobi na poslovnu i parničnu sposobnost*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 61. No. 5, 2011, pp. 1628 – 1629.

having procedural capacity for taking certain or all actions in the proceedings in which his or her rights and interests are being decided;

c) when deciding on the personal rights and interests of a child, the court may, by order, authorise a child who has reached the age of fourteen to present facts, propose evidence, submit legal remedies, and take other actions in the proceedings if he or she is capable of understanding the significance and legal consequences of these actions;

d) when the Family Act authorises the child to initiate proceedings for the purpose of deciding on: the parentage of the child (filing an action to establish maternity or paternity, filing an action to contest maternity or paternity); on the manner of exercising parental care and personal relations with the child (with which parent the child will live for the purpose of exercising parental care, the child's personal relations with the other parent, relatives and other persons, and the maintenance of the child); on the protection of rights and welfare of the child (measure of temporarily entrusting the child to another person, a foster family or a social institution, prohibition of contact with the child, withdrawal of the right to live with the child and to entrust him/her with the daily care of the child, entrusting a child with behavioural problems to an educational aid, withdrawal or restoration of the right to parental custody, measures to protect the child's property rights).

In matters concerning the personal rights and interests of the child, the court shall, at the request of the child, issue a decision enabling a child who has reached the age of fourteen to present facts, propose evidence, submit legal remedies, and perform other procedural acts if he or she is capable of understanding the significance and legal consequences of these acts (Art. 359, para. 1 of the Family Act). Before making this decision, the court is obliged to obtain the opinion of the Croatian Institute for Social Work (Art. 359, para. 2 of the Family Act). A special appeal is not admissible against the decision recognising the child's procedural capacity to perform certain or all acts in the proceedings (Art. 359, para. 3 of the Family Act). In addition to the child, the child's legal representative is also authorised to take actions in the proceedings (Art. 359, para. 4 of the Family Act). If the actions of the child and the child's legal representative contradict each other, the court examines whether it will take into account the actions of the child or the child's legal representative, taking into account all circumstances, in particular the best interests of the child (Art. 359, para. 5 of the Family Act). This provision gives the child new rights (limited legal capacity) that he or she did not have until the Family Act 2015, and the judge is instructed to give special protection to the rights and interests of the child through the court's obligation to determine whether the child

is capable of understanding the meaning and legal consequences of his or her legal acts, and then by the court's obligation to obtain the opinion of the social welfare centre, which is a good solution considering that the social welfare centres employ psychologists, social pedagogues and social workers and have data on whether the child or family has already been treated by the centre.

Parallel to the establishment of a new institution for the representation of children, however, the possibility was recognised in the Family Act 2015 that the court may grant a child who has reached the age of fourteen the procedural capacity (litigation capacity) and to perform all or some acts in the proceedings (359 of the Family Act 2015). In this case, if a child recognised as having procedural capacity was to authorise a representative, the child would not be represented in the proceedings by a special guardian from the institution for the representation of children (240, paragraph 4, Family Act 2015). It follows from the cited provision that the Family Act 2015 recognises the limited legal capacity of a child to enter into a power of attorney agreement, i.e. to appoint an attorney who would have to be a lawyer,[63] and whose costs for representation in court proceedings would have to be borne by the parents.[64]

Considering who is legitimised to initiate proceedings in which the rights and interests of the child are decided, situations may arise in which simultaneous proceedings are conducted in which decisions are made about the same child, but initiated by different persons, so that two files are formed, and they are decided on by two judges. For example, one parent or child initiates proceedings to make a decision on which parent the child will live with and what personal relationships he or she will have, and the other parent or child applies for a security measure, i.e. the adoption of a provisional measure in this matter. In some cases, the proceedings can be merged into a single hearing, which is the most appropriate and economical solution, but very often this cannot or does not happen, so the child participates in two proceedings, which can be stressful for him or her, especially

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63 Namely, if it were permissible under the provisions of the Civil Procedure Act, Art. 89, paragraph 3, for this to be a direct line blood relative, brother or sister, if he/she has legal capacity and if he/she is not involved in unlicensed legal practice, this would put the child in the situation of being represented by a grandparent, brother or sister who, by the very fact of kinship, is involved in the family relationship and whose impartiality may therefore be questionable.

64 Guide to realising the right of the child to: Information, Expression, Representation and Adapted Procedure in Divorce and Parental Care Court Proceedings, Project "Protection of Children in Divorce and Parental Care Court Proceedings", Aras Kramar, S.; Korać Graovac, A.; Rajhvan Bulat, L.; Eterović, I., Ministry of Social Policy and Youth of the Republic of Croatia, electronic issues, publisher: Croatian Law Centre *(Hrvatski pravni centar)*, Zagreb, 2015., [https://www.hpc.hr/wpcontent/uploads/2017/12/Vodiczaostvarivanjepravadjetetarazvodbrakaroditeljskaskrb-27-11-15.pdf], p. 50.

in view of the rules for determining the child's opinion, and the judges may make two different decisions.[65]

4.3. Representation of the child in court proceedings

The Family Act 2015 regulates in more detail the legal representation of the child in family and civil court proceedings in which decisions are made on the rights and interests of the child. A distinction is made between situations in which both parents represent the child, situations in which one parent represents the child, situations in which the Croatian Institute for Social Work represents the child and situations in which the child is represented by a special guardian.[66]

The child is a party to the agreement on the manner in which parental authority is exercised and to the procedure for its authorisation and is represented by both parents in these cases. Both parents exercising joint parental authority represent the child in extrajudicial proceedings for the purpose of authorising an agreement on personal contact with the child (Art. 468 of the Family Act).

Legal representation of a child by a parent, namely the parent with whom the child lives, is mandatory in out-of-court proceedings to authorise maintenance agreements, in simplified out-of-court proceedings to determine maintenance and in out-of-court proceedings to protect the right of residence of children and a parent in a dwelling or other property constituting a family home. The parent with whom the child lives is authorised to represent the child in civil or extrajudicial maintenance proceedings against the other parent liable for maintenance (Art. 424, para. 2, Art. 470, para. 2, Art. 474, para. of the Family Act).

Based on Art. 355 of the Family Act, the Croatian Institute for Social Work, when initiating proceedings in the name and on behalf of the child to establish paternity and maintenance of the child, has the position of the child's legal representative in these proceedings.

On the basis of public authority, through the appointed special guardian, the Centre for Special Guardianship:

1. represents children before courts and other authorities in accordance with the act governing family relations, and

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65 Šantek, R.; Parać Garma, M.; Sudjelovanje djeteta u sudskim postupcima te zaštita prava i dobrobiti djeteta u tim postupcima, Priručnik za polaznike/ice, Judicial Academy *(Pravosudna akademija),* Zagreb, November 2016, p. 36.

66 Aras Kramar, S., *op. cit.*, note 56, pp. 98 – 107.

2. represents adults before courts and other authorities in accordance with the act governing family relations (Article 3, paragraph 1 of the Act on the Centre for Special Guardianship, hereinafter: ACSG).[67]

The Centre also performs other professional tasks related to representation: 1. informs the child or adult of the subject matter, progress, and outcome of the dispute in a manner appropriate to the child's age or the adult's functional abilities; 2. contacts the parents or other persons close to the child or adult, as appropriate; 3. informs the child or adult of the content of the decision and the right to appeal; 4. obtains the opinion of the child or adult; and 5. performs other tasks assigned to the centre by law and statute (Article 3, paragraph 3, ACSG).

On the basis of Art. 240 of the Family Act, the social welfare centre[68] or the court appoints a special guardian for the child in order to protect specific personal and property interests of the child.[69]

In the cases defined by law, the child has the right to a special guardian. The question therefore arises as to whether this right also extends to cases in which meetings and contact are decided. Since the social welfare centre is obliged to appoint a special guardian for the child when the parent is deprived of the right to live with his/her child and when the child is entrusted to the care and education of the social welfare office due to behavioural disorders (i.e. when deciding on public-legal relations), the special guardian should also represent the child in the issue of meeting and contact, which should be decided by adhesion in this type of procedure.

In other cases where meetings and contact are decided, such as in the case of divorce, the Family Act does not provide for an explicit obligation to appoint a special guardian. However, such a possibility could be based on the provision according to which the social welfare centre is obliged to appoint a special guardian for the child if this is necessary to protect his or her personal rights and interests in cases where the interests of the child and the parents are in conflict. This means

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67 Act on the Centre for Special Guardianship, Official Gazette No. 47/2020.

68 "…the decision on the appointment of a special guardian is taken by the Social Welfare Centre, unless the law stipulates that the decision on the appointment of a special guardian is taken by the court." County Court in Zagreb, Gž Ob-78/2016 from 21 June 2016.

69 In the proceedings, the child's parents, as the child's legal representatives, had jointly submitted an application to the court for authorisation to sell a car belonging to the minor child in the name and on behalf of the minor child. In the first instance decision, a special guardian was appointed for the minor child in order to protect his personal rights and interests in these proceedings. However, the court of second instance upholds the appeal of the special guardian and revokes the appointment decision on the grounds that it cannot be concluded from the information in the file that there is a conflict of interest between the parents and the minor child in relation to this proposal and this procedure. County Court in Split, GŽ Ob-439/2016 from 18 October 2016.

that a special guardian should also be appointed for the child in proceedings in which the interests of the child and the parents are in conflict and decisions are made regarding meetings and contact.

5. CONCLUSION

The child's right to be heard arises from the final recognition of the child as the subject and not the object of law.[70] Croatian family law regulations, although they can still be improved, are undoubtedly well on the way to fulfilling the criteria established by international legal acts and practises. However, there is still some lag in the application of the prescribed rights in practise. However, the biggest stumbling block to the full fulfilment of the child's right to be heard lies in the general civil law regulation – the Civil Procedure Act, which gives the court too much discretionary power through the wording "the court may decide to hear the party (without litigation capacity) themselves instead of or in addition to the legal representative".

The relevant part of General Comment No. 12 (2009) on the right of the child to be heard, adopted by the Committee on the Rights of the Child stressed that Art. 12/1 provides that States parties shall assure the right of every child capable of forming his or her own views to freely express her or his views. In connection with the above, it is important to emphasize the following:

- shall assure is a legal term which leaves no freedom for discretion. Therefore, States parties are obliged to undertake measures to implement the right to be heard for every child. The child can be heard directly or through a representative, but the decision lies primarily with the child.
- the phrase should be seen as an obligation for States parties to evaluate the capacity of the child to form an opinion to the greatest possible extent. This means that States parties should presume that a child has the capacity of expressing her or his own views and not to presume that a child is incapable for that; it is not up to the child to first prove her or his capacity.
- and the last but not least, the Committee emphasizes that article 12 imposes no age limit on the right of the child to be heard, and discourages States parties from introducing age limitations. 71

De lege ferenda we therefore propose that the above-mentioned legal provision of Art. 267 of the Civil Procedure Act be amended so that it reads: A party who does not have litigation capacity shall be heard if it is possible to hear them. The court

[70] Hrabar, D., *op. cit.* note 41, p. 104.; Tobin, J., *op. cit.* note 9, p. 296.

[71] Committee, *op. cit.* note 14.

may decide that the legal representative of this party shall be heard instead of the party lacking litigation capacity if the hearing of the party is not possible for justified reasons.

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CHALLENGES OF PROTECTING THE RIGHTS OF CHILDREN AND PARENTS WHEN SEPARATING A CHILD FROM THE FAMILY

Anica Čulo Margaletić, PhD, Associate Professor
University of Zagreb, Faculty of Law
Trg Republike Hrvatske 3, 10000 Zagreb, Croatia
anica.culo.margaletic@pravo.hr

Barbara Preložnjak, PhD, Associate Professor
University of Zagreb, Faculty of Law
Trg Republike Hrvatske 3, 10000 Zagreb, Croatia
barbara.preloznjak@pravo.hr

ABSTRACT

The right of the child and parents to enjoy each other's company is guaranteed by Article 35 of the Constitution of the Republic of Croatia, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 7 of the EU Charter of Fundamental Rights. However, when parents do not comply with their responsibilities, duties and rights for the proper growth and development of children, there is a threat and/or a violation of the children's personal rights and well-being. If we begin with the understanding that children's personal rights and well-being are of the highest value and are part of the public order, the state must provide their protection, which includes not only the imposition of repressive measures, but also the provision of special care and assistance in preserving the family unit.

The paper will provide an outline of the Republic of Croatia's international commitments concerning family law protection measures, as well as obligations emanating from national normative acts. In addition, the constitutional judicial practice and the practice of the European Court of Human Rights will be analyzed to determine whether the state follows its obligations to protect the rights of the child and parents when imposing repressive measures to protect the personal rights and well-being of the child, and de lege ferenda proposals for the improvement of national normative acts, i.e. guidelines for a more consistent application of the existing legal framework in the practice of imposing measures by which a child is separated from the family in accordance with European standards of respect for the right to family life.

Keywords: *child's personal rights, child's well-being, right to family life*

1. INTRODUCTION

The family, as the fundamental unit of society, enjoys special protection and represents both the great value of society as a whole and, in principle, of each person individually. The state's obligation to protect the family derives from the highest legal act - the Constitution of the Republic of Croatia[1], but it also represents state's international obligation, and is specifically elaborated in domestic normative acts.

In this sense, the first part of the paper will present the normative international and domestic legal framework when it comes to the state's obligation to protect the family, while the following will consider the relevant regulations guaranteeing every individual the right to respect for family life, as well as the positive and negative obligations of the state with regard to this fundamental human right of both parents and children, bearing in mind the focus of the work, primarily on the challenges of realizing and protecting of this right when imposing family law protection measures by which a child is separated from the family.

Along with the analysis of the permissibility of the state intervention into family life of parents and children, special attention will be given to consideration of the interests of the child and the interests of the parents when they collide, as well as the need that best interest of the child should be the paramount consideration, taking also into account the principle of proportionality, i.e. necessity, in accordance with the requirements set by the European standards of protection of the aforementioned right to respect for family life.

In this sense, the second part of the paper will be focused on the analysis of the practice of the Constitutional Court of the Republic of Croatia (CCRC) and the European Court of Human Rights (ECtHR) with regard to repressive child protection measures by which the child is separated from his/her parents in order to determine whether the state follows its obligation to protect the fundamental rights of the child and parents when imposing such measures, as well as obligation to respect the principle of the best interests of child as a decisive criterion when imposing such measures in order to give some guidelines or suggestions in the concluding part, both *de lege ferenda* and regarding the interpretation and application of the existing normative framework.

[1] Official Gazette, Nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14. (further: Croatian Constitution).

2. THE FAMILY AS A VALUE UNDER THE SPECIAL PROTECTION OF THE STATE

The family is "a natural, primordial form of association and bringing people together on which every society rests." [2] The family as a community exists as long as humanity, and represents a natural environment for the generally safe and healthy growth and development of children.[3] In the family the various needs of individuals are met, and its fundamental characteristics are emotional connection, mutual affection as well as closeness of its members and durability.[4] Family legislation does not contain a definition of a family, and the reason for this is because "it is difficult to legally define a phenomenon that is not static, and is influenced by socioeconomic and other factors in the social environment".[5] What is indisputable is that parents and children make the so-called nuclear family because, in addition to being connected by marriage or extramarital union and kinship, they mostly live together.[6]

The family, as the fundamental form of the human community[7], enjoys the special protection of the state according to the highest legal act in Croatian legal system - the Croatian Constitution.[8] The aforementioned protection of the family is being realized in the legal sense by the application of various regulations which elaborate this constitutional obligation of the state in detail.

In this regard, and considering the topic of the work, we would emphasize the provisions of the basic family law regulation - Family Act[9] and the norms of the Social Welfare Act.[10]

When imposing measures for the protection of the welfare of the child some of the fundamental principles of the FA must be pointed out according to which special obligations of the state, i.e. competent authority come to the fore. These principles

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2 Hrabar, D., *Uvod u obiteljsko pravo*, in: Hrabar. D. (ed.), Obiteljsko pravo, Narodne novine, Zagreb, 2021, p. 3.

3 *Ibid*.

4 *Ibid*.

5 Alinčić, M. *et. al.*, *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, p. 7.; Korać Graovac, A.*, Brak i obitelj kao vrijednost u hrvatskom pravnom sustavu*, Bogoslovska smotra, 85, 2015, 3, p. 800.

6 Hrabar, D., *op. cit.* note 2, p. 4.

7 Alinčić, M., *op. cit.* note 5, p. 3.

8 Art. 61, para. 1.

9 Official Gazette, Nos. 103/15, 98/19, 47/20, 49/23, 156/23. (further: FA).

10 Official Gazette, Nos. 18/22, 46/22, 119/22, 71/23, 156/23 (further: SWA) The protection provided to the family based on the SWA can be recognized especially in the provisions on different types of social services, the content of which is determined in Art. 70, which reads: "Social services include activities intended to detect, prevent and solve problems and difficulties of individuals and the family, as well as the improvement of the quality of their life in the community."

are: the principle of primary protection of the welfare and rights of the child (Art. 5), the principle of the primary right of parents to take care of the child and the duty of the authority to provide them with assistance (Article 6), and the principle of proportionality and the most lenient intervention into family life (Art. 7).

Besides preventive protection and assistance to family in crisis, in some cases adequate protection will require repressive state intervention into the family, as a last resort, when there is a threat or violation of the rights of a child who cannot be protected by less intrusive measures.[11] Namely, the protection of the family inevitably includes the protection of children, and everyone is called upon to protect the most vulnerable members of the community, in accordance with the Croatian Constitution.[12] Therefore, FA prescribes general civil duty to report to the Croatian Social Welfare Institute (CSWI) violation of the child's personal and property rights. In these cases, parents as primary caregivers do not fulfil their parental role properly and competent authorities are authorized to intervene according to the Constitutional principle of the special protection of children.[13]

In addition to the constitutional obligation to protect the family elaborated in domestic legislation, state obligation to protect family arise also from regional and global international documents. Thus, according to the Charter of Fundamental Rights of the European Union[14] „(t)he family shall enjoy legal, economic and social protection"(Art 33 Para 1). Among the global international documents that guarantee family protection, we would single out the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In both documents we can find the same provision (Art. 16 Para 3, i .e. Art. 23 Para 1) which states that „(t)he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Besides these instruments, the most important and comprehensive international document on

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[11] According to Art. 129, para. 1 FA, the separation of a child from the family is determined only if it is not possible to protect the rights and welfare of the child with any other, more lenient measure. The preventive measures regulated in FA (Art. 134, 139-148) are: warning of errors and omissions related to the care and raising of the child, measure of professional assistance and support in the exercise of parental care and measure of intensive professional assistance and supervision over exercise of the parental care. The competence for these measures lies with the Croatian Social Welfare Institute.

[12] „The state shall protect maternity, children and youth, and shall create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life." (Art. 63 Croatian Constitution); „Everyone shall have the duty to protect children and infirm persons." (Art. 65, para. 1 Croatian Constitution).

[13] Art. 62 Croatian Constitution.

[14] Official Journal of the European Communities, 2000/C 364/01 More about Charter and its significance for family law relations see Korać Graovac, A., *Povelja o temeljnim pravima Europske unije i obiteljsko pravo*, in: Korać Graovac, A.; Majstorović, I. (eds.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013., pp. 25 – 51.

children's rights - the Convention on the Rights of the Child[15] in the Preamble states: „family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community…", as well as that „the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,…". Therefore, in accordance with these international commitments we can conclude about the state interest and obligation of adequate assistance and protection of the family and its value at the level of a society. Namely, these norms are primarily principled views that are being elaborated in national legal system of every state and are more an expression of the value system and support to the family. The value of the family at the individual level is shown by the data of the European value research project (European Values Study) which is carried out in most European countries, and Croatia joined in 1999, according to which family is the fundamental value cherished by citizens as one of their priorities.[16] In addition to the protection of the family, which is the state obligation, it is the right of every individual to respect for family life, and in this regard, the role of the state is also important, both in terms of positive and negative obligations, which will be discussed in the next part of the paper. Namely, living together, i.e. joint life, the family life of parents and children represents multiple value for both children and their parents. As a rule, the family environment, i.e. the child's upbringing by the parents, is the most suitable for the healthy development of the child in every respect because it provides the child with, among other things, emotional security and stability, guidance as well as the protection and exercise of the child's rights.

In this sense, the task of the state is to protect family life and to intervene only in the case of the need for protection, i.e. in situations where parents unfortunately do not fulfil their parental function, i.e. their rights, obligations and responsibilities as persons who are primarily responsible to protect the well-being of their child[17] in an appropriate manner, regardless of whether it is because of lack of

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15 Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 15/90; Official Gazette – International Treaties, Nos. 12/93, 20/97, 4/98, 13/98 (further: CRC).

16 For 85% of Europeans, family is very important. See Baloban, J.; Nikodem, K.; Zrinščak, S. (eds.), Vrednote u Hrvatskoj i u Europi – Komparativna analiza, Kršćanska sadašnjost – Katolički bogoslovni fakultet Sveučilišta u Zagrebu, Zagreb, 2014, p. 123. and Črpić, G., *Sociološki aspekti obiteljskopravnih instituta, pravna kultura i obiteljskopravni instituti*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. VIII, No. special issue, 2017, p. 7. More about this project on [https://europeanvaluesstudy.eu/].

17 „States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may

parental competences, ignorance or evil intent, and consequently the child's rights are being threatened or violated.

Depending on the degree of endangerment and violation of the child's rights, the reaction of the competent authorities may consist of preventive measures or repressive measures by which the child is being separated from the family environment.

The imposition of such separation measures undoubtedly represents a form of interference in the sphere of the family life of parents and children and a form of encroachment on their fundamental right - the right to respect for family life, but not necessarily its violation, and in that sense, the normative regulation of guarantee of this right will be considered *infra*, as well as the justification of its limitations mainly bearing in mind the repressive measures of separating the child from the family.

3. THE RIGHT TO RESPECT FOR THE FAMILY LIFE OF PARENTS AND CHILDREN - RESTRICTIONS INTENDED TO PROTECT THE RIGHTS AND WELFARE OF THE CHILD

Family life certainly includes the joint life of parents and children, and the right to respect for family life is one of the fundamental human rights guaranteed in the Croatian Constitution as well as in international treaties that are component of the domestic legal order[18]. Thus, the constitutional provision of Art. 35. reads: „Respect for and legal protection of each person's private and family life, dignity, and reputation shall be guaranteed ". In addition, it is worth noting the provision of Art. 16 Para 1 of the Croatian Constitution, which contains a restrictive clause: „Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, public morals and health." When it comes to international treaties, the (European) Convention on the protection of human rights and fundamental freedoms[19] is of exceptional value since its Art. 8 guarantees this right, i.e. legal good. This provision states:

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be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." (Art. 18 CRC).

[18] „International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law." Art. 134 Croatian Constitution.

[19] Official Gazette – International Treaties, Nos. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 (further: ECHR).

„1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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, for the protection of health or morals, or for the protection of the rights and freedoms of others."

According to para 2 Art 8 the right to respect for family life is not absolute, since the interventions i.e. involvement of the public authorities will be allowed if the strictly defined precondition are met, i.e. the so-called qualified conditions.[20] The first precondition is that all interference into family life must be in accordance with the law, i.e. that the measure by which a child is separated from the family is grounded in domestic legal regulations on such state intervention.

In the Croatian legal system, the repressive measures by which a child is separated from the family are regulated in such a way that the legislator, among other things, has determined what preconditions must exist in order to impose each of the individual measures of separation, given that the separation of a child from the family is a broader concept which includes few different measures, which have in common the separation of the child from his/her family environment and entrusting him/her to the care of another person or a social care institution.

Namely, according to the provision of Art. 129 Para 2 FA "separation of a child from the family means any measure on the basis of which the child is separated from the family and placed with another person who meets the requirements for a guardian, in a foster family, in a social welfare institution or with another physical or a legal entity that performs social welfare activities."

Having in mind that the separation of a child from the family represents interference in the fundamental human right of parents and children protected by the highest domestic legal act and the international legally binding documents, the legislator determined that the separation should not last longer than it is necessary to protect the rights and welfare of the child and that the measure of separating the child from the family must be regularly reviewed as well as that parents have the right to assistance and support in order to remove the causes of the separation and the child be returned to the family in accordance with his/her welfare (Art. 129, para. 4 and 5).

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[20] Omejec, J., *Značenje i doseg prava na poštovanje obiteljskog života u praksi Europskog suda za ljudska prava*, in: Hrabar, D. (ed.), Presude o roditeljskoj skrbi Europskoga suda za ljudska prava protiv Republike Hrvatske, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2021, p. 5.

Namely, one of the goals or purpose of the measure is the return of the child to the family, if this would not be against the child's welfare or the preparation of another permanent form of care for the child, which includes adoption in cases when the most repressive measure is imposed to the parent who abuses or gravely infringes parental responsibilities, duties and rights (Art. 170 FA).[21]

Additionally, it is worth emphasizing that the purpose of separation must be the protection of the child's life, health and development, and the measure is justified if it is not possible to protect the rights and welfare of the child by some lenient measure (Art. 129 Para 1 and 3 FA).

Therefore, child protection in such circumstances certainly represents a legitimate aim in the context of the provision of Art. 8 Para 2 ECHR for which interference with the protected convention right is allowed.

While the child is separated from the family, it is necessary to provide adequate care for him/her outside the family (with another person, foster career or in social welfare institution) as well as to provide assistance to the parents in order to try to eliminate the reasons that led to the child being separated.

Separation of a child from the family is therefore a collective name for several different measures that share a common purpose, and the meaning of separation is primarily protection of the child's life and health and secondary giving assistance to the parents. Such measures aren't in no way a sanction or punishment of parents for violations of parental duties and responsibilities that led to the child being separated from them.

The aforementioned legal solutions follow the requirements of the ECHR when it comes to the preconditions for interference in the right of parents and children to respect for family life. Namely, in order for the interference be justified it must be in accordance with the law, done with a legitimate aim, which in the case of separation is the protection of the child's life, health and development, and must be recognized as "necessary in a democratic society".

A repressive measure will be considered necessary if it is based on relevant and sufficient reasons that must be explained in the decision on the imposition of the measure, i.e. „the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. "[22]

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21 That is a measure of deprivation of parental care.

22 *Olsson v. Sweden (No. 1)*, Application no. 10465/83, §. 67, Judgement of 24 March 1988; Kilkelly, The right to respect for private and family life -A guide to the implementation of Article 8 of the European

The demand for necessity is therefore closely related to the fundamental principle of proportionality that should, in addition to the principle of the primary protection of the best interest of the child, be applied when deciding on measures for the protection of the welfare of the child. In accordance with this principle, when choosing a measure that would be appropriate for the protection of the rights and welfare of the child, the competent authority (the court in an extra-contentious procedure or the Croatian Social Work Institute) must determine the measure that least restricts the right of the parents to take care of the child, if with such a measure, it is possible to protect the rights and welfare of the child (Art. 128 FA).

This is precisely because the right of the parents (and the child) to respect for family life would not be violated by imposing, for example, some of the measures by which child is separated from the family if it was possible to protect the child's welfare with one of the preventive measures, and such an intervention wouldn't therefore fulfil preconditions for justified interference into sphere of family life, i.e. the requirement of necessity according to the ECHR.

Namely, it is important to emphasize that the right of parents and children, as well as other family members, to enjoy each other's company is a key element of the right to family life. [23]

In this regard, it is particularly important that the competent authority, when imposing a protective measure of separation of a child from the family decides on contacts of a child and parents. In the circumstances of the separated lives of parents and children, contacts are the element of family life that remains to both parents and a child and it must be protected, having in mind that the purpose of the measure is to reunite the family if this would be possible, i. e. would not be against the best interest of the child.

Namely, if these contacts wouldn't be enabled during the separation period, that would lead to the alienation of the child, and this fact would make return of a child to the family after the end of the measure more difficult.[24]

However, since the fundamental principle in making decisions concerning the child, as determined by the Art. 3. CRC, is the best interest of the child, the court has the authority to decide on the prohibition of contacts or to determine their exercise under supervision, if such limitation is necessary and is proposed by the

Convention on Human Right, Human rights handbooks, No. 1, Council of Europe, 2003.

[23] See: Korać, A., *Sadržaj i doseg prava na poštovanje obiteljskog života*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 49, No. 6,1999, pp. 759-794.

[24] Rešetar, B., *Pravna zaštita prava na susrete i druženja*, doctoral thesis, Pravni fakultet u Zagrebu, Zagreb, 2009, p. 129.

child, parent or the CSWI.[25] In such cases there are actually additional restrictions concerning the right of parents and children to respect for family life, therefore it is necessary to justify such restrictions with additional, relevant reasons in order to prevent the violation of their convention right to respect for family life.

The fundamental purpose of the constitutional and convention guarantee of the right to respect for family life is to protect individuals from unfounded, arbitrary interference by the state in their right to an undisturbed family life.[26]

The guarantee of the aforementioned right is also contained in the Charter of Fundamental Rights of the European Union in Article 7. which reads: "Everyone has the right to respect for his or her private and family life, home and communications."

The Charter also guarantees a whole range of other human rights, showing the commitment of the European Union to this particular area of human rights as well as to the rule of law.[27]

The CRC as the most important international document on children's rights also guarantees children the right to live with their parents. Namely, according to Art. 9 Para 1 „1. (S)tates Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents,…".

Therefore, and in accordance with the CRC, this right is not an absolute right, especially when its realization is against the best interests of the child. When it comes to state obligation Art. 3 Para 2 reads: „(S)tates Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other

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[25] Art. 152, para. 1, Art. 157, para. 1, Art. 166, para. 2. However, when it comes to the most restrictive measure for protection of child's right and interest – deprivation of parental care, the court will decide on contacts with the child only in exceptional cases, on proposal of a child or a parent who is being deprived of parental care. Having in mind the preconditions for such a measure, i.e. abuse and gravely infringement of parental responsibilities, duties and rights alongside with special circumstances in which such a measure shall be passed (Art. 170 and 171 FA), it can be expected that decisions on exercises of contacts with the child are extremely rare in practice.

[26] Schabas, W. A., *The European Convention on Human Rights – A Commentary*, Oxford University Press, 2015, p. 366.

[27] Majstorović, I., *Europsko obiteljsko pravo*, in: Hrabar, D. (ed.), Obiteljsko pravo, Narodne novine, Zagreb, 2021, p. 496.

individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".

Additionally, according to the CRC, the state is obliged to provide assistance to the parents in fulfilling their duties while strengthening care institutions and services (Art. 18 Para 2).[28]

From the aforementioned provisions we can conclude about the subsidiary role of the state in the protection of children. This fully corresponds to the negative obligation that the state has with regard to respecting the right to family life, i.e. refraining from intervening in the parent-child relationship except when it is necessary and in accordance with the law when parental care is inadequate, i.e. when there are parental failures in providing care for the child or neglect and violation of parental duties, rights and responsibilities, which results in the need to protect the welfare of the child through appropriate intervention by competent authorities.

When making decisions on repressive measures for the protection of the child's rights and welfare, the competent authorities are obliged to enable the child to express his/her opinion and to give due value to the expressed opinion of the child in accordance with his/her age and maturity (Art. 12 CRC).[29] This Convention right of the child and one of the fundamental principles of the CRC has been implemented in domestic legislation. [30]

To what extent are these international standards as well as the norms of domestic legislation brought to life in practice, we will consider by analysing individual decisions of the CCRC and the ECtHR. Therefore, next part of the paper will present an overview of court decisions on the violation of the right to respect for

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[28] *Cf.* Majstorović, I., *Mjere za zaštitu osobnih prava i dobrobiti djece u njemačkom pravu*, in: Rešetar, B.; Aras S. (eds.), Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta, Pravni fakultet Sveučilišta J. J. Strossmayera u Osijeku, Osijek, 2014, p. 97.

[29] *Amplius* Committee on the rights of the child, General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009., available at: [https://www.ohchr.org/en/treaty-bodies/crc/general-comments], Accessed: 6 May 2024.

[30] The general provision guaranteeing this child's right is contained in Art. 86 FA, while additionally in Art. 130, para. 1 is stipulated that the child has the right to participate and express his/her opinion in all procedures for assessing and determining measures that protect his/her rights and welfare, as well as that a special guardian must be appointed for the child in procedures for determining measures in competence of the court (Art. 130, para. 3 FA). Child's procedural rights are specially regulated in the European Convention on the Exercise of Children's Rights (Official Gazette – International Treaties, No. 1/10). Amplius Hrabar, D., *Europska konvencija o ostvarivanju dječjih prava – poseban zastupnik djeteta*, in: Filipović, G.; Osmak Franjić, D. (eds.), Dijete u pravosudnom postupku – Primjena Europske konvencije o ostvarivanju dječjih prava, Zbornik priopćenja sa stručnih skupova pravobraniteljice za djecu, Pravobranitelj za djecu, Zagreb, 2012., pp. 103-116.

family life committed by imposing repressive measures by which a child was separated from the family.

4. REVIEW OF THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

The family law perspective on the issue of the violation of the right to respect family life focuses on the state's obligations prescribed by the previously mentioned Article 8 of the ECHR, which concern the restraint of public authorities from unjustified and arbitrary interference in family life (negative obligation) and the provision of assistance in the implementation of the right to family life (positive obligation).

According to the interpretation of the ECtHR, positive obligations "must include actions and measures that are sometimes broader than the requirements of domestic regulations."[31]

To avoid a violation of the state's negative obligation, state interference in family life must be "in accordance with the law" and pronounced for a justifiable purpose that is "necessary in a democratic society".[32] In a democratic society, necessity is reviewed based on all of the circumstances of the case if the child's separation from the family is proportionate to the legitimate aim that the state's interference in family live attempts to achieve.[33] The legitimacy of the purpose is reflected in the protection of the best interests of the child when his/her rights and welfare are threatened and/or violated, and the state must ensure that before separating the child from the family, other, milder measures are considered to achieve the protection of the child's best interests.[34]

When we look back on the national legislation and evaluate its provisions, it is clear that the requirements for taking measures to separate a child from the fam-

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31 Korać Graovac, A., *Hrvatsko obiteljsko pravo pred Europskim sudom za ljudska prava*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. IV, No. 1, 2013, p. 50.

32 Korać, Graovac, A., *Obiteljskopravna zaštita osobnih interesa djece prije izdvajanja iz obitelji: prava djece - odgovornosti i prava roditelja*, in: Ajduković, M.; Radočaj, T. (eds.), Pravo djeteta na život u obitelji, Stručna pomoć obiteljima s djecom i nadzor nad izvršavanjem roditeljske skrbi kao proces podrške za uspješno roditeljstvo, Zagreb, 2008, p. 52.; See *Haase v. Germany*, Application No. 11057/02, § 83., Judgement of 8 April 2004.

33 Korać, Graovac, A., *ibid.*, p. 52.; See *Gnahoré v. France*, Application No. 40031/98, § 50. Judgement of 19 September 2000, *Haase v. Gemany*, § 88.

34 Korać, Graovac, A., *ibid.,* p. 52.; See *K. i T. v. Finland*, Application No. 25702/94, § 166., Judgment of 12 July 2001; *Kutzner v. Germany*, § 67, *P., C. i S. v. UK*, Application No. 56547/00, § 116., Judgement of 16 July 2002; *Haase v. Germany*, § 90.

ily are fairly broad.[35] The assumptions specified in this manner constitute legal standards that allow competent state bodies to make a decision as to whether they are met and whether they are in the best interests of the child, based on the facts of the case.[36] Even if these assumptions are met, the declared measure obviously limits the child's right to enjoy family life with his parents, thus the state must ensure that they "not last longer than necessary".[37] Furthermore, the mere fact that the child can be placed in an environment that will take better care of him/her does not justify the repressive measure of separating the child from the family and separating him/her from his biological parents, unless there are other circumstances that indicate the "necessity" of encroaching on family life.[38] Therefore, state bodies are required to constantly evaluate whether the circumstances that led to the enactment of the measure have changed (*rebus sic stantibus*).[39] Furthermore, during the application of the measure, the state is obliged to provide support in exercising the right to family life in such a way that, if possible, conditions are created for the child's return to the family by supporting the parents in eliminating the circumstances that led to the child's separation from the family.[40]

Interpreting the content of family life, the CCRC highlights the judgments of A.K. and L. *v.* Croatia (Application No. 37956/11, § 51, Judgment of January 8, 2013) and Vujica *v*. Croatia (Application No. 56163/12, § 87, Judgment of October 8, 2015) in which the ECtHR states that the enjoyment of parents and children in each other's company is a fundamental element of family life, which is, among other things, protected by the provisions of Article 35 of the Croatian Constitution, i.e. Article 8 of the ECHR, so measures that prevent the enjoyment of parents and children in each other's company constitute interference in that right.[41]

The CCRC considers that the circumstances in which it has to decide whether there has been a breach of the right to family life necessitate weighing the applicant's right to family life and the state's commitment to defend the best interests of the child.[42] Whereby, considering a possible breach of the right to family life, one

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35 Hrabar, D., *Obiteljskopravni odnosi roditelja i djece*, in: Hrabar. D. (ed.), Obiteljsko pravo, Narodne novine, Zagreb, 2021, p. 245.

36 Korać, Graovac, A., *op. cit.* note 31, p. 52.

37 Hrabar, D., *op. cit.* note 35, p. 245.; Art. 7, para. 1 CRC.

38 Korać, Graovac, A., *op. cit.* note 31, p. 52.; See: *K. A. v. Finland*, Application No. 27751/95, § 92., Judgment of 14 January 2003.

39 Hrabar, D., *op. cit.* note 35, pp. 245. i 252.

40 *Ibid.,* str. 245.

41 Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-2684/2022 od 19. listopada 2022.,* in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 175.

42 *Ibid.*

should consider the legitimacy and necessity of the state's intrusion in family life, as well as the legitimate purpose of protecting the child's best interests.

Furthermore, referring to the judgments of the ECtHR[43] the CCRC emphasises sufficient and relevant reasons for intrusion in family life, which must be the result of an analysis of the entire family situation, for which the decisive factors are factual, emotional, psychological, economic, and health, in order to "achieve a fair balance between the interest of the child being separated from the parents and the interest of the parents to live with their child, where the best interest of the child had decisive importance."[44] When considering court proceedings in which a decision is made to separate a child from the family, the CCRC concludes that it is necessary to ensure the involvement of parents, but also of all interested parties, to the extent that will enable them to directly present relevant arguments in order to achieve a fair balance of interests.[45]

The CCRC considers ECtHR judgments like B. *v.* the United Kingdom (§ 64) and X *v.* Croatia (Application No. 11223/04, § 48, Judgement of 18 May 2006) when determining the necessity of interference in family life and the occurrence of a violation of the right to family life and points out that is crucial to assess whether the parents participated sufficiently in the decision-making process to separate the child from the family. In other words, are parental rights during the procedure protected, in manner that they were informed about the procedure and given the opportunity to be heard.[46] The CCRC points out that the removal of a child from the family should not be justified only by the fact that the new environment, where the child

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43 *Sommerfeld v. Germany* (Application No. 31871/96, § 62, Judgement of July 8, 2003), Sahin *v.* Germany (Application No. 30943/96, § 64, Judgement of July 3, 2003), *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07, § 139, Judgement of 6 July 2010) and *Antonyuk v. Russia* (Application No. 47721/10, § 134, Judgment of August 1, 2013).

44 U-III-34/2020 of 15 July 2020 par. 11., see: Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-34/2020 od 15. srpnja 2020.*, in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, pp. 140-141.

45 The CCRC emphasizes the importance of immediate evidence assessment in proceedings involving measures that encroach on family life. As well, it emphasizes that the CCRC is not authorized to make a decision on who a child should live with. *Ibid.*
The ECtHR's case law indicates that parties must be sufficiently involved in the decision-making process to provide appropriate protection of their interests. See *Venema v. the Netherlands*, Application No. 35731/97, § 91, Judgment of 17 December 2002, *P., C. and S. v. Great Britain*, Application No. 56547/00, § 119, Judgment of July 16, 2002, *T.P. and K.M. v. Great Britain*, Application No. 2894/95, § 72, Judgment of 22 November 2000, *Haase v. Germany*, Application No. 11057/02, §§ 94 and 95, Judgment of 8 April 2004; Korać, Graovac, A., *op. cit.* note 31, p. 52.

46 Preložnjak, B., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-2342/2022 od 19. listopada 2022.*, in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 158.

will live after removal form the family, is more favorable for the child, but as well with the fact that the child's stay in the family will harm his/her health and proper development.[47] Since every decision to separate a family represents a very serious form of interference, the CCRC concludes that it is important that it has a temporary nature and that while the reasons that led to the separation of the child from the family last, the state does everything necessary to reunite the family.[48]

Furthermore, the CCRC emphasizes that when separating a child from his family or reuniting the family, the state is required, in accordance with the provisions of the CRC and FA, to allow a child who is able to form his/her own opinion to freely express his/her views on all matters relating to him/her, and to respect his attitudes and opinions in accordance with his age and maturity level.[49] For this purpose, the state must ensure that the child, directly or through an intermediary, i.e., an appropriate service, is heard in all procedures linked to him/her, in a manner that is aligned with the procedural norms of the national legislation.[50] The ECtHR also emphasizes the importance of allowing children to express their opinions in suitable situations (Bronda *v.* Italy, Application No. 40/1997/824/1030), §59, Judgment of June 9, 1998; Dolhamre *v.* Sweden, Application No. 67/04), §116, Judgment of June 8, 2010).[51]

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47 U-III-34/2020 of 15 July 2020, §§ 11-12; Preložnjak, B., *op. cit.* note 43, p. 141. CCRC refers to the practice of the ECtHR, i.e. judgments *Scozzari and Giunta v. Italy (*Application Nos. 39221/98, 41963/98, § 169, Judgement of 13 July 2000), *T.P. and K.M. v. the United Kingdom* (Application No. 28945/95, § 71, Judgment of 10 September 1999), *Ignaccolo Zenide v. Romania* (Application No. 31679/96, § 94, Judgment of 25 January 2000), and *Sahin v. Germany* (Application No. 30943/96, § 66, Judgement of 8 July 2003).

48 *Ibid*., p. 165. *K. and. T. v. Finland*, No. 25702/94, 2001, § 154-155.; *Kutzner v. Germany*, No. 46544/99, 2002., § 65-66; *Saviny v. Ukraine*, No. 39948/06, 2008., § 48-49.

49 Art. 12 para. 1 CRC; The provisions of the CRC are followed by the norms of the European Convention on the Exercise of Children's Rights, which aims to improve the child's procedural position by granting the child procedural rights (the right to be informed, to express his opinion, and to request the appointment of a special representative) and allowing child to be informed about proceedings before judicial bodies that concern him/her, either alone or through other persons or bodies. See: Šimović, I., *The right of the child to be heard in the Croatian family law system*, European Integration Studies; Miskolc, Vol. 19, 2023, 1; pp. 1-15, Majstorović, I., *The Realisation of the right of the child to express his/her views – How "visible" are children in Croatian family judicial proceedings?'*, Ljetopis socijalnog rada, 24 (1), 2017, pp. 55-71.
Radina, A., *Praksa suda i posebnog skrbnika u postupcima radi odlučivanja o mjerama zaštite osobnih prava i dobrobiti djeteta*, in: Rešetar, B.; Aras, S. (eds.), Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta, Interdisciplinarni, komparativni i međunarodni osvrti, Pravni fakultet Osijek, Sveučilište Josipa Jurja Strossmayera, Osijek, 2014, p. 31.; Art. 1, para. 2, Art. 2, point c, Art. 3 and Art. 4 of the European Convention on the Exercise of Children's Rights.

50 Art. 12, para 2 CRC.

51 Radina, A., Izdvajanje djeteta iz obitelji u praksi Europskog suda za ljudska prava, Godišnjak Akademije pravnih znanosti Hrvatske, vol. VIII, Poseban broj, 2017, p. 99.

In this regard, a special guardian plays an important role, whose task is to represent the child and inform the child about his role in the procedure, the subject of the procedure that concerns him/her, and to familiarize the child with the convention right to express his/her opinion and the potential consequences of respecting his/her opinion and decisions.[52]

Although the Convention and legal norms guarantee the child the right to participate and express his/her own opinion in the proceedings in which his/her rights and interests are decided, the CCRC observed violations of these children's rights in the proceedings for imposing measures particularly because of the omissions in the work of special guardians.[53]

The reason for this is the Centre for Special Guardianship's broad scope of competence, which overloads special guardians with a large number of cases and has a negative impact on the quality of representation of children in court proceedings in which a special guardian is appointed for them.[54] As a result, "representation of children by special guardians is often reduced to simply filling out the form prescribed by law".[55] Therefore, it is difficult to expect that the best interests of the child will be protected in court proceedings, unless normative changes are made to the institution of special guardianship in the form of improving its organization and personnel capacities and/or allowing the child to be represented by a lawyer in accordance with the provisions of the European Convention on Children's Rights.[56]

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52 Čulo Margaletić, A., *Oduzimanje prava na stanovanje s djetetom i povjeravanje svakodnevne skrbi o djetetu - Odluka br. U-III-2901/2020 od 18. veljače 2021*, in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 85.; More about the role of the special guardian in the context of the child's right to express his/her opinion see Šimović, I. *op. cit*. note 39. Regarding overload and other problems that special guardians encounter in practice, which ultimately affect the quality of representation of children in court proceedings see more in Lucić, N., Child's special guardian – International and European expectations and Croatian reality, Balkan Social Science Review, 2021, 17, pp. 108–112.

53 U-III-2684/2022 of 19. October 2022, see: Preložnjak, B., *op. cit*. note 41, p. 184.

54 Čulo Margaletić, *Oduzimanje prava na stanovanje s djetetom i povjeravanje svakodnevne skrbi o djetetu – U-III-1674/2017 od 13. srpnja 2017*., in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, p. 86.; Šimović, I., *op. cit*. note 39., p. 11.

55 Lucić, N., *op. cit*. note 52, p. 110.; See Report on the work of the Ombudsman for children in 2022, Ombudsman for children, Zagreb, 2023, pp. 22, 34.

56 Lucić, N., *op. cit.* note 52, p. 110; Art. 2, Art. 5, Art. 9 of European Convention on the Exercise of Children's Rights; Hrabar, D., *Lišenje prava na roditeljsku skrb - Odluka br. U-III-249/2022 od 12. srpnja 2022*. in: Korać Graovac, A. (ed.), Odluke Ustavnog suda Republike Hrvatske o mjerama za zaštitu prava i dobrobiti djeteta, Biblioteka Monografije, Sveučilište u Zagrebu Pravni fakultet, Zagreb, 2023, pp. 118-132.; Hlača, N., Skrbništvo, in: Hrabar, D. (ed.), *op. cit.* note 2, pp. 391–392., Preložnjak, B., *op. cit.* note 41, p. 185.

5. FINAL REMARKS

Measures for the protection of the child's rights and well-being must be based on legal norms and must correspond or be proportionate to the degree of threat to the child's rights and well-being.[57] The evaluation of the necessity of public authority interference in the private lives of parents and children is critical in determining the existence of a violation of the right to respect for family life guaranteed by Article 35 of the Croatian Constitution, Article 8 of the ECHR, and Article 7 of the Charter.

In addition to necessity requirement, which is determined in more detail by the ECtHR in its judgments, on which the CCRC refers to in the explanations of its decisions, we would also emphasize a requirement that arises from the practice of the ECtHR and that is temporality of imposed repressive measures. Namely, measures by which the child is separated from the family should in principle be of temporary nature and be discontinued as soon as circumstances permit as well as that during imposed repressive measure parents should be provided with help and support to improve their parenting skills, having in mind an aim of state intervention and that is family reunification unless it would be contrary to the best interest of the child. To determine the child's best interests and to protect the rights and welfare of children expressed through physical, emotional, and educational needs in the long term, as well as to strengthen parental abilities to meet these needs, it is critical to allow the child to exercise his/her right to express his/her opinion in an appropriate manner in every proceeding concerning him/her.[58] However, there is no obligation of public authorities to make endless attempts at family reunification since unjustified insistence on giving biological parents the opportunity to take over exercise of parental care despite their lack of interest and reluctance leads to the question of whether the child's rights and interest are being violated by such prolongation of adequate intervention. Namely, parent's rights cannot be above the interest of their children.

Bearing in mind the aforementioned obligations of the state, i.e. competent authorities, it is of utmost importance strengthening the system of support and assistance to families who are in crisis. Timely recognition of risks, appropriate action and active work with families, especially parents, is necessary as a form of prevention of endangerment and violation of children's rights as well as prevention of

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[57] Art. 7. FA "Measures that encroach on family life are acceptable if they are necessary and their purpose cannot be successfully achieved by taking milder measures, including preventive assistance, i.e. family support."

[58] U-III-34/2020 of 15. July 2020., para. 11. See Preložnjak, B. *op. cit*. note 44, pp. 133-148.; When assessing the well-being of children, public authorities also take into account the age of the children, the likely effect of changes in the children's life circumstances, the damage that the children have suffered so far or may suffer in the future. See Radina, A., *op. cit.* note 51, p. 105.; *Y. C. v. United Kingdom*, Application No. 4547/10, §§ 103, 135, Judgment of 13 March 2012.

separation of children from families, and facilitation of family reunification. This would also contribute to fulfilling the positive obligations of the state that derive primarily from the ECHR, which consist precisely in ensuring support for the exercise of the right to family life, i.e. effective respect for family life.[59]

Having in mind the unique role of parents as the primary and most important persons in the upbringing and development of the child and their responsibilities concerning caring and protecting of the child according to the domestic and international legal norms, we believe that setting requirements for their additional proactive involvement, depending on the parent's problems that affect their parenting abilities (knowledge and skills), would be worth to consider. That could be obliging (not just instructing) parents by the court decision on repressive measure to undergo adequate medical treatment or psychosocial treatment or other appropriate programs in order to remove inappropriate behaviour so that they can independently (over)take care of the child.[60] Namely, welfare of the child should be parent's basic concern and the state and society have a subsidiary role by render appropriate assistance to parents in the performance of their demanding and unique child-rearing responsibilities. [61]

Therefore, strengthening and investment in more effective functioning of the social welfare system, which is the first line of support for families, is undoubtedly a key prerequisite for fulfilling the aforementioned Convention obligation, but no less important, the constitutional obligation of family protection.

If we start from the family as the fundamental value of the vast majority of the citizens of the Republic of Croatia as well as citizens of the European Union, as confirmed by the research we referred to in the paper, then undoubtedly the family deserves greater respect, support and empowerment, which can only be achieved, *inter alia* with appropriate investments in a system that should be available to family members who are facing difficulties, especially parents and children.

However, if the preventive measures are not adequate or there is no progress on the part of the parent and according to the expert assessment, the life and health of the child in the family are threatened, prompt intervention is necessary. In accordance with the principle of timeliness[62], relevant decision on repressive measure of

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59 See *Kutzner v. Germany,* Application no. 46544/99, Judgment of 26 February 2002.

60 In practice this would inevitably represent a great challenge for intersectoral cooperation.

61 Art. 18 para 1 and 2 CRC; See: Hrabar, D., *Uvod u prava djece*, in: Hrabar, D. (ed.), Prava djece multidisciplinarni pristup, Biblioteka Udžbenici, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016., p. 32.

62 *Amplius* see: Šimović, I.; Majstorović, I., *Povreda prava na obiteljski život u postupcima međunarodne otmice djece: o značenju načela žurnog postupanja*, Hrvatska pravna revija, 17, 2017 (11), pp. 1-9.

competent authority should be made and in deciding competent authority must respect accepted international and national legal framework as well as to follow the guidelines deriving from the practice of the CCRC and the ECtRH in order to protect the rights and welfare of the child in a timely and appropriate manner, to respect the rights of the parents, i.e. to consistently and effectively ensure the exercise of the right to respect for the family life of parents and children.

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16. *Scozzari and Giunta v. Italy*, Application Nos. 39221/98, 41963/98, Judgement of 13 July 2000
17. *Sommerfeld v. Germany*, Application No. 31871/96, July 8, 2003
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CHALLENGES IN THE LIVES OF CHILDREN WITH DEVELOPMENT DISABILITIES AND THEIR PARENTS IN THE CITY OF VUKOVAR

Matea Radić, mag. act. soc.
matea.radic032@gmail.com

Branka Rešetar, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
branka.resetar@pravos.hr

Ivana Tucak, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
ivana.tucak@pravos.hr

ABSTRACT

Children with development disabilities are guaranteed at the international and national full and effective participation in society on an equal basis with others. They exercise their rights in the family and community in which they live. Therefore, the family and the community, as well as public policies, are factors that affect the life and realization of the rights of children with development disabilities.

The aim of the paper is to gain insight into the community support for children with development disabilities and their families as well as into the realization of the rights of children with development disabilities in the city of Vukovar from the perspective of their parents.

The qualitative research was conducted with parents of children with development disabilities. The results indicate the following challenges faced by parents of children with development disabilities living in the city of Vukovar: late diagnosis, lack of public and community services and professionals, lack of understanding and support in the family and community, lack of information about the rights of children and parents, challenges in the field of education, absence of parents' right to balance professional and private life, lack of leisure time for parents and fear of parents for the future of the child.

***Keywords**: Children with development disabilities, city of Vukovar, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, family*

1. INTRODUCTION

Children with developmental disabilities (hereinafter: children with DD) represent the most vulnerable group of society that struggles with multiple threats in all spheres of life. On the one hand, these are children who represent a vulnerable group of society due to their psychological and physical immaturity, which makes them dependent on adults. On the other hand, people with disabilities historically struggle with discrimination and stigma in society, as well as obstacles in exercising their rights daily. When we combine these two vulnerable groups, we get children with DD who, compared to healthy children, stay in institutions more often, die more often, are more often exposed to violence and neglect, are more often exposed to a lack of education, employment and a greater risk of poverty.[1] Children with disabilities often suffer additional vulnerability and discrimination based on gender, ethnicity, poverty or living in alternative forms of care. These are cumulative factors of the risk of social exclusion, which has a negative impact on the quality of life and development of children.[2]

According to UNICEF data,[3] there are around 240 million children with DD in the world, that is, one out of ten children have DD. The Republic of Croatia also records an increase in children with DD. In Croatia, on September 1, 2022 there were 69,953 children with DD, while in 2012 there were 38,196 children with DD. This represents an increase of 31,757 children with DD in the past ten years.[4]

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1 Rešetar, B., *Prava djece s invaliditetom – prava djece s problemima mentalnog zdravlja*, Socijalna psihijatrija, Vol. 45, No. 1, 2017, p. 5.; World Health Organization (WHO) and UNICEF, *Global report on children with developmental disabilities – From the margins to the mainstream*, 2023, iv, [https://www.unicef.org/media/145016/file/Global-report-on-children-with-developmental-disabilities-2023.pdf], Accessed 10 April 2024.

2 Borić, I.; Mataga Tintor, A., *Studija o participaciji djece iz ranjivih skupina u Hrvatskoj,* Ured UNICEF-a za Hrvatsku, Zagreb, 2022, p. 26-27, 118-119. Available [https://www.unicef.org/croatia/media/12201/file/Studija%20o%20participaciji%20djece%20iz%20ranjivih%20skupina%20u%20Hrvatskoj.pdf], Accessed 9 April 2024; Bouillet, D., *S one strane inkluzije djece rane i predškolske dobi*, Ured UNICEF-a za Hrvatsku i Pučko otvoreno učilište „Korak po korak", Zagreb, 2018, p. 22. Available [https://www.unicef.hr/wp-content/uploads/2018/12/S_one_strane_inkluzije_FINAL.pdf], Accessed 9 April 2024.

3 UNICEF, *The world's nearly 240 million children living with disabilities are being denied basic rights.* Available [https://www.unicef.org/turkiye/en/press-releases/fact-sheet-worlds-nearly-240-million-children-living-disabilities-are-being-denied], Accessed 9 April 2024.

4 Croatian institute of public health, 2012 -2022 (Hrvatski zavod za javno zdravstvo 2012-2022). *Izvješće o osobama s invaliditetom u Republici Hrvatskoj*. Available [https://www.hzjz.hr/cat/periodicne-publikacije/], Accessed 10 April 2024; In Portal – News portal za osobe s invaliditetom, *Značajan porast - djece s teškoćama u razvoju svake je godine sve više*, 2019. Available [https://www.in-portal.hr/in-portal-news/moderna-vremena/19162/znaajan-porast-djece-s-teskocama-u-razvoju-svake-je-godine-sve-vise], Accessed 10 April 2024.

Children are guaranteed at the international and national level the right not to be discriminated against other children, i.e. full and effective participation in society on an equal basis with others. Children exercise their rights in the family and community in which they live. Therefore, the family and the community, as well as public policies, are factors that affect the life and realization of the rights of children with DD. Thus, an ecological framework situates individual development within concentric circles of influence radiating outwards, including family, community, institutions, politics and the environment.[5]

Caring for a child with DD is a very dynamic process full of challenges. The family where the child lives experiences specific challenges of caring for a child with DD. In addition, families are often the only providers and coordinators of care for a child with DD.[6] Accordingly, parents' care for children with DD gives parents the right to participate in the evaluation of the situation, and in proposing and deciding on the creation of public policies at all levels.[7]

In the Croatian context, the Ombudsman for Persons with Disabilities points out that children in schools with DD are still primarily viewed through their disability. Early intervention is unavailable, so only every eighth child has access to early intervention services. There is a lack of professionals in Croatia, and the spatial and financial capacities of social service providers are limited. Therefore, children wait too long for psychosocial support or assessment by a speech therapist.[8]

The goal of this research is to gain insight into the way parental care is provided for children with DD from the parents' perspective based on the area of the city of Vukovar. Therefore, this paper first presents the theoretical and legal framework that defines children with DD and prescribes their rights. This is followed by an overview of previous research that related to the lives of children with DD and their parents in Croatia. The central part of the paper presents the research of the lives of children with DD from the perspective of their parents in the city of Vukovar. Finally, the conclusion focuses on the recommendations to the city of

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5 Borić, I.; Mataga Tintor, A., *op. cit.*, note 2, p. 89; WHO and UNICEF, *op. cit.*, note 1, p. 1.

6 Currie, J.; Kahn, R., Children with disabilities: Introducing the issue, *The Future of Children*, Vol. 22, No. 1, 2012, p. 6; Vash, C. L.; Crewe, N. M., *Psihologija invaliditeta (prijevod 2. izdanja),* Naklada Slap, Jastrebarsko, 2010, p. 64-85; Leutar, Z. *et al.*, *Obitelji osoba s invaliditetom i mreže podrške*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2008.

7 Ombla, J., *Skrb o odrasloj djeci s invaliditetom: pilot istraživanje percepcije i iskustva roditelja*, Jahr, Vol. 14, No. 1, 2023, pp. 21-44.

8 Ombudsman for persons with disabilities (Pravobranitelj za osobe s invaliditetom), *Report on the work of the Ombudsman for Persons with Disabilities (Izvješće o radu pravobranitelja za osobe s invaliditetom),* Pravobranitelj za osobe s invaliditetom, Zagreb, 2022, p. 94-96. Available [https://posi.hr/izvjesca-o-radu/], Accessed 10 April 2024.

Vukovar based on which it is possible to improve the lives of children with DD and their parents in the community of the city of Vukovar where they live.

2. CONCEPT AND RIGHTS OF CHILDREN WITH DEVELOPMENTAL DISABILITIES

World Health Organization (hereinafter: WHO) and the United Nations Children's Fund (hereinafter: UNICEF) developed a joint definition of children with DD for the needs of the Global report on children with DD (2023). „Children and young people with DD refer to children and young people with health conditions that affect the developing nervous system and cause impairments in motor, cognitive, language, behaviour and/or sensory functioning. In interaction with various barriers and contextual factors, these impairments may hinder a child's full and effective participation in society on an equal basis with others. These include a range of underlying health conditions such as autism, disorders of intellectual development and other conditions listed in the International Classification of Diseases 11th Revision under neurodevelopmental disorders and a much broader group of congenital conditions (such as Down syndrome) or conditions acquired at birth (such as cerebral palsy) or during childhood".[9]

In the Croatian legal system, children with DD are defined in the Social Welfare Act[10] and the Act on the Register of Persons with Disabilities.[11] According to the Social Welfare Act, children with DD are children who, due to physical, sensory, communication, speech-language or intellectual difficulties, need additional support for development and learning with the aim of achieving the best possible developmental outcome and social inclusion.[12] The Act on the Register of Persons with Disabilities defines children with DD as children whose full, effective and equal participation in society, in the interaction of the child's abilities and surrounding factors, is limited.[13]

The rights of children with DD are stipulated at the international level by the UN Convention on the Rights of the Child[14] (hereinafter: UNCRC) and the UN Convention on the Rights of Persons with Disabilities.[15] (hereinafter: UN-

9 WHO and UNICEF, *op. cit.*, note 1, p. 1.

10 Official Gazette, No. 18/22, 46/22, 119/22, 71/23, 156/23.

11 Official Gazette, No. 63/22.

12 Art. 15 of the Social Welfare Act.

13 Art. 2 of the Act on the Register of Persons with Disabilities.

14 Official Gazette of the SFRY, International Agreements, No. 15/90, Official Gazette, International Agreements, No. 12/93, 20/97, 4/98, 13/98.

15 Official Gazette, International Agreements, No. 6/07, 3/08, 5/08.

CRPD). The UNCRC and the UNCRPD commit governments to policy changes that contribute to creating the conditions for children with DD to enjoy optimal health and inclusion.

The UNCRC includes a stand-alone provision on children with DD in Article 23. prescribing that „states parties recognize that a child with DD should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."[16] The child with DD has a right to special care and states parties shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.[17] Recognizing the special needs of a child with DD, assistance shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.[18] The rights of children with DD are further interpreted in a series of comments of UN Committee on Children's Rights (hereinafter: CRC). When interpreting the rights of children in early childhood, the UN Committee on Children's Rights points out that early childhood is the period during which disabilities are usually identified and the impact on children's well-being and development recognized. Young children should never be institutionalized solely on the grounds of disability. It is a priority to ensure that they have equal opportunities to participate fully in education and community life, including by the removal of barriers that impede the realization of their rights. Young disabled children are entitled to appropriate specialist assistance, including support for their parents (or other caregivers).[19] In the context of the special rights of children with disabilities, the UN Committee on Children's Rights considers the problem of children's accessibility to public services. The physical inaccessibility to public transportation and other facilities including shopping areas, recreational facilities among others, is a major factor in the marginalization and exclusion of children with disabilities

16 Art. 23, para. 1 of the UNCRC.

17 Art. 23, para. 2 of the UNCRC.

18 Art. 23, para. 3 of the UNCRC.

19 Para. 36 (Implementing rights in early childhood) of the General Comment No. 4 (2003) – Adolescent health and development in the context of the Convention on the Rights of the Child, Committee on the Rights of the Child, CRC/GC/2003/4, 1 July 2003.

as well as markedly compromising their access to services, including health and education.[20]

In the footsteps of the UNCRC, the UNCRPD continues to develop the international protection of the rights of children with DD. The article 7 of the UNCRPD prescribes that children with disabilities have the right to enjoy all human rights and fundamental freedoms on an equal basis with other children. Children with disabilities have rights with respect to family life just like other children. States Parties are obliged to provide early and comprehensive information, services and support to children with disabilities and their families.[21] In the field of education, children with DD must not be excluded from the general education system based on disability, regardless of whether it is free primary education or secondary education.[22] Children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system.[23] Finally, it is essential that children with disabilities are heard in all procedures affecting them and that their views be respected in accordance with their evolving capacities. Children should be equipped with whatever mode of communication to facilitate expressing their views.[24]

3. PREVIOUS RESEARCH ON THE LIFE OF CHILDREN WITH DEVELOPMENTAL DISABILITIES AND THEIR PARENTS IN CROATIA

Most children with DD live in families with their parents, where parental care of these children represents an extraordinary responsibility and demands that go beyond the obligations of typical parental care of children. These are intensive care requirements, long-term care that lasts throughout childhood and often continues after the child reaches adulthood.[25] The care of a child with DD differs from the typical parental responsibilities in several segments: the time of care is longer and

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[20] Para. 39. of the General Comment No. 9 (2006) – The rights of children with disabilities, Committee on the Rights of the Child, CRC/C/GC/9, 27 February 2007 (hereinafter: CRC General Comment No. 9); WHO and UNICEF, *op. cit*., note 1, p. 2; Schulze, M., *Understanding The UN Convention On The Rights Of Persons With Disabilities. A Handbook on the Human Rights of Persons with Disabilities (Third Edition).* Paper Slam, Inc., New York, 2010, p. 68-69. Available [https://www.internationaldisabilityalliance.org/sites/default/files/documents/hi_crpd_manual2010.pdf].

[21] Art. 23, para. 3 of the UNCRPD; Schulze*, op. cit*., note 20, p. 126.

[22] Art. 24, para. 2 of the UNCRPD.

[23] Art. 30, para. 5 d) of the UNCRPD.

[24] Para. 36 of the CRC General Comment No. 9.

[25] Ombla*, op. cit*., note 7, p. 22.; Milić Babić, M., *Obiteljska kohezivnost u obiteljima djece s teškoćama u razvoju*, Nova prisutnost, Vol. 10, No. 2, 2012, p. 209-214.

the demands of care are more frequent with a higher probability of more intensive care in frequent health care crisis situations.[26]

In recent years, several research have been conducted in Croatia on the lives of children with DD and their parents from the parents' perspective. For example, research on the quality of life of parents of children with DD,[27] research on social support for parents of children with DD[28], research on the satisfaction of parents of children with DD with the Croatian social welfare system,[29] research on social-professional support and assistance to children with DD from the perspective of parents.[30]

Research by Rašan et al. (2017) showed that parents of children with DD are exposed to numerous new situations, such as the search for professional support, increased financial expenses, the necessity of acquiring new knowledge and skills related to the child's type of DD, time management related to taking care of the child, greater absence from the workplace, and sometimes giving up one's own career. All the above can affect the high level of stress and changes in parents' behaviour and the quality of life of the entire family. Unlike many Western systems, where parents of children with DD are provided with a system of support by various experts, in Croatia such a form of support is still in its infancy.[31]

Research by Blažević Simić and Đurašin (2020) shoved that mother of children with DD face numerous challenges (e.g. stress and fatigue) and use various strategies (e.g. planning carefully and consulting other parents or experts) to organise family leisure that is beneficial for the child with DD as well as for the family.[32]

Research by Gović and Buljevac (2022) showed that the parents of children with DD evaluated the professionalism of experts, the improvement of the quality of

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26 Ombla, *op. cit*., note 7, p. 22.

27 Buljevac, M. *et al*., *Kvaliteta života odraslih osoba s intelektualnim teškoćama i njihovih roditelja: spoznaje i specifičnosti*, Ljetopis socijalnog rada, Vol. 29, No. 3, 2022, pp. 381-411; Blažević Simić, A.; Đurašin, M., *Oprostite, čije slobodno vrijeme?! Iskustvo slobodnog vremena obitelji djeteta s teškoćama u razvoju,* Hrvatska revija za rehabilitacijska istraživanja, Vol. 56, No. 1, 2020, pp. 107-131; Rašan, I. *et al.*, Doživljaj samoga sebe i okoline kod roditelja djece urednog razvoja i roditelja djece s razvojnim teškoćama, *Hrvatska revija za rehabilitacijska istraživanja*, Vol. 53, No. 2, 2017, pp. 72-87.

28 Leutar, Z.; Oršulić, V., *Povezanost socijalne podrške i nekih aspekata roditeljstva u obiteljima s djecom s teškoćama u razvoju,* Revija za socijalnu politiku, Vol. 22, No. 2, 2015, pp. 153-176.

29 Gović, J.; Buljevac, M., *Sustav socijalne skrbi iz perspektiva roditelja djece s teškoćama u razvoju*, Revija za socijalnu politiku, Vol. 29, No. 2, 2022, pp. 213-227.

30 Ombla, *op. cit*., note 7; Vlah, N. *et al., Nepovjerenje, spremnost i nelagoda roditelja djece s teškoćama u razvoju prilikom traženja socijalno-stručne pomoći*, Jahr, Vol. 10, No. 1, 2019, pp. 75-97.

31 Rašan *et al*., *op. cit*., note 27, p. 73.

32 Blažević Simić and Đurašin, *op. cit*., note 27, p. 129-130.

life due to the possibility of free time and the exercise of various rights among the positive aspects. Among the negative aspects they pointed out certain shortcomings related to the work of social welfare canters, a disability evaluation authority („*jedinstveno tijelo vještačenja*"), an ineffective system of information on rights and insufficient emergency responses in the Croatian system.[33] Although the research by Buljevac et al. (2022) relates to adults with disabilities, it confirmed that the quality of life of adults with intellectual difficulties and their parents is determined through different subjective and objective indicators, and it is affected by various factors such as support, social networks, formal support system, but also by certain characteristics of individuals. Persons with intellectual difficulties influence the quality of life of their parents, and the parents affect the quality of life of their adult children with intellectual difficulties.[34]

According to research by Ombla (2023) parents in Croatia appreciate the accessibility and competence of experts as well as the support they receive outside the formal system (friends, family members, other parents). However, they also point out that the lack of (in)ability to exercise rights related to the health system, the social welfare system and the education system, makes their everyday life difficult. The existing social rights are insufficiently sensitive and they encounter certain difficulties when exercising them.[35] A few foreign and national studies have shown that community support for parents who care for a child with DD is extremely important, whether it is informal support from family, friends, civil society organizations, or support from public services.[36]

STUDY PURPOSE AND RESEARCH QUESTIONS

The purpose of this research was to gain insight into the community support for children with DD and their families as well as to gain insight into the realization of the rights of children with DD in the city of Vukovar from the perspective of their parents. The following questions were asked:

1. What challenges do parents of children with DD face?

2. What are the disadvantages and opportunities in the lives of children with DD and their parents in the city of Vukovar?

3. Is the support of the Vukovar community to children with DD and their parents satisfactory?

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33 Gović and Buljevac, *op. cit.,* note 29, p. 223.

34 Buljevac *et al.*, *op. cit.*, note 27, p. 400.

35 Ombla, *op. cit.*, note 7, p. 24.

36 *Ibid.*, p. 23.

4. METHODOLOGY

For the purposes of the research, the authors used a qualitative research method.[37] Such research enables us to have a better and clearer insight into the data to be able to explain and describe a certain topic. This method helps us to better understand social phenomena.[38] The interview is the most used method in qualitative research, because of the flexibility it offers.[39] The authors created a semi-structured interview based on three research questions, with each research question being further elaborated. The questions were formulated in accordance with the general research area and the purpose of the research. The authors also created a Protocol for qualitative data collection, which contains a list of questions and is stored together with the recording of the interview. A semi-structured interview with an open-ended type of question made it possible to maintain the direction of the research topic, leaving space for the participants to share their experiences.

The research was conducted with parents of children with DD, and the sample of respondents was purposive. Purposive sampling requires the deliberate selection of information-rich units on the basis that they allow the researcher to learn as much as possible about the phenomena of interest. Researchers select units of analysis precisely because they will allow the researchers to answer the research questions in a way that is as meaningful and informative as possible.[40] Therefore, the respondents were members of the civil society organization (CSO) - "Who is afraid of tomorrow?" in Vukovar. The interview was conducted with those parents who volunteered and agreed to participate and who have a minor child with DD and reside in the city of Vukovar.

Eight parents (N=8) participated in the research, of which there were seven mothers (N=7) and one father (N=1). They are the parents of a total of eight children with DD (N=8) aged from four to seventeen. Four children have autism spectrum disorders (N=4), two have multiple disabilities (N=2), one has a speech and understanding disorder (N=1) and one has a motor impairment (N=1).

Before conducting the research, CSO "Who is afraid of tomorrow?" in Vukovar received a letter via e-mail with an explanation of the purpose of the research and

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37 Ugwu, C. N.; Eze Val, H. U., *Qualitative Research*, Idosr Journal of Computer and Applied Sciences, Vol. 8, No. 1, 2023, pp. 20-35; Buljan, I., *Izvještavanje o rezultatima kvalitativnih istraživanja*, Zdravstveni glasnik, Vol. 7, No. 2, 2021, pp. 49-58.

38 Mejovšek, M., *Metode znanstvenog istraživanja u društvenim i humanističkim znanostima (2. dopunjeno izdanje)*, Naklada Slap, Jastrebarsko, 2013.

39 Clark, T. *et al., Bryman's Social Research Methods (Sixth Edition)*, Oxford University Press, Oxford, 2021.

40 *Ibid*., p. 537-541.

a request for cooperation. Parents were informed about the purpose of the research and the principles of anonymity and voluntary participation. Parents were given a contact phone number to participate in the research (the so-called volunteer sample). Before conducting the interview, the purpose of the research and the method of conducting the interview, the voice recording of the conversation and the protection of personal data were again explained to the parents. The interviews were conducted during August and early September 2023, and the interview was conducted in the premises of the CSO, in a family home or a coffee bar and lasted between 25 and 45 minutes.

The collected data, i.e. the recorded interviews, were stored on the computer and a transcript of the interview was created. The transcripts were stored on a separate medium so that the data could not be connected, and a special name was determined for each participant.

As one of the most frequently general strategies for doing qualitative data analysis, we used a thematic analysis. Thematic analysis is dependent on coding as a way of identifying themes in the data.[41] The data were summarized by coding and defining key terms.[42] From the analysed data, themes and sub-themes emerged, which are listed in the rest of the paper. The most illustrative quotes are listed next to each theme and sub-themes.

5. RESULTS

The received data were analysed according to the predefined research questions. The results overview is divided into three sections. The first section refers to challenges that parents of children with DD face, the second section refers to disadvantages and opportunities in the lives of children with DD and their parents in the city of Vukovar and the third section refers to the support of the Vukovar community to children with DD and their parents.

RQ 1. What challenges do parents of children with DD face?

The first research question pointed out several problems and challenges which relate to the subjective feelings of parents related to parental care of a child with DD. However, some problems relate to the mismatch between work and childcare, and the lack of information about rights and services for parents and their children with disabilities.

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41 *Ibid*.

42 Bognar, L., *Kvalitativni pristup istraživanju odgojno-obrazovnog procesa*, Pedagoški fakultet Osijek, Osijek, 2000.

Parents' knowledge of the child's developmental disabilities and ignorance of the disability

After the diagnosis of the child's developmental disability, parents face new challenges such as acceptance and lack of knowledge about the child's disability. Five parents stated that they initially felt lost, but very quickly accepted the truth and continued to fight.

"After that diagnosis and the first hospitalization, it was clear that the struggle would be difficult and long-lasting, but nothing can prepare you for the reality of a sick child, believe me" (P1). "...First it was, impossible, and then it was we will fight no matter what." (P2).

Lack of understanding and support

According to parents' answers, one of the biggest challenges is the lack of understanding and lack of support in the community, including family members. Five out of eight parents state that at the very beginning they did not receive any formal or informal support, or it was only provided by their partners. One parent stated that in the beginning there was support, but as the child grew up, the support decreased:

"My life changed completely...the environment and family hurt me the most… that misunderstanding" (P3). "A small child, great understanding from the profession and the whole environment. As the child grows, that understanding and support weakens, and over time you become more and more left to yourself and the small circle of people who stayed by your side." (P1).

Fear for the future

When asked how they deal with challenges and fears related to the future, all eight parents state that they do not want to think about the future.

"Sometimes it's easier, sometimes you barely survive the day, but what's hardest is precisely the uncertainty of the future. We all fear what will happen to our children in a system like this, which is not prepared for even minor challenges in relation to the care of a person with disabilities after the death of a parent... The only thing the system offers is nursing homes, sedation with drugs and isolation. This must be changed urgently... and I am afraid that everything will again fall on the backs of already tired parents. The obligation to do our best to organize communities for our children while we are alive where they will be able to maintain, at

least approximately, the quality of life they are used to." (P1). "I don't think about it, I ignore it." (P8).

Lack of leisure time

When asked about the parents' leisure time, six parents stated that they adjusted all their time to the child and lived that way.

"We have adapted to the child...we live according to him." (P3). "After the surgery, I had no recovery days. The stitches give way, but who cares. Even if you can pay a person to help, it is difficult to find a person who can or wants to take care of a child with disabilities." (P1).

Balance between professional life and caring for a child with DD

Five parents are employed and have no problems with work because they managed to organize themselves. Three parents are unemployed to take care of a child with DD. One parent uses the right to work part-time.

"One mom told me about the possibility of working part-time and then I submitted a request and got the right to work part time" (P8). "I had to quit my job, stop my studies and devote myself completely to my child. I want to realize the right to my own life and work... The system is obliged to provide medical and social care for the child so that life can continue normally after the diagnosis appears in the family. This is in the interest of the whole family. I am sure that the number of divorces would be lower if the system were better organized" (P1).

Right to information about rights

All eight parents highlighted the problem of not knowing their rights. They said that no one informed them about their rights and that they got their first information from other parents of children with DD.

"I learned the first information from parents who before me had the experience of caring for a family member with disabilities." (P2). "Where to go, who to go to, who to contact, the mother of a child with disabilities gave me the most information about my rights, followed by a social worker from the social welfare centre." (P8).

RQ 2. What are the disadvantages and opportunities in the lives of children with DD and their parents in the city of Vukovar?

The second research question pointed out the number of problems and challenges which relate to the lack and inefficiency of public services for parents and their children with DD in city of Vukovar.

Lack of services and professionals

All eight parents cited a lack of certain services or professionals. The absence of health services and professionals in the city of Vukovar affected the late diagnosis. All the parents were forced to go to another city and finally to Zagreb so that the child could be diagnosed. Five out of eight parents state that there is a lack of therapy in Vukovar. Three parents stated that health professionals were unfriendly or uneducated.

"The child was 8 years old when the diagnosis was made" (P3). "The child was diagnosed when he was 5 years old." (P5). " The physician in Vinkovci gives us information that our child's EEG is extremely …. After that, he lets us go home so that we can order ourselves to one of the Zagreb hospitals." (P1). "We spent the first years of the child's life in the car driving the child to therapy sessions all over Slavonia, from Đakovo to Osijek and Vinkovci. From the beginning, we are oriented towards Zagreb...we have been on the route Vukovar - Zagreb for 15 years..." (P2). "The diagnosis was made at the Faculty of Education and Rehabilitation in Zagreb" (P4, P8). "We treated the child in Osijek until he reached puberty, then we transferred to Zagreb" (P7); "The support of the system is weaker as the child gets older..." (P1). "In Vukovar, we never received any therapy, except for those that we paid for privately." (P2). "We were separated for three years because the child was in another city for therapy with his father, and I was at home with the younger child." (P5); "There is no speech therapist, and we have been waiting for sensory therapy for two years" (P8). "Doctors are not familiar with the syndrome, so they are a little scared...uneducated." (P6); "Doctors are not accommodating." (P4)

Challenges of education

All parents have encountered challenges in the educational environment. Two parents cite problems with their child's inclusion in early and preschool education. Six out of eight research participants had problems involving their children in regular primary school education.

"We were among the first to fight for our girl to attend kindergarten. Admittedly, during those years, I was in the group with her, but at least the girl was among her peers." (P1). "When it came time for primary education... there were no assistants, there was no support whatsoever. However, we overcame this with our own strength and inexhaustible will for our child to be involved in education. The first year, without an assistant, I was constantly with the child at school. From the second year, the child got an assistant, but we still encountered various challenges, for example, the school has a strange habit of constantly changing teachers and assistants... that did not suit the child. We still struggle with it today." (P1) "The biggest challenge I encountered was the lack of understanding and expertise of the school staff." (P4). "We constantly had to justify why the child couldn't do something, why he couldn't, for example, carry a table and other heavier things. " (P7).

RQ 3. Is the support of the Vukovar community to children with DD and their parents satisfactory?

The third research question pointed out the lack of financial support as well as community services in Vukovar that are necessary to parents and their children with DD.

Financial support and community services of the city of Vukovar

All parents state that financial support and community services of the city of Vukovar is not at a satisfactory level.

"Well, not nearly satisfactory." (P2). "It could be bigger." (P3). "It is not enough... For an individual, it is almost non-existent, and weak for civil society associations, for groups of parents." (P4). "It depends on the policy that is in power." (P5); "Only with the help of civil society associations in the city, we try to be at a satisfactory level." (P6). "Our family has an organized life in Vukovar, but realistically, we have achieved little in our city for the benefit of a child." (P2); "Today, when the child is older, there is nothing again, but we are starting from scratch to provide them with some opportunities... That is what the civil society organizations and day-and-night work is for, in order to provide children with some kind of life outside the walls of their own homes." (P3).

Recommendations of parents of children with DD for public policy in the city of Vukovar

All parents uniquely state that CSO should be encouraged to provide services, which is otherwise an obligation of the state that is absent. Four parents state that

more services should be organized for children, especially adolescents, so that they can have useful time, but also so that parents can have leisure time for themselves. One parent state that it is necessary to work on employing persons with disabilities and securing the future of children with DD. One parent points out that work should also be done on the development of society's empathy towards children with DD.

"The first thing that would help is that we are not seen as a burden or a stumbling block. Civil society organizations are organized in the city, which do what the state system should do, and it would help a lot to provide support for the easier organization and implementation of the necessary services." (P1). "Civil society organizations that gather and help children with difficulties should be supported." (P6).

6. DISCUSSION

The conducted research indicated the following challenges faced by parents of children with DD living in the city of Vukovar: late diagnosis, lack of public and community services and professionals, lack of understanding and support in the family and community, lack of information about the rights of children and parents, challenges in the field of education, absence of parents' right to balance professional and private life, lack of leisure time for parents and fear of parents for the future of the child.

It could be seen that the parents of children with DD in Vukovar spent a lot of time looking for physicians, psychologists and other experts in order to get answers to their questions and diagnosis. The results of this research coincide with the research conducted by Laklija et al. (2016) on the experiences of mothers of premature babies regarding social support in the health system. This research also shows that early information about diagnosis, as well as treatment and services for children are lacking in Croatia.[43]

Learning that a child has a disability causes grief in parents that is like the experience of people who grieve after the death of a loved one.[44] In addition to the problems of lack of services, professionals and information, parents face the problem of lack of support in the community. Most parents of children with DD in Vukovar

[43] Laklija, M. *et al.*, *Socijalna podrška u sustavu zdravlja – iskustva majki nedonoščadi*, Revija za socijalnu politiku, Vol. 23, No. 2, 2016, pp. 261-282; Milić Babić, M. *et al.*, *Iskustva s ranom intervencijom roditelja djece s teškoćama u razvoju*, Ljetopis socijalnog rada, Vol. 20, No. 3, 2013, pp. 474.

[44] Jerić, B. *et al.*, *Obiteljski odnosi u kontekstu pojave invalidnosti*, in: Miljenović, A. (ed.), Socijalne usluge u zajednici za osobe s invaliditetom – Priručnik za početnike, Društveni centar Kostajnica, Zagreb, 2015, p. 61-65.

had neither formal nor informal support, except possibly mutual partner support. Leutar and Buljevac stress that support is important for the whole family. A family whose member is a person with a disability often identifies with that disability.[45]

According to the results of the research, parents in Vukovar, after the first information they receive from the physicians, find another source of information on the Internet. Just as in this research, parents do not effectively exercise their right to information about the rights of children with DD. As a rule, the source of information is other parents who had the same experience. This is consistent with the research conducted by Mamić[46] and Milić Babić *et al.* (2013).[47]

Parents pointed out the lack of leisure time as a challenge in Vukovar. Their life is completely adapted to the child and his needs. If it is a matter of greater difficulties and parents who have the status of parent carers, leisure time is almost non-existent. This is not good for either the parents or the child. This research also pointed to the needs of parents of children with DD in Vukovar for work and time for themselves. The psycho-physical health of parents who care for a child with DD is often neglected. The parent of a child with DD is perceived only as the parent of a child with disabilities, forgetting about all other roles and needs that a person has in life The absence of parental leisure time leads to the impossibility of entering into an employment relationship, which can lead to parental isolation, as well as household financial problems. This is consistent with the research conducted by Lučić et al. (2017).[48]

The fear for the future of the child is constantly present among the parents of children with DD in Vukovar, which coincides with the research conducted by Ombla et al. (2023)[49] according to which parents do not want to think about the future because they cannot control what it brings with them, and this represents an additional emotional burden.

The next challenge comes from the educational environment. Parents encountered numerous obstacles in realizing the right of children with DD to education starting from kindergarten to high school in city of Vukovar. Inadequacy of the

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45 Leutar, Z.; Buljevac, M., *Osobe s invaliditetom u društvu*, Sveučilište u Zagrebu, Zagreb, 2020, p. 157-161; Jerić *et al., loc. cit.*, note 44.

46 Mamić, P., *Usluge rane intervencije: perspektiva obitelji djece s odustupanjima u psihomotoričkom razvoju (diplomski rad)*, Edukacijsko-rehabilitacijski fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 87. Available [https://urn.nsk.hr/urn:nbn:hr:158:490231].

47 Milić Babić *et al.*, *op. cit.*, note 43, p. 471.

48 Lučić, L. *et al.*, *A comparison of well-being indicators and affect regulation strategies between parents of children with disabilities and parents of typically developed children*, Hrvatska revija za rehabilitacijska istraživanja, Vol. 53, Supplement, 2017, pp. 38-46.

49 Ombla *et al.*, *op. cit.*, note 7, p. 85-86.

system, misunderstanding of school staff, i.e. teachers, lack of assistants, isolation of children, are just some of the challenges. Misunderstanding often occurs in the community where children live. This is consistent with the research conducted by Ured UNICEF-a and Pučko otvoreno učilište "Korak po korak".[50]

Finally, the parents in this research show that they have adapted to life in the city of Vukovar and do not have high expectations of the community in which they live. They state that the support of the Vukovar community is not at a satisfactory level. Parents know what their and their children's needs are. Therefore, they founded a CSO in which they realize various projects. It is a CSO "Vukovarski leptirići" that provides social services of psychosocial support, however, they also struggle with the lack of specialists in relation to the large number of children with DD. In other words, the parents took matters into their own hands. They are only asking the city of Vukovar to support them in this. They have ideas, desire and will, but they cannot do everything by themselves. They expect that the procedures for developing the necessary services in the community will be simplified, so that their lives and the lives of their children with DD will be equal to the lives of other children and their families. The parents gave the following recommendations to the city of Vukovar: providing support for the organization and implementation of necessary services in the community, more services in the community for children, especially adolescents with DD, employment of people with disabilities, raising empathy and respect for diversity.

When observing the results of the research, certain limitations should be considered. Limitations of the research include the lack of heterogeneity of participants in terms of gender, given that only one male participant took part in the research, as well as the inclusion of parents of children with DD who are not members of the CSO. Future research should include a larger number of parents, and it should include categorization, not only by type of difficulty but also by degree of DD, to get a clearer insight into the challenges and what affects them.

7. CONCLUSION

Despite all the problems faced by children with DD, their position in society at the global level is changing for the better, which is influenced by the increase in the number of these children, progress in diagnostics, as well as greater awareness of parents, experts and society about the rights of children with DD. Despite this, children with DD will always represent one of the most vulnerable groups of society subject to discrimination.

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[50] Bouillet, *op. cit.*, note 2, p. 105-106.

Children with DD and their parents go through various challenges and obstacles in almost all spheres of life, from accepting the diagnosis, through inclusion in education, growing up, employment and inclusion in community life. Therefore, children with DD and their parents need support from their families, professionals, and the community in which they live. In this context, one of the important roles is played by social workers who should work with the family from the first to the last stage of accepting the difficulties in the child's development. It is an important obligation of social workers to inform parents about rights and services, to provide them with support, counselling, but also to advocate positive social changes in society. In order for social workers to be able to fulfil their role in social work with children with DD and their families, it is necessary to identify their needs and challenges they face in a dialogue with them. Therefore, the goal of the conducted research was to gain an insight into the challenges faced by parents of children with disabilities in the city of Vukovar, to identify their problems and to get to know the professional public and public policy makers in Vukovar. It is up to us experts, community and society to listen to them, provide support and work together to realize the rights of children with DD as well as the rights of their parents.

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Chapter 5

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Review article

SELF-DETERMINATION OF THE EUROPEAN UNION*

Aleksandar V. Gajić, PhD, Associate Professor
Belgrade University Faculty of Law
Bulevar Kralja Aleksandra 67, Beograd, Republic of Serbia
gajic@ius.bg.ac.rs

ABSTRACT

The European Union is not just an international organization. It is a unique political and legal system based primarily on the fundamental principles of democracy and the rule of law. As such the European Union has a right of self-determination, namely that its own political mechanisms "freely determine its political status and freely pursue its economic, social and cultural development. While it is undisputable that Members of the European Union have the right of "national" self-determination within the European Union, the self-determination of the European Union, as such, is a concept still almost unknown in political and legal theory and practice. However, the Treaty on the European Union and the Treaty on the Functioning of the European Union already provide enough elements for the identification and conceptualization of the self-determination of the European Union as understood in international law (and politics).

Self-determination of the Member States and self-determination of the European Union can exist as separate and interconnected concepts that might provide an adequate legal and political framework for further development of the European Union, its identity, key values and ends of its internal and foreign policy. Recognition and conceptualization of the right of self-determination, not only in political and legal theory but also in the political practice of the European Union might be a further step in the development of the European Union, as "a new stage in the process of creation an ever-closer union among the peoples of Europe".

While the concept of self-determination of the European Union might be developed in the existing legal framework, namely in accordance with the founding treaties, it seems that it should have a proper place in its forthcoming revision. The recognition of the self-determination of the European Union certainly improves the very concept of the identity of the European Union and the perception of its role in international affairs.

***Keywords**: European Union, Identity of the European Union, People, Self-Determination*

* The author is also Chief Legal Advisor in the Ministry of Foreign Affairs of the Republic of Serbia and Advisor in the Ministry of Justice of the Republic of Serbia. Views expressed in this article are of the author alone, and does not necessarily correspond to the positions of the Ministry of Foreign Affairs, Ministry of Justice or of the Government of the Republic of Serbia.

1. INTRODUCTION

The right of self-determination belongs to the European Union, or to the people of the EU. The concept of self-determination of the European Union is still unknown (or avoided) both in theory and practice of the European Union. The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as well as the Charter of Fundamental Rights of the European Union[1] do not contain any direct reference to the "self-determination".[2] While there are a lot of discussions on the self-determination within the Member States of the European Union, the European Union as such, nor the "people" of the European Union, were not identified as a holder of the right of self-determination, even though the competencies of the European Union, its political aims, values on which it is based, exercise of the said competencies are completely in line with the proper exercise of the right of self-determination.

The right of self-determination of people played a significant role in the process of decolonisation[3] and are frequently discussed in relation to secessionist claims.[4] Exercise of this right in creation of the union of states and association of states was largely avoided even though it is without any doubt that the right to self-determination is clearly recognized also outside the colonial context and particularly in Europe.[5] As it was desirable in the process of decolonisation, it is not only desirable but also necessary and legally binding in the process of creation and development of an "union of states." The most complex right of "peoples", may play a prominent role in the current and further political processes in creation of the new stage of development of the European Union, diminishing its "democratic deficit" and creating an "ever closer union".

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1 Consolidated version of the Treaty on the European Union, (2016) OJ C202/1, Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, Charter on Fundamental Rights of the European Union (2020) C 364/1.

2 It is worth noting that European Convention on Human Rights and Fundamental Freedoms does not contain any reference to the right of people to self-determination. The author briefly expressed idea of the self-determination of the European Union in: Gajić, A., *Facing Reality: A Need to Change the Legal Framework of the EU Public Health Policy and the Influence of the Pandemic of COVID-19 on the Perception of Identity and the Role of the EU*, EU and Comparative Law Issues Challenges Series (ECLIC), Issue 6, 2022, pp. 353-374.

3 Emerson, R., *Self Determination,* The American Journal of International Law, Vol. 65, 1971, pp. 459-475.

4 See for example Christakis, T., *Self-Determination and Fait Accompli in the case of Krimera*, ZAOR, Haidelberg Journal of International Law. Vol 75, No1, 2015.; Nicolas, L., *The Right to National Self-determination within the EU: A Legal Investigation*, EUROBORDERS Sovereignty and Self-Determination, Working Paper 8, September 2017.

5 See Article VIII of the Conference on Security and Co-operation in Europe Final Act, Helsinki 1975.

In this article we will first briefly outline the essence of the right of self-determination, then the nature of this (legal) right particularly in the context of the European Union, and the (particularly legal) nature of the European Union as a beneficiary or a holder of the right of self-determination and provide certain notes on the identity of the European Union. Finally at the end we will clarify our position concerning further revision of the founding treaties. This article does not cover all aspects of the exercise of the right of self-determination in relation to the European Union and its main aim is primarily to emphasise the very existence of the right of self-determination of the European Union.

2. SELF-DETERMINATION

The right of self-determination is "one of the essential principles of contemporary international law",[6] "a fundamental right, without which other rights cannot be fully enjoyed… Enjoyment of this right is a prerequisite for the exercise of all individual rights and freedoms.[7]" Discussions concerning "historical origins" of the right of self-determination is outside the scope of this study, however, its contemporary legal meaning has been developed through series of international legal instruments.[8]

The Charter of the United Nations proclaims that one of the purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[9] Dealing with the international economic and social cooperation, Article 55 of the Charter of the United Nations states that: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall

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6 *Case Concerning East Timor (Portugal v Australia)* Merits, Judgment, ICJ Reports 1995 p. 102, para 29.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, ICJ reports 2024, p. 39-40, para. 88. This principle is also recognized by the United Nations International Law Commission as a ius cogens of contemporary international law. International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries 2022*, UN Doc. A/77/10, Yearbook of the International Law Commission, 2022, Vol. II, Part Two.

7 *The right to self-determination-Historical and current development on the basis of United nations Instruments,* study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, New York, 1981. Un Doc. E/CN.4/Sub.2/404/Rev. 1, para 228.

8 However, there is a need to say that issues concerning the very substance of self-determination are of very complex nature, and the right of self-determination was primarily discussed in the context of decolonization or various secessionist claims. See: Shaw, M., *Peoples, Territory and Boundaries*, European Journal of International Law, 1997, pp. 478-507.

9 Article 1, paragraph 2 of the Charter of the United Nations.

promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b)solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c)universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[10]

The content of the right of people of self-determination is not defined by the United Nations Charter, but in the common Article 1 of the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966) it is stated that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[11] This content of the peoples' right of self-determination is confirmed and further elaborated in the United Nations General Assembly Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970):[12] "By virtue of principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter…Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter. The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by people constitute modes of implementing the right of self-determination by that people."[13]

The principle of equal rights and self-determination of peoples are also confirmed by, inter alia, Helsinki Final Act (1975)[14] stating that: "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external

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10 The aims proclaimed in Article 55 of the Charter are completely in line with, for example with express wordings of Articles 2, 3, 10 of the Treaty on the European Union.

11 In paragraph 2 it is stated that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

12 UN Doc. A/Res/2625 of 24 October 1970.

13 This Declaration is perceived as "very substantial contribution to clarification of the key concepts of international law" Rosenstock, R., *The Declaration of Principles of International Law concerning Friendly Relations: A Survey*, American Journal of International Law, Vol. 65, 1971, p. 713.

14 Conference on Security and Co-operation in Europe Final Act, Helsinki 1975.

political status, without external interference, and to pursue as they wish their political, economic, social and cultural development…The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle."

It seems that the (political) process of European integration is a clear example of the exercise of the right of self-determination, however, as stated above, it was not recognized as such. In another words, it was not explained by a clear reference to the right of self-determination. Even the mentioning of this term is largely avoided. The process of European integration whose main achievement is creation and further development of the European Union that started after the Second World War with the creation of the European Coal and Steal Community is the integration process "produced the most extensive example of inter-state co-operation"[15] covering almost every aspect of legal, economic, social and political life in the political process that was completely in line with the aims and principles of the Charter of the United Nations. However, the EU is not the result of an inter-state cooperation process, it is also a process in which a unique political and legal order was established. The subjects of the legal (and also political) system of the European Union are not just states, but also their citizens, with the clearly recognized citizenship of the European Union for every person who holds the nationality any of the state member of the European Union. Therefore, subjects of this legal order are all states (currently 27 Member States),[16] peoples,[17] nations and citizens[18] of the European Union.

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15 As Fligtein et all summarized: "European political, legal and economic integration has proceeded from the Treaty of Rome in 1957 to the Treaty of Lisbon in 2007. During this period, EU membership has expanded from six to 27, and EU authority has extended to almost every domain of modern economic and social life. That this has occurred peacefully and without threats of violence or coercion makes the EU project one of the most fascinating in world politics. From the beginning, the architects of the EU thought that once the process of economic integration was established, political integration would follow. One of the early leading scholars of European integration, Ernst Haas, formulated this idea into a theory of regional integration (Haas, 1961)." Fligstein, N.; Polyakova A.; Sandholtz W., European Integration, nationalism and European Identity, Journal of Common Market Studies, Vol. 50, 2012, pp. 106-122.

16 Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

17 "The peoples of Europe, in creating an ever-closer union among them, are resolved to share a peaceful future based on common values." Preamble of the Charter of Fundamental Rights of the European Union.

18 See, *inter alia,* Articles 1, 10 and 13 of the TEU. Article 10 (3) of the TEU provides that "every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and closely as possible to citizens.".

3. THE NATURE OF THE SELF-DETERMINATION RIGHT AND THE EUROPEAN UNION

Self-determination is a right that can be established and exercised only in the continuing political process. It could be understood as a legal right, as well as a political aim or as a mode of social development. The right of self-determination is not a judiciable category *per se*, it might be recognized but it cannot be established and exercised solely by legally binding decision of some international court or some international legal or political authority, it needs to be achieved in the political process.

Crawford argued that "we have the paradox that the international law of self-determination both exists and is obscure."[19] It seems to be the common and for some actors desirable blurred understanding. However, it is not so obscure as argued by Crawford if understood in the political process, where at least some measure of divergent views and interests are involved.[20] Speaking on the self-determination Crawford pointed that "no one is very clear as to what it means, at least outside the colonial context. There are major uncertainties about its interpretation and application, uncertainties which seems to go to the heart of the notion of self-determination itself".[21] However, it seems that it is not the right of self-determination that is obscure, rather the concrete political process in which the right of self-determination might be achieved could be described as obscure. Outside the colonial context the concept clearly exists, but it was discussed and recalled mainly in the colonial context and when dealing with separatist claims,[22] and blurred the very idea of the right of self-determination, blurred with strong political influence in the realm of power politics.

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19 Crawford, J., *The Right of Self-Determination in International Law: Its Devlopment and Future*, in: Alston, P. (ed.) Peoples's Rights, Collected courses of the Academy of European Law, 2001, p. 10.

20 For example, as noted by Christakis "The choice between self-determination and territorial integrity is one of the oldest false dilemmas of International Law. It sets the problem of secession under two contradictory and mutually exclusive options, neither of which is true as such under positive International Law: either a specific group within a State constitutes a "people" and has a right to "external" self-determination; or the territorial integrity of the parent State must be respected and prohibits secession by such a group. This dilemma is very convenient from a political point of view. It provides States with the opportunity to "ride two horses at the same time". States could thus embrace 'self-determination' of some groups and encourage in one way or another separatist claims compatible with their interests, while proclaiming that the principle of territorial integrity prevails at home or in the territory of friends and allies." Cristakis, T., *op. cit.*, note 5, p. 1.

21 Crawford J., *op. cit.*, note 20, p. 10.

22 See for example Shaw, M., *Peoples, Territory and Boundaries*, European Journal of International Law, 1997, pp. 478-507.

The right of self-determination must be understood and implemented in harmony with other core principles of the international law (particularly those clearly expressed in the UN Charter).[23] It is not a self-contained principle that exist in "clinical" isolation from other principles and rules of the international law. Its application is determined also by other rules of international law and particular by the aim of its establishment – to strengthen universal peace. In that context it is worth mentioning that dividing the right of self-determination on "external" and "internal" seems to represent the great misunderstanding of this right.[24] The right of self-determination is a unique right that must be perceived and applied together with other principles and rules of international law. Understandings of the external and internal right of self-determination confuses the very existence of the right with the consequences of its exercise. It is very hard to quote some "scholarly examples" because divergent political interests are always involved and particular cases might be a subject to great discussions about the exercise of the right of self-determination and legality of certain acts. Exercise of the right of self-determination in some cases might produce creation of a new legal and political entity (state or some level of autonomy); in some cases it might result in improvements of internal legal and political system, and finally it can result in voluntary creation of an union of political entities (such as states) with wide and strong competencies.

The right of self-determination was established as a legal right by the UN Charter, along with the principles of prohibition of use of force, territorial integrity of States and political independence.[25] Political process is aimed "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"[26] Disrespect of those rights or principles is inevitably a source of conflicts, however its full respect among states that have some common interests

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23 See articles 1 and 2 of the United Nations Charter.

24 In that context Christakis rightly argues that "the choice between self-determination and territorial integrity is one of the oldest false dilemmas in International Law. " Cristakis, T., *op. cit.*, note 5, p. 2.

25 In classic international law that existed before the Charter, *ius ad bellum* was a basic right of state, and resort to war or military intervention was "a normal" state of affairs. In this context the right of self-determination cannot be considered as a right, but as a political aspiration, and particularly in creating unions (unification of Germany, Italy, Slavic peoples…etc). In line with this argument See Crawford, J., *op. cit.*, note 20, p. 12. The right of existence of states was a matter of their ability to survive. After the Second WW the situation changed dramatically, and this change was introduced in order to achieve the peace (as written in the preamble of the UN Charter "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind") the principle of self-determination emerged as a natural consequence, not only as a lead to a process of decolonisation, but also in relations between states that soon entered into the Cold War.

26 Article 1 (2) of the United Nations Charter.

might have as a result creation of an union of states, a new subject that also holds the right of self-determination.

The right of self-determination is established by the Charter of the United Nations, as a legal rights in order to achieve universal political aim (to strengthen universal peace).[27] Creation of the European Union implemented this principle in relation to its Member States respecting both equal rights and self-determination of the peoples of the European Union, but went beyond that, creating an entity that is a holder (a subject) of the right of self-determination.

4. THE NATURE OF THE EUROPEAN UNION AS A BENEFICIARY OR A HOLDER OF THE RIGHT OF SELF-DETERMINATION

The nature of the European Union is subject to extensive discussions. The European Union is a unique and unprecedented "union of States" with its own legal system and common policies not similar to those created by other (classical) international organizations. As noted by Crawford: "The fundamental principle in the context of political union, no less than in the context of status, is that the incidents of a particular arrangement are to be determined only by an examination of that arrangement, and not by deductions from some a priori category or construction."[28]

As argued by Bogdany and Smrkolj, "one of the core issues was to emancipate the law of the /European Union/ from international law".[29] Even in 1963, the European Court of Justice in celebrated *Van Gend and Loos* case reasoned that the

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[27] This right was unknown in classical international law where resort to force was legal equally as resort to negotiations or arbitration. In contemporary international law, legal framework clearly exists in order to achieve political aim (universal peace), and reaffirmation of the right of self-determination particularly in the International Covenants on Human Rights, the UN "has helped to create the necessary conditions for the establishment of peaceful relations among nations and thus to strengthen international cooperation." *The right to self-determination-Historical and current development on the basis of United nations Instruments, op. cit.*, note 8, para. 21.

[28] Crawford, J., *The Creation of States in International Law*, Oxford Scholarship Online, Oxford 2007., p. 379. As stated by Crawford "Nevertheless, machinery for an unprecedented degree of functional unification exists under the Treaties, and this has been developed, if not to the fullest extent possible, then certainly to an extent greater than has been seen under other unions of States", *Ibid.*, p. 499.

[29] Von Bogdandy A; ,Smrkolj M., *European Community and Union Law and International Law*, Max Planck Encyclopedia of Public Internaional Law, (section 1) "Von Bogdandy A.; Smrkolj M., *European Community and Union Law and International Law*, Max Planck Encyclopedia of Public International Law, Von Bogdandy A.; Smrkolj M., *European Community and Union Law and International Law*, Max Planck Encyclopedia of Public Internaional Law,
[http://www.mpil.de], Accessed June 2020.

objective of the 1957 Treaty Establishing the European Economic Community was to establish a common market "implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states" and that "the Community constitutes a new legal order of international law."[30] Today, more than a 60 years after the celebrated judgment, it seems undisputable that the legal system of the European Union is "an autonomous legal order" with unique characteristics similar to those of an internal/municipal law character and with "federal features".[31]

The European Union can neither be considered as a State, nor as a classic international organization.[32] It emancipated from international law in the sense that new legal order or legal system was created, in the (political) process of European integration, in accordance with international law, as a law of the "ever closer union of member states."[33] Even the principle is that "the limits of Union competencies are governed by principle of conferral", and that the use of competencies "is governed by the principles of subsidiarity and proportionality"[34] the competencies are very wide and affect almost all aspects of the life of its citizens.[35]

Three main type of competencies[36], "exclusive competencies" (covering customs union, establishing competition rules necessary for the functioning of the internal market, monetary policy for euro-zone countries, conservation of marine biological resources under the common fisheries policy, common commercial policy – i.e. the Article 3 of the TFEU), "shared competencies" (covering internal market,

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30 *Ibid*.

31 Compare with: Bogdany and Smirkolj, *op. cit.*, note 30, para. 2 and 3.

32 Von Bogdandy, A., *Neither an International Organization Nor A Nation Sta*te, The EU as a Supranational Federation, in Jones E.; Menon, A.; Weatherill S. (eds), The Oxford Handbook of the European Law, 2012, pp. 761-772.

33 Aee Article 5 of the TEU. Declaration in relation to the delimitation of competences (attached to the TEU) states that "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality.".

34 Article V of the TEU.

35 See, for example, Konstadinides, T., *The Competences of the European Union,* Oxford Principles of European Union Law: The European Union Legal Order: Volume I, (eds.) Schutze and Tridimas), Oxford University Press, 2018. It goes to underline that: "there is hardly today an area of regulation in which the EU does not play an active part—from trade and energy to sport and fundamental rights protection.".

36 *Division of competences within the European* Union, [https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html], Accessed 2 March 2024. See also Dashwood, A. *et al.*, Wyatt and Dashwood's European Union Law, Oxford and Portland, Oregon 2011, pp. 97-131.

social policy (but only for aspects specifically defined in the treaty) economic, social and territorial cohesion (regional policy) agriculture and fisheries (except conservation of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common safety concerns in public health matters (limited to the aspects defined in the TFEU), research, technological development and space development cooperation and humanitarian aid – i.e. the Article 4 of the TFEU) and "supporting competences" (covering areas of protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation – i.e. the Article 6 TFEU) as well as "special competencies" that ensure ability of the EU to "take measures to ensure that Member States coordinate their economic, social and employment policies at EU level", determined the legal and political order and status of the European Union. Competencies of the European Union, together with the established procedures or modes of "cooperation" (even in the area of shared and supporting competencies) are of such a nature that that they not only have a significant influence, but they also determine political, economic social and cultural development of all the peoples or citizens in the European Union.

The European Union, as s separate and quite unique subject of international law and as a legal and political entity, is not only obliged to respect equal rights and self-determination of its peoples, but is also a holder of the right of self-determination. The European Union is bound by the international obligation, in order to preserve international peace and security to have a well-developed institutional and political "processes which in practice allow the exercise" of the right of self-determination.[37]

Member States of the European Union, in accordance with its constitutional requirements, and by conferring powers to the European Union and establishing the rules of political process of cooperation in variety of fields of economic, social and cultural life, created a union of unprecedented nature that cannot be devoted of the right of self-determination. Unlike in other some other cases that provoked international attention, the right of self-determination in the case of the European Union was exercised in a peaceful manner without putting the issue of, for example, territorial integrity and political independence. Article 4 of the Treaty on the European Union provides that "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fun-

[37] In that sense, the European Union, having in mind "CCPR General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples" need to describe and to have well developed "the constitutional and political processes which in practice allow the exercise of" the right of self-determination."

damental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."[38]

Creation of a union, as described in the TEU as "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizens" is in fact the implementation of the right of self-determination of the peoples of the European Union, in a peaceful manner and completely in line with all relevant international instruments dealing with the self-determination. While the right of self-determination is discussed in connection with the States and state authority, the new form of organization of states, the European Union, with broad categories of competencies, need to include the right of self-determination of its peoples as a fundamental right of the European Union.

5. THE PEOPLE OF THE EUROPEAN UNION, OR EUROPEAN UNION AS A HOLDER OF THE RIGHT OF SELF-DETERMINATION

There is no accepted definition of the term "people" under international law. As noted in the United Nations study on the right of self-determination, "it is difficult to arrive at a precise definition of the term 'people', because identification of people to whom the principle would apply may present very complex problems."[39]

However, it goes without saying that international legal terminology is not always precise, particularly when dealing with the key elements of political process. Just for example, even though it primarily regulates relations between states, it was originally called the Law of Nations, and the "constitution" of the contemporary international community gathering exclusively states is called the Charter of the

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[38] However, with the creation of the Common Foreign and Security Policy of the European Union, national security become also the issue of the European Union. Common Foreign and Security Policy is aimed to "preserve peace, strengthening international security, promoting international cooperation and developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms". See: *Common foreign and security policy*, [https://fpi.ec.europa.eu/what-we-do/common-foreign-and-security-policy_en], Accessed 3 March 2024.

[39] *The right to self-determination-Historical and current development on the basis of United nations Instruments*, *op. cit.*, note 8, para. 275. See also: United Nations Educational, Scientific and Cultural Organization, International Meeting of Experts on further study on the concept of the rights of peoples, Unesco Paris 27-30 November 1989 (SHS-89/Conf.602/7, Paris 22 February 1990.

United Nations (not United States). Many terms were used in key international instruments not as a precise legal category but intentionally in a broader sense, under influence of the strong historical heritage and in order to encompass different situations.[40] At the time when the principle of the right of self-determination was formulated there was a need to cover all instances of the application, particularly having in mind the process of decolonization. The existence of various political entities created a need that the principle of equality of rights extends "to states, nations and peoples" in the Charter. The meaning of the term "nations, states and peoples" remains intentionally imprecisely defined. Linguistic determination of those terms is of little help, because those terms have been used in their contextual meaning, having in mind variety of situations, political aspirations and historical development.

In the preparation of the UN Charter, the Secretary of the United Nations Conference in San Francisco prepared a Memorandum entitled "List of certain repetitive words and phrases in the Charter,[41]" and the central position was given to the words "nations", "States" and "peoples." As explained, the word "State" is used "to indicate a definite political entity", the word "nation" is used several times "for the most part in board and non-political sense, via. "friendly relations between nations" … and it would seem preferable to "state" since the word "nation" is broader with a more general sense enough to include colonies, mandates, protectorates, and quasi-states as well as states. It has also a poetical flavour that is lacking in the word 'state'."

Concerning the term people, the said Memorandum "explained" as follows: "No difficulty appears to arise from the use of the word 'peoples' which is included in the Technical Committee texts whenever the of 'all mankind' or 'all human beings' is to be emphasized. The word 'peoples' thus occurs only in the Preamble, in Article 1, paragraph 2, and in the old Article 58 /latter article 55/, outlining the

[40] It is necessary to note that there is "an obvious relationship between equal rights and self-determination of peoples, on the one hand, and respect for human rights and fundamental freedoms, on the other. This relationship is stated explicitly in Article 55 of the Charter of the United Nations, which provides that "With a view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*, the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Now it is common to say that "The right of peoples to self-determination is a fundamental right, without which other rights cannot be fully enjoyed…. enjoyment of this right is a prerequisite for the exercise of all individual rights and freedoms." (*Ibidem*, para. 228.).

[41] *Documents of the United Nations Conference on International Organization San Francisco 1945*, Volume XVIII: Documents of the Coordination Committee including Document of the Advisory Committee of Jurists, Part 2, United Nations, New York, 1954, p. 654 (Memorandum prepared by the Secretary on the subject: List of Certain Repetitive Words and Phrases in the Charter, pp. 654-666.

purposes of the Economic and Social Council. In both Articles 2 and 58/latter 55/, the word 'peoples' is used in connexion with the phrase 'self-determination of peoples'. This phrase is in such common usage that no other word seems appropriate. The question was raised at the Co-ordination Committee as to whether the juxtaposition of 'friendly relations among nations' and 'self-determination of peoples' is proper. There appears to be no difficulty in this juxtaposition since 'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or nations."[42] In that sense, the term people might be freely used in the sense of the people of the European Union, since the European Union, as a territorial entity is composed of its States and citizens, belonging to nations that created the European Union.

While the term used might produce a certain level of confusion, it shall be clear that the term "people" denotes a social entity "possessing a clear identity and its own characteristics" and implies a relationship with a territory. The entities such as the European Union were not even in the "vision field" at the time of creation of the United Nations. However, the term "people" is broad enough to encompass the people of the "Union", not only the people of only one State or a nation.

Exercise of the right of self-determination is not reserved for the Member States of the European Union. Determination of the political status in order to pursue economic, social and cultural development (the basic content of the right of self-determination) is closely connected with the competencies. If transferred to the level of the Union there is a need to create conditions for proper exercise of the right of self-determination. Having in mind competencies of the European Union, and their actual exercise, political, economic and social development becomes the responsibility of the European Union.

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[42] These considerations are of particular importance in order to determine the bearer of the rights to self-determination in non-colonial context. Poetical flavor and the need to encompass all categories determines the use of particular terms in the charter such as nations and peoples. As stated in the quoted UN study "In fact, in drafting this principle, the authors of the Charter sought to take into account the aspirations of all peoples, including those of Non-Self-Governing and Trust Territories, and the connexon between the principle of self-determination of peoples and the need to encourage respect for, and universal application of, human rights and fundamental freedoms for all." And it seems indisputable that "The "principle of self-determination applies to sovereign States, for Articles 1 and 55 lay upon States the obligation to base their relations on " respect for the principle of equal rights and self-determination of peoples". *The right to self-determination-Historical and current development on the basis of United nations Instruments*, *op. cit.*, note 8, para. 265.

6. ON THE IDENTITY OF THE EUROPEAN UNION

The European Union is a single entity, 27 Member States also appears in international fora as a sovereign subject of international law and politics. Something about 448 million people, within defined territory, are citizens of the European Union. International law and international political system are state centric but recognize the role of the European Union. Theoretical approaches might be influenced by preferences and particular interests, however in practice it seems to be recognized as a subject of international law and one of the key international actors. This is a great opportunity for the EU, as well as theoretical and political galimatias, since they cannot be explained simply using "standard" legal and political categories. That underline the issue of the identity of the European Union.

Today it is beyond dispute that European Union identity exists alongside identities of Member States[43]. It seems also undisputable that Member States of the European Union has its membership status in the European Union as one of its common detriments,[44] much more than membership in any other international organization. In another words, identity of each of Member State of the European Union is necessarily determined by the membership in the European Union.. Member States internal law and politics are largely determined by the European Union Law and policies, they are major participant in policy and law-making process of the European Union, and also "from outside" they are represented[45] and perceived as members of the European Union.

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43 Prutsch 2017, *Research for CULT Committee – European Identity*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, Available at : [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/585921/IPOL_STU(2017)585921_EN.pdf], Accessed 1 May 2024.

44 Official and more than symbolic act is flag display at diplomatic missions of the Member States of the European Union, disposing national flag and/or other official symbols and also very frequently the flag of the European Union. This is interpreted as in accordance with the Vienna Convention on Diplomatic Relations (1961). See for example: *Flags display at diplomatic missions (Provisions governing flag displays at diplomatic missions in Germany and the official German buildings abroad)* Domestic Protocol Office of the Federal Government *Flags display at diplomatic missions (Provisions governing flag displays at diplomatic missions in Germany and the official German buildings abroad)* Domestic Protocol Office of the Federal Government,
[https://www.protokoll-inland.de/Webs/PI/EN/flag-displays/special-situations/diplomatic-missions/diplomatic-missions-node.html], Accessed 1 May 2024. It goes without saying that any trade or arrangement which is *ratione materiae* affected by the EU law and policy with any Member State of the EU or company or individual established in the EU Member State cannot ignore competencies of the EU.

45 There is also the more fundamental problem that 'identity' per se is ambiguous: there is no one single meaning, nor even a set of equally valuable multiple meanings which one could agree on; rather, what 'identity' is supposed to mean and describe depends on the specific context in which it is used and the disciplinary background from which the use is derived." *Research for CULT Committee – European Identity*, *op. cit.*, note 44.

However, when two identities exist side by side (real identities represented by institutions with its own competencies) they cannot have identical powers (they exercise different but complementary competencies) and growing competencies of the European Union institutions, by nature of things, diminish competencies of the member states.[46] Stronger (or more precisely growing) competencies of the European Union make identity of the European Union and its role, at least, more prominent.

States sovereignty is in unprecedented degree transferred to the European Union, together with the restrictions of the treaty making powers of the State Members of the European Union. All external affairs of the Member States must be in accordance with the founding treaties and common policies.[47]

Identity of the European Union is heavily enforced by its unique legal framework,[48] that is a consequence of the long-lasting political process. More than 40 years ago, in 1973, when the European Communities was composed of only nine States, in the Document on the European Identity it is stated that the Union is even more dependent on the rule of law than an established nation state. "The outstanding importance of a common law as a bond that embraces all Union citizens is, in view of the dearth of other integrating factors such as language or history, hardly contestable."[49] However, as noted by Fligstein et all, "the growth of the EU's in-

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[46] Broadly speaking, the expansion of EU governance has increased the salience of identity issues, at least for some citizens of Europe. As EU influences have spread into new domains of economic, social and political life, some citizens have embraced a European identity. See: Fligstein, N. *et al.*, *op. cit.*, note. 16, p. 108.

[47] As a part of identity of the European Union and limitation of the States are contained in provisions of the Treaty on the Functioning of the European Union addressing effects of the international treaties concluded before they become the EU Members, and obliges Member States to take all appropriate measures to eliminate possible conflicts between its international treaty obligations and obligations and the EU law. In particular, in accordance with Article 351 (3) of the TFEU dealing with the application of agreements concluded before they become members of the EU "Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.".

[48] "Perhaps the Union is even more dependent on the rule of law than an established nation state. The outstanding importance of a common law as a bond that embraces all Union citizens is, in view of the dearth of other integrating factors such as language or history, hardly contestable. Moreover, as already pointed out by de Tocqueville, the bigger and freer a polity is, the more it must rely on the law to achieve integration. So far, then, the notion of a community of law aptly reflects the particular importance of the rule of law in creating a cohesive Union." von Bogdany, A.; Smrkolj, M., *op. cit.*, note 30. p. 763.

[49] Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities. "*Declaration on European Identity*", pp. 118-122. As noted by Bogdany, as already pointed out by de Tocqueville, the bigger and freer a polity is, the more it must

stitutions and competencies has led some citizens to view that growth as a threat to national identity and autonomy."[50] However, if the European Union recognize on official basis and exercise the right of self-determination in accordance with the international legal requirements, it will make the process of its grow more democratic, and certain political interests tending to preserve what is already guaranteed by article 4 of the Treaty of the European Union[51] will find its proper place in the political order of the European Union. National identity and autonomy (self-government) in the European Union are not the same as in the States that are not part of the "union." Transmission of competencies to the institutions of the European Union must be followed by a proper way of its exercise, that respects national identities and rights of citizens to pursue their political ideas in democratic process at the level of the union. Further development of the European Union, its competencies and the way of its exercise must be based on the principles of self-determination of the peoples of the European Union in order to preserve "the area of freedom, security and justice." Ideals and objectives of the European Union[52] must be reconsidered and determined by way of exercise of the right of self-determination. In its internal order the European Union must reconsider its procedures enabling full effectiveness of the already established "rights of the European Union", and also to create an effective mechanism for decision making in the area of foreign policy.

While internal relations (within the European Union) are matters of the ongoing political process (matters essentially within the domestic jurisdiction of the European Union)[53], in the field of foreign policy the European Union it need to further develop its identity and authority. As stated in the 1973 in the Document on European Identity, "Although in the past the European countries were individually able to play a major role on the international scene present international problems are difficult for any of the Nine to solve alone. International developments and the growing concentration of power and responsibility in the hands of a very small

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rely on the law to achieve integration. So far, then, the notion of a community of law aptly reflects the particular importance of the rule of law in creating a a cohesive Union." von Bogdany, A.; Smrkolj, M., *op. cit.*, note 29., p. 763.

50 Fligstein, N. *et al.*, *op. cit.*, note 16, p. 108.

51 "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

52 Declaration on European Identity stated in para. 3 that "The construction of a United Europe, which the Nine Member Countries of the Community are undertaking, is open to other European nations who share the same ideals and objectives."

53 Compare with Article 2 para 7 of the United Nations Charter.

number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper rôle in the world."[54]

This wording is of much importance today, when the European Union is composed of 27 Member States. Speaking in one voice is not an easy task and the position of the European Union is rather difficult, and unlike in other areas, provisions on the Common Foreign and Security Policy covering "all areas of foreign policy and all questions relating to the Union's security"[55] remains insufficiently clear.

As stated in Article 24 of the TEU: "The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded." This is the most problematic area of the European Union competencies. However, in relation to the question of identity of the European Union Article 26 (3) provides that "the common foreign and security policy shall be put into effect by the High Representative and by the Member States, using national and Union resources." In another words, in implementation of the common foreign and security policy of the EU, the Member States are obliged to act "as agents" od the European Union.

One of the main indicators in the perception of the European identity is the position of the European Union in certain international organizations. The European Union is recognized as an entity with specified status in key international organizations. At the United Nations the European Union cannot be described only as an "enhanced observer" with the right to submit proposals and right to speak at the General Assembly of the United Nations, it is a party of about 50 international UN agreements as the only "non-state participant", alongside with the full membership of its all 27 Member States. The European Union has a full membership in the World Trade Organization[56].

However, the role of the European Union in international affairs need to be further specified, particularly in the founding treaties. As noted by Ramses Wessell "despite an active role of the EU in international organizations in practice, one will look in vain for an explicit legal competence in the treaties. The absence of a clear and explicit competence means that the participation in (and the membership of) international organizations is based on implied powers only, which

54 *Ibid.*, para 5.

55 Article 24 of the TFEU.

56 "The European Commission – the EU's executive arm- speaks for all EU member States at almost all WTO meetings and in almost all WTO affairs." The European Union and the WTO, [https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm], Accessed 1May 2024.

find their source in the general competencies of the Union enjoys in the different policy fields"[57] However, regardless of the status, as a full member or having some observer status, the practice shows that the European Union is more than an active participant. The main question is not whether the EU is a separate subject of international law, it certainly is, but whether it have or need to have a joint approach with the 27 Member States.[58]

While the competence problem arises, its involvement as a full member or as just an observer, make its prominent role, besides 27 member states, it has a right to raise a voice, making the European Union unavoidable actor in multilateral diplomacy."[59]

7. CONCLUDING REMARKS

It seems beyond dispute that the European Union has a right of self-determination. Even not expressly recognized as such. In the further process of creation "an ever-closer union among the peoples of Europe" proclamation and respect of the right of self-determination of the European Union can significantly influence economic, social, cultural and political development. In the further efforts in creation of an "ever closer union among the peoples of Europe.[60]", the right of self-determination of its people must be recognized as such, and the European Union political procedures and policies must be developed in full compliance with the right of self-determination. TEU and TFEU already contain a number of provisions, including fundamental principles on which the Union is based, that enable proper exercise of the right of self-determination.

However, while the concept of the self-determination of the European Union might be developed in the existing legal framework, namely in accordance with the founding treaties, it seems that it should have a proper place in its forthcoming revision. The very recognition of the self-determination of the European Union

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57 Jorgensend, K. E.; Wessel, R. A., *The position of the European Union in (other) international orgnaizations: confronting legal and political approaches,* European Foreign Policy 2013, p. 265.

58 The position of the EU in certain international organizations (FAO, WTO) "in cases where the EU is entitled to vote, tis vote equals the number of votes of the Member States" Ramses Wessel, p. 271.

59 "The participation of the EU in international organizations relexts the flexibility of the EU's external regime. As legal competences are divided between the Union and its Member States the actual use of those competences to a large extends depends on the possibilities offered by the organization. Jorgensend, K.E.; Wessel, R. A., *op. cit.,* note 57, p. 272.

60 Article 1 of the TEU. See: Miller, *"Ever Closer Union" in the EU Treaties and Court of Justice case law*", Briefing Paper Number 07230 of 16 November 2015, House of Commons, [www.parliament.uk/commons-library|intranet.parliament.uk/commons-library], Accessed 1 May 2024.

certainly improves the very concept of the identity of the European Union and the perception of its role in international affairs. Also, the European Union is not just a union of States, but union of its people(s) and citizens that must have a recognized identity and the role in the political process of creation of an ever-closer union. All individuals' citizens of Member States are citizens of the European Union, and as such has a rights and obligations towards the European Union, and also the right of self-determination as the "people" or "citizens" of the European Union. Transfer of a part of sovereign powers of member states to the European Union makes the European Union a vehicle for further development. The peoples of the European Union can freely determine the political status and chose to create a union, and in that political status freely to "freely pursue their economic, social and cultural development." If it is beyond dispute, beyond dispute is also that the European Union has a right to self-determination and need to act in accordance with the nature of that right.

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Review article

CHALLENGES AND ISSUES FOR (THE RIGHT TO) AFFORDABLE HOUSING IN CROATIA*

Mira Lulić, LLM, PhD, Full Professor with Tenure
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
miral@pravos.hr

Davor Muhvić, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
dmuhvic@pravos.hr

Sanda Pašuld, PhD
City of Osijek
Franje Kuhača 9, 31000 Osijek, Croatia
sanda.pasuld@gmail.com

ABSTRACT

Real estate prices in the 2020s reached record figures for purchases in the Republic of Croatia, Europe and beyond, and with the increase in real estate prices on the market, apartment rents also rose. The cost of living is extremely high, loans are more and more expensive and unattainable, interest rates are high, recession and inflation dominate, all of which affects real estate prices that are too high for an increasing number of citizens. The focus of the work is not the most vulnerable groups of the population who already live below the poverty line and are fully exposed to state and social assistance, but mid-income groups who are often unjustifiably ignored on the scale of those whose rights to housing are threatened. The paper contributes to the understanding of the problem of affordable housing, the terminological determination and definition of the term affordable housing, but also the clarification of the specific international legal obligations of states regarding the realization of the right to affordable housing, and the providing a basis for innovative legal solutions and models for realizing affordable housing in the Republic of Croatia.

Keywords*: affordable housing, adequate housing, Croatia, international human rights law*

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1. INTRODUCTION

In recent years, real estate prices have reached record values for purchases in Croatia, in most of Europe and beyond, and with the increase in real estate prices on the market, apartment rent prices have also risen. The cost of living has become extremely high, loans appear to be more and more expensive and difficult to realise, interest rates are high, and recession and inflation are an additional blow to the ability of citizens to become owners or to rent their real estate, i.e. to secure affordable housing. Global and national markets have not recovered from the 2008 mortgage crisis, and we have already entered a new global economic crisis that has been shaken in the past few years by, among other things, the COVID-19 pandemic and Russian aggression against Ukraine. In such global economic crises, part of the population becomes (exceptionally) vulnerable and exposed to existential problems. For a large number of citizens with average income, real estate (buying or renting) thus becomes more or less unaffordable.

In the modern world characterised by an increase in the number of inhabitants on Earth, strong urbanisation poses a special problem. People are continuously moving to (larger) cities, expecting that they will find work more easily and thus ensure a better existence, health and social care, education, better access to urban infrastructure, etc., and, of course, better housing conditions. Half of the world's population lives in cities today, and according to United Nations (UN) estimates, by 2050, 70% of the population will live in cities.[1] This puts enormous pressure on and creates expectations of cities to cope with population growth and to ensure at least minimum conditions for a dignified life of their citizens. In overcrowded cities, the main problem is high demand and low supply, primarily of apartments, which increases their price. Cities cannot develop economically if they do not have adequate infrastructure and do not take into account the well-being of their citizens.

By 2030, according to the United Nations Human Settlements Programme (*UN-Habitat*), 3 billion people (about 40% of the world's population) will need access to quality housing.[2] This translates into a demand for 96,000 new affordable and accessible housing units every day.[3] Additionally, an estimated 100 million people worldwide are homeless and one in four people live in harmful conditions to their health, safety and prosperity.[4] Without adequate housing, there is no human progress. Therefore, pursuant to the UN, cities and other human settlements should be

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1 *Sustainable Development Goals: 17 Goals to Transform our World*, [https://www.un.org/en/exhibits/page/sdgs-17-goals-transform-world], Accessed 21 April 2024.

2 UN-Habitat, *Housing*, [https://unhabitat.org/topic/housing], Accessed 21 April 2024.

3 *Ibid*.

4 *Ibid.*

made "inclusive, safe, resilient and sustainable".[5] However, the efforts made so far are not enough, and the housing crisis in which the world finds itself is deepening instead of being resolved. According to Wetzstein, housing affordability is currently one of the most complex policy challenges our societies in Europe are faced with.[6]

One of the fundamental human rights is the provision of *adequate housing*, because there is no survival without it. The right to adequate housing should ensure physical and mental health, a safe and secure environment, human dignity, physical and any other security, social inclusion and generally healthy living conditions for every person. Adequate housing includes a healthy environment, a housing unit that can withstand natural disasters, connected to basic communal services (e.g. water, electricity, heating and sewage), in which there is enough space for each person who lives in it. The housing unit should also be resistant to weather conditions, and there should be no environmental hazards in the building (e.g. asbestos, mould, etc.). Adequate housing also implies access to the community's social amenities (e.g. schools, parks, health care facilities, shops, etc.). It is the duty of every state to respect and implement these rights of its citizens, regardless of its economic development, political situation and social conditions.[7] Housing is at the centre of the sustainable development agenda.[8] Achieving the right to adequate housing is also increasingly problematic for developed countries and has been the focus of activities in the field of economic and social human rights for the past ten years.[9]

The term *affordable housing* appears as a broader concept within the framework of the key aspects of adequate housing (with legal security of tenure, availability of services, materials, facilities and infrastructure, habitability, accessibility, location and cultural adequacy).[10] Affordable housing refers to reasonably priced housing provided to working people who earn a certain income. Affordable housing is housing that will not burden an individual or family with more than 30% of their monthly income, which is the most common and simplest method of calculating the affordability limit. The goal would be to keep housing costs below 30% of

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5 Sustainable Development Goals: 17 Goals to Transform our World, *loc. cit.*, note 1.

6 Wetzstein, S., *Access to affordable and adequate housing is perhaps the social problem of our generation*, Interview, 29 May 2019, [https://www.housingeurope.eu/blog-1283/access-to-affordable-and-adequate-housing-is-perhaps-the-social-problem-of-our-generation], Accessed 21 April 2024.

7 Terminski, B., *The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experiences*, Revista Latinoamericana de Derechos Humanos, Vol. 22, No. 2, 2012, p. 219.

8 Habitat III recommendations from the Special Rapporteur on adequate housing, The full report of the United Nations Special Rapporteur on the right to adequate housing, [http://www.ohchr.org/EN/Issues/Housing/Pages/AnnualReports.aspx], Accessed 21 April 2024.

9 *Ibid*.

10 *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, The Committee on Economic, Social and Cultural Rights, Sixth Session (1991), para. 8(b).

monthly income to ensure the quality of other aspects of life (e.g. food, health care, transport, education, social life, etc.).

It is the state that should help that category of the moderate-income population to make housing more affordable through various housing measures. In this paper, therefore, we will not concentrate on the most vulnerable groups of society who already live below the poverty line and the minimum income necessary for a dignified life and are entirely dependent on the assistance of the state and society. Middle-income groups are at the centre of attention of this paper, which are often unjustifiably ignored on the scale of those whose right to affordable housing is threatened.

Over the past ten years, half a million people have emigrated from Croatia.[11] However, due to rapid urbanisation and population growth in Zagreb and other larger cities, especially on the coast (strong apartment construction), there has been a high demand for apartments on the market. There are not enough apartments on the existing real estate market, which is one of the key reasons for high real estate prices on the housing market. As the offer of apartments on the real estate market in cities is weak, the demand for apartments to rent is also increasing, and the prices of those rentals are skyrocketing. Although this, given the unexpected jump in real estate prices and rents in the country, has been one of the most pressing issues in Croatia for the past 10 years, there has been no scientific research on this topic in the field of law. In Croatian science, this problem has been dealt with by fellow scientists in the field of social work (Bežovan,[12] Pandžić,[13] Matković[14]), sociology (Sviržić Gotovac,[15]

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11 Croatia in Figures 2023, Croatian Bureau of Statistics, Zagreb, 2003, p. 7.

12 *E.g.* Bežovan, G., *Procjena standarda stanovanja u Zagrebu kao razvojnog resursa*, Revija za socijalnu politiku, Vol. 12, No.1, 2005, pp. 23-44; Bežovan, G., *Procjena stambenih potreba u Hrvatskoj*, Ceraneo, Zagreb, 2012; Bežovan, G.; Matančević, J.; Baturina, D., *Socijalne inovacije kao doprinos jačanju socijalne kohezije i ublažavanju socijalne krize u europskim urbanim socijalnim programima*, Revija socijalne politike, Vol. 23, No. 1, 2016, pp. 61-80; Bežovan, G.; Pandžić, J., *Kvaliteta stanovanja u programu javnog najamnog stanovanja: primjer Novog Jelkovca*, Sociologija i prostor, Vol. 58, No. 1, 2020, p. 33-57.

13 *E.g.* Pandžić, J., *Europeizacija stambenih politika u postsocijalizmu: usporedba iskustava Slovenije i Hrvatske*, Revija za socijalnu politiku, Vol. 28, No. 1, 2021, pp. 25-46; Pandžić, J., *Stambena politika između znanosti i ideologije*, Revija za sociologiju, Vol. 48, No. 3, 2018, pp. 329-358.

14 Rodik, P.; Matković, T.; Pandžić J., *Stambene karijere u Hrvatskoj: od samoupravnog socijalizma do krize financijskog kapitalizma*, Revija za sociologiju, Vol. 49, No. 3, 2019, pp. 219-348.

15 *E.g.* Sviržić Gotovac, A., *The quality of living in the settlements network in Croatia*, Sociologija sela, Vol. 44, No. 1, 2006, pp. 105-126; Sviržić Gotovac, A., *Akteri društvenih promjena u prostoru* (2007- 2011), in: Sviržić Gotovac, A.; Zlatar, J. (eds.), Akteri društvenih promjena u prostoru; transformacija prostora i kvalitete života u Hrvatskoj, Institut za društvena istraživanja, Zagreb, 2012, pp. 13-27; Sviržić Gotovac, A., *Učinci procesa privatizacije stanovanja u postsocijalističkoj Hrvatskoj, Geoadria*, Vol. 25, No. 2, 2020, pp. 151-176; Sviržić Gotovac, A., *New housing estates in the settlement network of Zagreb – community infrastructure,* in: Sviržić Gotovac, A.; Zlatar, J. (eds.). *Kvaliteta života u novostambenim*

Zlatar,[16] Rodik[17]) and economics (Vizek,[18] Tica,[19] Rašić, Slijepčević, Stojčić[20]). In this paper, we will first present the latest data at the level of the EU countries, and then analyse the issue of defining the term and concept 'affordable housing'. After that, we will provide an overview and analysis of the existing legal regulations on housing at the international and European level. Finally, in the last section of the paper, we will analyse the current data related to (affordable) housing in Croatia, give an overview of the relevant Croatian regulations and present the current initiatives aimed at solving the challenges of affordable housing in the Republic of Croatia.

2. HOUSE OR FLAT, OWNING OR RENTING – THAT IS THE QUESTION

We will start with the latest statistical data related to housing in European countries, through the available last year's official Eurostat statistical data, i.e. from 2023, which we will now present and analyse in this section.[21] We will refer in particular to data on preferences for living in one's own or rented homes, living in houses or apartments, data on the increase in real estate prices and rents, data on housing costs within disposable income, and data on single-person households, the number of rooms per person, the number of persons per household, and the housing cost overburden rate.

First of all, the data show that European citizens, and we will see specific data for Croatia later in the text, prefer owning real estate to renting. Namely, more than two thirds of people in the EU lived in households owning their home and more than half of the EU population lived in a house. In contrast to Romania (95%), Slovakia (93%), Croatia (91%) and Hungary (90%), in which the proportion of owners is extremely high (even higher than 90%), in some countries this need for

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naseljima i lokacijama u zagrebačkoj mreži naselja, Institut za društvena istraživanja u Zagrebu, posebna izdanja, 2015, pp. 45-75.

16 *E.g.* Sviršić Gotovac, A.; Zlatar, J., *Novi Jelkovec ili Sopnica-Jelkovec kao primjer POS-ovog naselja*, in: Sviršić Gotovac, A.; Zlatar, J. (eds.), Kvaliteta života u novostambenim naseljima i lokacijama u zagrebačkoj mreži naselja, Institut za društvena istraživanja, Zagreb, 2015, pp. 147-180.

17 Rodik, Matković, Pandžić, *loc. cit., note* 14.

18 *E.g.* Vizek, M., *Priuštivost stanovanja u Hrvatskoj i odabranim europskim zemljama*, Revija socijalne politike, Vol. 16, No. 3, 2009, pp. 281-297.

19 *E.g.* Tica, J., *Tranzicija hrvatskog stambenog tržišta*, Politička kultura, Zagreb 2002.

20 Rašić, I.; Slijepčević, S.; Stojčić, N.; Vizek, M., *Pregled tržišta nekretnina Republike Hrvatske*, Studije, Ekonomski institut Zagreb, Zagreb, 2022.

21 *Eurostat Housing in Europe 2023, interactive publication*, Eurostat – the Statistical Office of the European Union, European Union, 2023. See: [https://ec.europa.eu/eurostat/web/interactive-publications/housing-2023] and [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Household_composition_statistics], Accessed 22 April 2024.

property ownership is significantly lower. Therefore, for example, in Germany, the population is more inclined to rent (53%) than to buy an apartment and a similar tendency can be seen in Austria (49%) and Denmark (40%). As for the tendencies of EU citizens whether they prefer to live in apartments or houses, statistics show that the attitudes are divided, that is, they are slightly in favour of living in houses. A total of 47.5% people in the EU lived in flats. In addition, we can note that houses are most common in 2/3 of the EU Member States. In some countries, the share of the population that owns a house is extremely high. For instance, Ireland (89%) is in the first place, followed by the Netherlands (79%), Croatia and Belgium (both 77%). On the other hand, in Spain (66%), Latvia (65%, 2021 data), Germany (63%) and Estonia (61%) citizens are more inclined to live in flats. The preferences of EU citizens regarding both the choice of owning or renting and the choice of a house or an apartment thus differ from country to country.

We now focus on data related to real estate prices and apartment rental prices from 2010 to 2022. According to Eurostat data, house prices rose by 47% in the EU between 2010 and 2022, and there has been a steady upward trend, especially since 2013, with particularly large increases between 2015 and 2022. The largest increases were observed in Estonia (192%), Hungary (172%) and Luxembourg (135%), while decreases were registered in Italy (-9%) and Cyprus (-5%). On the other hand, because of that, there has also been a steady increase of rents in the EU between 2010 and 2022. Rent increased 18% during that period. The largest increases were registered in Estonia (210%), Lithuania (144%) and Ireland (84%), but in Cyprus, this increase was only 0.2%. In conclusion, there was an increase in all Member States except Greece, interestingly, where rental prices even fell (-25%). This is a question that would require careful research as to why this is so. In this regard, inflation played a major role in price changes during the period 2010-2022, which was recorded in all Member States as high as 28%. We should mention that the annual inflation was the highest in 2022 (9.2%).

As for income and expenses, which are very important when analysing affordable housing, according to Eurostat, on average 19.9% of disposable income was dedicated to housing costs in 2022. This is on average lower than the previously mentioned 30% as the upper limit of affordable housing. Housing costs were between 63% below and 112% above the EU average. The highest housing costs in 2022, compared to the EU average, were recorded in Ireland (112% above the EU average), Luxembourg (87% above) and Denmark (82% above). The lowest housing costs were observed in Bulgaria (63% below the EU average) and Poland (60% below). Housing price levels compared to the EU average have increased in 17 Member States and decreased in 10. The largest increases were recorded in Ireland (from 17% above to 112% above the EU average) and Slovakia (from 44%

below to 3% below the EU average), while the largest decreases were observed in Greece (from 8% below to 30% below the EU average) and Cyprus (from 8% below to 23% below). Interestingly, and we believe that we need to present this information in the context of affordable housing, the number of single-person households without children in the EU has increased significantly by 30.7% from 2009 to 2022. Buying real estate can be a big burden for citizens, but renting is also unattainable for many people, especially in cities. Let us have a look at what "the housing cost overburden rate" is. According to Eurostat, the highest housing cost overburden rates in cities were observed in Greece (27.3%) and Denmark (22.5%), and the lowest in Slovakia (2.3%) and Croatia (2.6%). On average, in the EU in 2022, 19.6% of total disposable income was dedicated to housing costs, which is a high percentage. However, even that differs among the Member States, with the highest shares recorded in Greece (34.2%), Denmark (25.4%) and Germany (24.5%). Data on how much real estate prices have risen in the last ten years clearly indicate the dramatic nature of the economic crisis.

3. TERMINOLOGICAL CHALLENGES AND DEFINING THE TERM 'AFFORDABLE HOUSING'

An overview and analysis of affordable housing and related concepts, terms and phrases will be given in this part. We will see that they are numerous and that there is no terminological agreement, let alone a generally acceptable and universal definition of the basic concepts. The term 'housing' is easier to define than the term 'affordable'. The right to housing is a fundamental human right, every person has the right to adequate, sanitary, and safe housing, where their physical and mental health will not be threatened, which will provide them with security and protection from the outside world. Housing implies that a person has adequate heating, light, ventilation, access to clean water and functional sanitation, secured garbage disposal, unpolluted air and transport connections to other parts of the city or town, etc. Rights in this area are usually formulated by the following phrases: the human right to adequate housing, the right to housing, the right to adequate housing, housing rights, the right to one's home, the right to shelter, land rights, livelihood rights, and the right to the city.[22] The attitude towards affordability changes over time, and it is not the same even in the same parts of the city, region or country.

'Adequate housing' is a broad term that, together with legal security of tenure, availability of services, materials, facilities and infrastructure, habitability, acces-

[22] *Housing rights legislation - Review of international and national legal instruments*, Office of the High Commissioner for Human Rights, United Nations Human Settlements Programme, Nairobi, 2002, [https://www.ohchr.org/sites/default/files/Documents/Publications/HousingRightsen.pdf], Accessed 22 April 2024.

sibility, location and cultural adequacy, among other things, also includes affordability.[23] 'Affordable housing' is a vague term and too broad for any universal definition. It is related to a person's financial situation and the amount of income they earn monthly (or annually), compared to what they must set aside for housing (monthly or annually). There are various ways to ensure affordable housing, and not only the state (public), but also the private and non-profit sector can be included in the solution process. The practice of states in terms of affordable housing is very diverse. These issues are most frequently resolved by state authorities in cooperation with local self-government (partner relationship). The state usually provides housing for a certain period to citizens who have a certain but insufficient income, with the provision of decent accommodation, and enables them to build their lives and become independent.

The term 'housing affordability' has come into popular usage in the last two decades, replacing 'housing need' at the heart of the debate about the provision of adequate housing for all, as Torluccio and Dorakh claim.[24] The term 'housing affordability' simply implies the ability to purchase housing.[25] For some people, according to Stone, all housing is affordable, no matter how expensive it is; for others, no housing is affordable unless it is free.[26] Some citizens move to places far away from where they are employed in order to reduce housing costs, because their transportation costs are lower than the rent in the city or attractive parts of the city. However, because of this, they will waste time commuting to work and lose other benefits offered by the urban centre. Affordability is therefore the challenge that every family or individual faces when balancing the cost of their actual or potential housing with their non-housing expenditures, all within the constraints of their income.[27]

As mentioned in the introduction, the focus of this paper is not on so-called 'social housing' (or social rented housing), but although this term is related to 'affordable housing' and these two terms overlap to a certain extent, they are not synonymous. Social housing is typical of people with no or very little income. Social housing rents are significantly cheaper than 'market rents', but they are also significantly cheaper than 'affordable rents'. With social housing, the state ensures the payment of housing for a longer or shorter period to extremely vulnerable groups of people and young people who cannot take care of themselves and will hardly be able to secure

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23 General Comment No. 4, *loc. cit.*, note 10.

24 For details, see: Torluccio, G.; and Dorakh, A., *Housing affordability and methodological principles: An application*, International Research Journal of Finance and Economics, No. 79, 2011, p. 66.

25 *Ibid*.

26 Stone, M. E., *What is housing affordability? The case for the residual income approach*, Housing Policy Debate, Vol. 17, No. 1, 2006, p. 153.

27 *Ibid.*, pp. 151-152.

rents.[28] In contrast to social housing, where an individual or family has no income at all, no fixed or very low income, in affordable housing a person or family has a fixed but insufficient income. 'Low or moderate income housing' is defined by some authors as any housing subsidised by the government under any programme to assist the construction of low or moderate income housing, whether built or operated by a public agency or any non-profit or limited dividend organisation.[29]

So, affordable housing is associated with working people who have a stable income, but who earn less than the median income. It is related to people with a constant but insufficient income, who work, for example, in a city or part of a city with extremely high housing costs. These are, for example, professors, nurses, paramedics, police officers, fire fighters, construction workers, etc. who cannot afford housing due to their lower income and high real estate prices. Monk and Whitehead thus divide affordable housing into 'social rented housing and intermediate housing'. 'Social rented housing' would be rented housing which is "owned and managed by local authorities and registered social landlords, for which guideline target rents are determined through the national rent regime".[30] On the other hand, 'intermediate affordable housing' would be housing for which prices and rents are "above those of social rent but below market price or rents".[31]

It is not easy to give a definition of affordable housing. 'Housing affordability' is a very slippery thing to try to grasp. There is a lot of talk about housing affordability, "but a precise definition of housing affordability is at best ambiguous".[32] The price of housing depends on the type of real estate, whether it is a purchase or rental, location, type, size, condition, energy class, how old it is, etc. Due to the rent increase, there is a possibility of eviction, and the need to look for a new apartment or move.

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28 These can be, for example, the homeless, social cases, victims of domestic violence, people with disabilities or special needs, (internal) migrants, pensioners, children without adequate parental care after leaving the system at the age of 18 who need help with their first property, and the like. These can be singles and young families buying their first property who cannot afford housing costs in certain parts of the city, given their low and low to medium income. These can also be one parent with a child/children or couples with more than three children.

29 For more details on the problem of affordable housing in e.g. Boston as "the most expensive place in the nation for a family of four to live", see: Ligatti, A., *Localized Affordable Housing Solutions: A Multi-Disciplinary Approach*, Review of Banking and Financial Law, Vol. 28, No. 2, 2009, p. 719 *et seq*.

30 Monk, S.; Whitehead, C., *Introduction*, in: Monk, S.; Whitehead, C., (eds.), Making Housing more Affordable: The Role of Intermediate Tenures, Wiley-Blackwell, 2010, p. 9.

31 For example, "shared ownership, rent to buy and intermediate rent". *Ibidem*, p. 10. In the UK, "affordable rented housing" is a category where rents are capped at 80% of local market rates.

32 Bourassa, S.C., *Measuring the affordability of home-ownership*, Urban Studies, Vol. 33, No. 10, 1996, p. 1870.

In short, your housing is affordable if up to 30% of your net income is enough to cover rent or mortgage and you do not need to save on other aspects of life or take on additional debt to keep your home.[33] When approving a loan, the banks will also take into account that the loan instalment amounts to up to a third of the household's income. If housing costs exceed 30% of the total income, this is historically considered "a housing affordability problem".[34] The UN is on the same track when defining affordable housing as "housing that is priced at or below the market rate, whilst considering the average household income of the area (Area Median Income), so that the net monthly expenditure on housing cost does not exceed 30% of the total monthly income of the household".[35] Housing costs often represent a significant cost to a family's income and determine largely how much is left over for living costs.[36] According to Belsky, households spending more than 30% are labelled 'cost burdened' and those spending more than 50% are labelled 'severely cost burdened'.[37] If you pay more than about a third, you will have to reduce other expenses, borrow money, take on additional debt, fall into arrears, etc. It is not reasonable for everyone to spend a third of their income on housing. It is not the same to pay a third of one's income for someone who has a modest income compared to someone who has a high income. For someone, due to other high expenses (e.g. healthcare or increased expenses for children, etc.), 70% of the income will not be enough to cover these costs. The predominant strength of 'the thirty percent rule' lies in its simplicity, stresses Courtney, specifically because it can be easily calculated and comprehended.[38]

In this paper, we will not go into the complex issues of various measurements, indicators and standards for assessing housing affordability, we will rather stick to the usual 30%, even though we are aware of weaknesses and criticisms (banalising and simplifying the problem). After all, as Rowley and Ong point out, the trouble with existing debates surrounding housing affordability is the narrow focus on measuring the problem rather than understanding its wider implications.[39]

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33 For more details on the history of the 30% rule, see: Anderson, C. L., *You Cannot Afford to Live Here*, Fordham Urban Law Journal, Vol. 44, No. 2, 2017, p. 251 *et seq*.

34 *Ibid*.

35 UN-Habitat, *Addressing the Housing Affordability Challenge: A Shared Responsibility*, 2020, [https://unhabitat.org/addressing-the-housing-affordability-challenge-a-shared-responsibility], Accessed 22 April 2024.

36 Rowley, S.; Ong, R., *Housing affordability, housing stress and household wellbeing in Australia*, Ahuri Final Report, No. 192, Australian Housing and Urban Research Institute Melbourne, Melbourne, 2012, p. 23.

37 Though different in the information each measure conveys, each derives from the same basic premise: when a household spends more than 30 percent of income on housing, it is unaffordable, and if it spends more than 50 percent, it constitutes a serious cost burden. Belsky, E.S.; Goodman, J.; Drew, R., *Measuring the nation's rental housing affordability problems*, The Joint Center for Housing Studies, Harvard University, 2005, p. ii.

38 Anderson, *op. cit.,* note 33, p. 253.

39 Rowley and Ong, *op. cit.*, note 36, p. 24.

The history of the relationship between housing, health and well-being has been a long and fruitful one.[40] Affordable housing should ensure safety and security for all people and family members, especially the most vulnerable ones - children, the elderly and the sick, in order to maintain their health, but also to ensure well-being. Having an adequate home means enabling the growth and development of children, but also a peaceful old age for older family members, that is, providing stability for productive and employed members of the family and community. Adequate housing thus contributes to and shapes the entire society and economy of a country.

According to Quigley and Raphael, housing is the single largest expenditure item in the budgets of most families and individuals but the average household devotes roughly one quarter of income to housing expenditures, while poor and near-poor households commonly devote half of their incomes to housing.[41] Bourassa, for instance, warns that older owner occupiers represent a special case because a significant proportion of this group is house-rich but income-poor.[42] Therefore, affordability measures should be calculated for different age groups because the circumstances referring to different groups vary and any policy implications that might flow from the analysis need to reflect different circumstances.[43] According to Hancock, "any rent will be affordable which leaves the consumer with a socially acceptable standard of both housing and non-housing consumption after rent is paid".[44]

Housing insecurity is growing year by year. Terms like 'housing deprivation' and 'housing stress' can also be found in the literature, which are closely connected to affordable housing. 'Housing deprivation' can take a variety of forms, one of which is lack of affordable housing. Singles or families can live in spaces that fail to meet physical standards of decency, in overcrowded conditions, with insecure tenure, or in unsafe or inaccessible locations.[45] Most households that experience one or more of forms of deprivation in reality do so because they cannot afford satisfactory housing and residential environments.[46] Gabriel *et al.* defined 'housing stress' as a generic term that denotes negative impacts on households with in-

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40 *Ibid.*, p. 29.

41 Quigley, J. M.; Raphael, S., *Is housing unaffordable? Why isn't it more affordable?* Journal of Economic Perspectives, Vol. 18, No. 1, 2004, p. 129.

42 Bourassa, *op. cit.,* note 32, p. 1870.

43 *Ibid*.

44 Hancock, K., *'Can Pay? Won't Pay?' or Economic Principles of 'Affordability',* Urban Studies, Vol. 30, No. 1, 1993, p. 143-144.

45 Stone, *op. cit.,* note 26, p. 153.

46 *Ibid*.

sufficient income to secure adequate housing, but it can also refer to other factors (e.g. overcrowding and insecurity).[47] 'Housing stress' has been of interest to governments since the mid-1990s and 'housing stress figures' are still widely reported to support claims of housing affordability declines and calls for more affordable housing.[48]

This paper is also on the path to try to solve 'housing stress' in Croatia, to come up with innovative solutions to ensure affordable housing for employed citizens with constant but insufficient incomes. If we do not take care of affordable housing, we could find ourselves in a situation of deepening social differences, growth of poverty enclaves, an increase in the number of homeless people and an increase in the number of people living on the margins of society, which has been experienced by a number of countries.[49] In addition to the homeless living on the streets or in tents, other examples of inadequate housing conditions are, for example, favelas or slums, as we call various poor parts of cities, usually on their outskirts, where the poor working class lives, who often build their homes in shanties of salvaged materials. Another extreme case is e.g. Hong Kong, where it is estimated that as many as 200,000 'cage tenants' live in cramped, dank dwellings averaging just a few square meters in size (so-called 'cage homes').[50] All of these are possible scenarios for Croatian society as well if attention is not paid to the creation of an adequate and modern housing policy and regulations.

4. AFFORDABLE HOUSING IN INTERNATIONAL HUMAN RIGHTS LAW

As one of the key aspects of the right to adequate housing,[51] affordable housing has been drawn through a number of international human rights treaties and other documents. The right to adequate housing is an integral part of the right to an adequate standard of living,[52] which can be found as early as in the 1948 Universal

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47 Gabriel, M. *et al.*, *Conceptualising and measuring the housing affordability problem*, Research Paper 1, Australian Housing and Urban Research Institute, 2005, p. 7.

48 Rowley and Ong, *op. cit.,* note 36, p. 23.

49 Terminski, *op. cit.,* note 7, p. 239.

50 Luke, M., *The Strategic Use of Human Rights Treaties in Hong Kong's Cage-Home Crisis: No Way Out?,* Asian Journal of Law and Society, Vol. 3, No. 1, 2016, p. 159 *et seq*.

51 Along with legal security of tenure, availability of services, materials, facilities and infrastructure, habitability, accessibility, location and cultural adequacy. See: *General Comment No. 4, loc. cit.*, note 10.

52 See e.g. Smith, R.K.M., *International Human Rights Law*, 10th edition, Oxford University Press, Oxford, 2022, p. 312; Eide, A., *Adequate Standard of Living*, in Moeckli, D.; Shah, S.; Sivakumaran, S. (eds.), International Human Rights Law, 3rd edition, Oxford University Press, Oxford, 2018, p. 190, 193; Wilson, S., *The Right to Adequate Housing*, in Dugard, J. *at al.* (eds.), Research Handbook on Economic, Social and Cultural Rights as Human Rights, Edward Elgar, Cheltenham, Northampton,

Declaration of Human Rights (UDHR). According to Art. 25(1) of the Declaration, "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including […] housing".[53] There is a whole range of universal and regional international instruments that contain or refer to the right to adequate housing, especially those that are not legally binding. Considering the topic of the paper, emphasis will be placed on those international documents and their parts that are most relevant precisely to affordability as one of the key components of the right to adequate housing. First, an overview of relevant universal treaties will be given, followed by relevant European regional treaties and finally relevant international soft law documents, i.e. their relevant parts.

4.1. Affordable Housing in Universal International Human Rights Law

When talking about international human rights law at a universal level, in addition to the UDHR, it is necessary to start from two international covenants of 1966. The right to adequate housing from Art. 25(1) of the UDHR was inserted into Art. 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR): "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate […] housing, and to the continuous improvement of living conditions".[54] Housing issues are also touched by Art. 17 of the 1966 International Covenant on Civil and Political Rights (ICCPR)[55] in the context of the protection of one's home from arbitrary or unlawful interference (analogous to the provision of Art. 12 of the UDHR), but here we talk about the 'civil right' aspect of this human right, which goes beyond the scope of this paper.[56] Namely, even though the right to adequate housing as a social right also includes components of the duty of the State to respect (e.g. refraining from forced eviction and displacement) and the duty of the State to protect (e.g. protection against unjustified evictions by third parties) typical of civil and political rights, in this context the *duty of the*

2020, p. 183; Devereux, A., Australia and the Right to Adequate Housing, Federal Law Review, Vol. 20, No. 2, 1991, p. 223 and *The Right to Adequate Housing*, Fact Sheet No. 21/Rev. 1, Office of the United Nations High Commissioner for Human Rights, Geneva, 2014, pp. 1 and 10.

53 UN General Assembly Resolution 217 A (III) of 10 December 1948.

54 *United Nations Treaty Series*, vol. 993, p. 3. For more details on the history of the drafting of the provision of Art. 11(1) and the question of adequate housing as a separate right, see Dennis, M.J.; Stewart, D.P., *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health*, American Journal of International Law, Vol. 98, No. 3, 2004, pp. 493-498.

55 *United Nations Treaty Series*, Vol. 999, p. 171.

56 See Wilson, *op. cit.*, note 52, p. 180.

State to fulfil is in the forefront. Namely, the state has a duty to exercise regulatory functions "to *facilitate* the opportunity of everyone to find affordable housing".[57]

The right to housing is also recognised in other UN core human rights treaties in the narrower context of their area, including e.g. the 1965 International Convention on the Elimination of all Forms of Racial Discrimination (Art. 5(e)(iii)),[58] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Art. 14(2)(h)),[59] the 1989 Convention on the Rights of the Child (Art. 27(3)),[60] the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 43(1)(d)),[61] and the 2006 Convention on the Rights of Persons with Disabilities (articles 9 and 28).[62] In addition, the right to adequate housing is also present in the 1951 Convention Relating to the Status of Refugees (Art. 21),[63] as well as in certain International Labour Organisation (ILO) conventions.[64]

Given that the ICESCR is a fundamental international treaty of universal significance in the field of social rights, the general comments of the Committee on Economic, Social and Cultural Rights as its implementing body, are particularly significant for this matter. In terms of the question of the right to affordable housing, the most relevant is its General Comment No. 4,[65] according to which affordable housing is housing in which costs associated with it are "at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised". Accordingly, States Parties should "ensure that the percentage of housingrelated costs is, in general, commensurate with income levels". In addition, according to the Committee, States should "establish housing subsidies for

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57 Eide, *op. cit.*, note 52, pp. 194-195. See also Majinge, C., *Housing, Right to, International Protection*, June 2010, Max Planck Encyclopedias of International Law, Oxford Public International Law, [https://opil.ouplaw.com/home/mpil], Accessed by subscription 29 March 2024, paras.1 and 15.

58 *United Nations Treaty Series*, Vol. 660, p. 195.

59 *United Nations Treaty Series*, Vol. 1249, p. 13.

60 *United Nations Treaty Series*, Vol. 1577, p. 3.

61 *United Nations Treaty Series*, Vol. 2220, p. 3.

62 *United Nations Treaty Series*, Vol. 2515, p. 3.

63 *United Nations Treaty Series*, Vol. 189, p. 137.

64 See e.g. Art. 5(2) of the 1962 ILO Convention No. 117 concerning Basic Aims and Standards of Social Policy, articles 85-88 of the 1958 ILO Convention concerning Conditions of Employment of Plantation Workers and articles 14, 16-17, and 20 of the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. All ILO conventions are available at NORMLEX, ILO's Information System on International Labour Standards, [https://www.ilo.org/dyn/normlex/en/f?p=1000:12000], Accessed 13 April 2024.

65 See *supra*, note 10. See also *General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions*, Sixteenth session (1997) and General Comment No. 26 on Land and Economic, Social and Cultural Rights, Seventy-second session (2022).

those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs". Furthermore, "tenants should be protected by appropriate means against unreasonable rent levels or rent increases" (para. 8(c)). Although the general comments of the UN treaty bodies as such are legally non-binding and of contesting normative value,[66] reasoning of the Committee on Economic, Social and Cultural Rights on the key aspects of the right to adequate housing, including affordability, is taken as undisputed in the literature.[67]

4.2. Affordable Housing in European Regional International Human Rights Law

At the European regional level,[68] provision of housing is only marginally mentioned in the 1961 European Social Charter[69] as the European regional equivalent to the ICESCR, in the context of the family's right to social, legal and economic protection (Art. 16). However, in its revised version of 1996,[70] the right to housing is guaranteed much more explicitly and elaborately. In addition to emphasising the right to housing in the context of narrower issues of protection of persons with disabilities (Art. 15), family (Art. 16), elderly persons (Art. 23) and poverty and social exclusion (Art. 30), the revised version of the European Social Charter contains in its Art. 31 "the right to housing" as a right that belongs to everyone. Art. 31 obliges State Parties to take measures "to promote access to housing of an adequate standard" (Art. 31(1)) and "to prevent and reduce homelessness with a view to its gradual elimination" (Art 31(2)). The provision of its paragraph 3, which obliges State Parties to take measures designed "to make the price of housing accessible to those without adequate resources" is particularly significant in the context of this paper.

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66 See Takata, H.; Hamamoto, S., *Human Rights, Treaty Bodies, General Comments/Recommendations*, January 2023, Max Planck Encyclopedias of International Law, Oxford Public International Law, [https://opil.ouplaw.com/home/mpil], Accessed by subscription 29 March 2024, para. 48 *et seq*. See also Chinkin, C., *Sources*, in: Moeckli, D.; Shah, S.; Sivakumaran, S. (eds.), *International Human Rights Law*, 3rd edition, Oxford University Press, Oxford, 2018, pp. 69-70.

67 See e.g. Eide, *op. cit.*, note 52, p. 194, Smith, *op. cit.*, note 52, pp. 312-313, Majinge, *op. cit.*, note 57, para. 6, Wolf, R., *Participation in the Right of Access to Adequate Housing*, Tulsa Journal of Comparative & International Law, Vol. 14, No. 2, 2007, pp. 273, 275-276, and Senders, M., *Women and the Right to Adequate Housing*, Netherlands Quarterly of Human Rights, Vol. 16, No. 2, 1998, pp. 178-179.

68 For a brief overview of other regional human rights protection systems in the context of the right to housing, see Majinge, *op. cit.*, note 57, paras. 7, 9 and 10.

69 *European Treaty Series*, No. 35.

70 *European Treaty Series*, No. 163.

Similarly to the ICCPR, the 1950 European Convention on Human Rights,[71] as its European regional counterpart, also contains certain provisions relevant to housing issues, such as the right to respect for private and family life (Art. 8) and protection of property (Art. 1 of the Protocol No. 1). However, as we concluded with the ICCPR, the (civil rights) aspects of housing addressed by the ECHR go beyond the scope of this paper. The right to housing is also guaranteed by the provisions of some other international treaties adopted under the auspices of the Council of Europe, such as the 1977 European Convention on the Legal Status of Migrant Workers (Art 13).[72] It is also present in the fundamental document on the protection of human rights of the European Union, the Charter of Fundamental Rights of the European Union. According to its Art. 34(3), "[i]n order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices".[73]

According to the European Committee of Social Rights, the monitoring body of the European Social Charter, housing is affordable "when the household can afford to pay the initial costs (deposit, advance rent), the current rent and/or other costs (utility, maintenance and management charges) on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located". The obligations of State Parties in this regard are "in order to increase the supply of social housing and make it financially accessible to adopt appropriate measures for the construction of housing, in particular social housing, where their own direct involvement is complemented by that of other partners; to introduce housing benefits for the low-income and disadvantaged sectors of the population".[74]

4.3. Affordable Housing in International Soft Law Documents

In addition to treaties, housing related provisions are also present in certain international soft law documents dedicated to the protection of a certain category of persons, such as the 1998 Guiding Principles on Internal Displacement (principle

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71 *European Treaty Series*, Nos. 5, 9, 44, 45, 46, 55, 114, 117, 118, 140, 146, 155, 177 and 187; *Council of Europe Treaty Series*, Nos. 194, 204, 213 and 214.

72 *European Treaty Series*, No. 93.

73 *Official Journal of the European Union*, 2012/C 326/02, C 326/391, 26 October 2012.

74 European Committee of Social Rights, Doc. ID: 2003/def/SWE/31/3/EN, Conclusion, Sweden, 30 June 2003.

18, para. 2),[75] the 2005 Principles on Housing and Property Restitution for Refugees and Displaced Persons (paras. 8.1 and 8.2),[76] and the 2007 Declaration on the Rights of Indigenous Peoples (articles 21(1) and 23).[77] However, documents that more explicitly refer to affordable housing as a component of the right to adequate housing are more relevant to this paper. Affordable housing is also present in some soft law documents of general importance for the international community, such as the 2030 Agenda for Sustainable Development (Goal 11.1),[78] but it is also the subject of certain specialised programmes and activities under the auspices of the UN. The most important of them are the UN-Habitat programme and the activity of the Special Rapporteur on the right to adequate housing, under whose auspices a whole range of relevant documents in this area were adopted.

UN-Habitat acts under the General Assembly and its mission is "to promote socially and environmentally sustainable human settlements development and the achievement of adequate shelter for all".[79] UN conferences on housing are convened under its auspices every twenty years. So far, three such conferences have been held (Habitat I, II and III), which resulted in the adoption of final (legally non-binding) declarations and action plans. In the context of this paper, it is particularly important to highlight the declaration of the signatory states of the last of these documents, the New Urban Agenda of 2016[80], that they will "support the development of appropriate and affordable housing finance products and encourage the participation of a diverse range of multilateral financial institutions, regional development banks and development finance institutions, cooperation agencies, private-sector lenders and investors, cooperatives, moneylenders and microfinance banks to invest in affordable and incremental housing in all its forms" (para. 140).

The Special Rapporteur on the right to adequate housing has been working under the auspices of the UN since 2000.[81] The mandate of the Special Rapporteur

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75 UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

76 UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005.

77 General Assembly Resolution 61/295 of 13 September 2007.

78 General Assembly Resolution 70/1 of 25 September 2015.

79 See the official internet website of *UN-Habitat*, [https://unhabitat.org/about-us/learn-more], Accessed 5 April 2024.

80 The full name of the document is the 2016 Quito Declaration on Sustainable Cities and Human Settlements for All and Quito Implementation Plan for the New Urban Agenda, General Assembly Resolution 71/256 of 23 December 2016. See also previous declarations and actions plans: the 1976 Vancouver Declaration on Human Settlements and Action Plan (UN Doc. A/CONF.70/15) and the 1996 Istanbul Declaration on Human Settlements and the Habitat Agenda (UN Doc. A/CONF.165/14, 7 August 1996).

81 Commission on Human Rights Resolution 2000/9 of 17 April 2000.

has been extended on several occasions, together with the change of the mandate holder,[82] last time in April 2023, for three more years.[83] Its task is to cooperate with states, other UN bodies and other international organisations, civil society and other stakeholders with a view to progressively achieving the full realisation of the right to adequate housing, and to make proposals and recommendations for that purpose. Out of a number of important recommendations of the Special Rapporteur adopted in the last twenty years in the context of the topic of this paper, the most important ones are the 2020 Guidelines for the Implementation of the Right to Adequate Housing.[84] In the aforementioned document, it was pointed out, among other things, that "[p]rivate developers and investors are dominating housing systems in an unprecedented fashion, often divorcing housing from its social function by treating it as a commodity for speculation" with the final consequence of "making housing and land increasingly unaffordable" (para. 3). According to the Special Rapporteur, a "change in direction is urgently needed, and a new relationship between governments and the investors currently dominating the housing landscape must be forged" (para. 67). States should, *inter alia*, ensure that developers "produce needed affordable housing, that housing is not left vacant and that some of the profits from housing or other economic activities are redirected to ensure the availability of adequate housing for low-income households" (para. 68). Although non-binding, this kind of recommendations grounded in existing international human rights law provide valuable guidelines on the meaning of the right to affordable housing and the ways of its realisation.

5. THE SITUATION WITH AFFORDABLE HOUSING IN CROATIA

This section will provide an overview of Eurostat data for the Republic of Croatia relevant to affordable housing, as well as an overview of relevant Croatian regulations. Special attention will be paid to the by-laws of the four largest cities in Croatia with a corresponding analysis. The section will end with a brief overview of current local and national initiatives aimed at improving affordable housing in Croatia.

What follows is an overview of Eurostat data relevant to affordable housing, isolated for Croatia only.[85] In Croatia, 91.1% of citizens are real estate owners, and

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82 See the official website of the UN Office of the High Commissioner for Human Rights (OHCHR), *About the mandate, Special Rapporteur on the right to adequate housing*, [https://www.ohchr.org/en/special-procedures/sr-housing/about-mandate], Accessed 10 April 2024.

83 Human Rights Council Resolution 52/10 of 3 April 2023.

84 UN Doc. A/HRC/43/43, 26 December 2019.

85 Eurostat Housing in Europe 2023, *loc. cit.*, note 21.

only 8.9% are renters. The answer to the question why Croats prefer owning to renting lies primarily in the fact that investing in real estate is a safe form of saving, and according to existing regulations, real estate is not taxed. Croats are also at the top of the list of countries with the highest share of the population living in a house because as many as 77.4% live in houses and 22.6% in apartments. However, the data for Croatian cities show that in cities more people live in apartments (i.e. 53.9%), while 46.1% live in houses, which is explained by an increase in the number of inhabitants living in cities and their urbanisation.

Compared to most of Europe, as shown in section 2, with 2.6%, Croatia is among the countries that have the lowest rates of burdened housing costs in cities of all the EU Member States (only Slovakia has a slightly lower rate), and the share of housing costs in total disposable income for 2022 in Croatia was 15.1%. Based on the aforementioned data, it follows that the average situation in Croatia is not so dramatic compared to the rest of Europe. However, the current situation on the real estate market in Croatia shows that the prices of apartments for purchase and rent are still too high compared to the average salary of Croats. According to Eurostat annual data on the price index of apartments and houses in Croatia, as well as the level of rents, a constant trend of price increases can be seen in the period from 2015 to 2023. Furthermore, according to statistical data contained in the Review of the real estate market in Croatia for the year 2022,[86] it follows that the median price of an apartment per m^2 in 2022 compared to a year earlier increased by 15.7%, and the increase in the median rental price compared to 2021 occurred in most of Croatia, i.e. in 14 counties.

The least affordable apartments are recorded in the coastal part of Croatia, where citizens have to allocate more than 30% of their annual income for one m^2 apartment (in seven cities). The data also show that for the average annual income in twenty least affordable cities, citizens can buy between 2.4 and 3.9 square meters of living space, and in cities where real estate is more affordable, between 11.7 and 12.8 square meters. This problem especially affects young families, who are just entering the labour market and do not have enough financial resources either to buy real estate or to pay for an expensive rent, so for them solving the housing issue is a big challenge, which directly affects demographic trends. All this is a result of the lack of a systematic housing policy, which has not been adopted in Croatia since its establishment in the 1990s. Instead of a coherent housing policy, the issue of housing in Croatia has been dispersed under different regulations to this day. If this problem is to be solved and citizens are to be guaranteed the right to affordable housing, it will be necessary in the coming period to review the existing

[86] See *Pregled tržišta nekretnina Republike Hrvatske za 2022.*, Ekonomski institut Zagreb, p. 196.

legal framework, adopt a specific housing policy and connect it with economic, demographic and social policy.

Let us see how housing policies are regulated in Croatian law and whether there are provisions on housing affordability.

First of all, it should be said that in Croatia there is no regulation that comprehensively deals with the topic of housing; it is rather the subject of several laws regulated from different aspects. The multidimensional character of housing policy is a significant challenge to researchers because the study of individual public policies necessarily involves questions about the character of the ideas based on which they are formulated[87].

The highest legal act in Croatia, the Constitution of the Republic of Croatia,[88] unlike the constitutions of some other democratic and social states,[89] does not recognise the right to housing as the highest value of the constitutional order. However, through personal and political freedoms and rights, the Constitution guarantees the inviolability of the home, just as the European Convention on Human Rights does.[90] It protects citizens from forced eviction from their homes, but this constitutional right is not correlated with the obligation of the state to help citizens meet their housing needs. Incorporating the right to housing as a standalone article in a constitution is probably the strongest expression of recognition of housing as a national issue.[91]

In the context of rights and obligations related to renting an apartment, the area of housing is regulated by the Apartment Lease Act.[92] It is the only regulation in Croatia that partially regulates the issue of the amount of rent. Namely, the act defines two types of rent that can be paid by the tenant, namely, protected rent, the amount of which is determined by the Government of the Republic of Croatia

87 Pandžić, *Stambena politika…, op. cit.*, note 13, pp. 330.

88 Constitution of the Republic of Croatia, Official Gazette Nos. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

89 See e.g. Art 65 of the Constitution of Portugal, [https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf/], Accessed 19 April 2024; and Art. 47 of the Constitution of Spain, [https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf/], Accessed 19 April 2024.

90 See *supra*, note 71.

91 See Oren, M.; Alterman, R.; Zilbershats, Y., *Housing rights in constitutional legislation: a conceptual classification*, in: Kenna, P. (ed.), Contemporary housing issues in a globalized world, Routledge, 2016, pp. 141–158.

92 Apartment Lease Act, Official Gazette Nos. 91/1996, 48/1998, 66/1998, 22/2006, 68/2018, 105/2020.

in the Regulation on conditions and criteria for determining protected rent,[93] and freely negotiated rent, the amount of which is determined by the market. According to the legal provisions, protected rent is intended for contracts with people of weaker financial status, people who use the apartment pursuant to the regulations on the rights of Croatian veterans, as well as people who had previously been right-of-occupancy apartment holders. It is, as a rule, several times lower than the amount of freely negotiated rent on the market of apartments for rent, which makes it affordable for the mentioned categories of tenants, although the term affordability is not mentioned in the text of the act itself.

The second aspect of housing, i.e. the construction of apartments or residential buildings, is regulated by the Act on State-Subsidised Housing Construction (or POS in Croatian).[94] According to this act, socially encouraged housing construction is made possible by public funds (the state or local self-government units), in order to satisfy the housing needs and improve the quality of a wider range of citizens, whose apartments are intended for sale or rent, with more favourable interest rates and repayment terms than market ones. According to this act, 8,356 apartments in 260 buildings have been built in Croatia since the beginning of its implementation.[95] According to many professionals, the POS flats are not real social housing in the sense developed by European countries, but a kind of partly subsidised housing.[96]

The act that resolves the issue of territorial competence for housing regulation is the Act on Local and Regional Self-Government.[97] It enables each local self-government unit to independently regulate issues related to housing through its by-laws. Therefore, cities with a large number of inhabitants who own a certain number of apartments for rent, as a rule, make decisions that regulate the issue of living in their apartments, and above all, the procedure, criteria, amount of rent, rights and obligations of the contracting parties and conditions for renting city-owned apartments.

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93 Regulation on the conditions and criteria for determining protected rent, Official Gazette Nos. 40/1997, 117/2005.

94 Act on State-Subsidised Housing Construction, Official Gazette Nos. 109/2001, 82/2004, 76/2007, 38/2009, 86/2012, 7/2013, 26/2015, 57/2018, 66/2019, 58/2021.

95 Official website of the Agency for Transactions and Mediation in Immovable Properties, [https://apn.hr/izgradnja-i-prodaja-stanova-pos/izgradeni-stanovi/], Accessed 11 April 2024.

96 Sviržić Gotovac, *Kvaliteta života…, op. cit.*, note 15, pp. 45-72.

97 Act on Local and Regional Self-Government, Official Gazette Nos. 33/2001, 60/2001, 129/2005, 109/2007, 125/2008, 36/2009, 150/2011, 144/2012, 19/2013, 137/2015, 123/2017, 98/2019, 144/2020.

The key condition for renting city-owned apartments is the amount of total monthly income of the tenant or the members of their household, which, as a rule, must not be higher than the average monthly wages paid in Croatia. For example, decisions on renting apartments in four large cities in Croatia - Zagreb, Split, Rijeka and Osijek - differ only in nuances. Thus, the City of Osijek has determined that the total average net monthly income of the applicant's family household must not exceed twice the amount of the average monthly net salary paid in Croatia, and for a single person, it is the single amount.[98] The City of Rijeka stipulates that the total average monthly income of the family household must not exceed the following amounts: for a single person, 90% of the average monthly paid net salary in Croatia, and for a family with two or more members, 50% of the average paid salary per member of the family household specified in the application.[99] In the City of Split, the total average monthly income per member of the family household must not exceed the following amounts: for a single person, 50% of the amount of the average monthly salary in Croatia, and for a family with two or more members, 30% of the amount.[100]

The City of Zagreb went a step further in the creation of housing policy and changed its decision on renting apartments in 2023, trying to fit it into the topic of affordable housing. Accordingly, apartments owned by the City of Zagreb are rented according to the Decision on renting apartments,[101] for housing based on socioeconomic status, and for providing housing for people with lower and middle income at affordable prices. The applicant's socioeconomic status necessitates that their average income per household member for the year preceding the year of publication of the tender must not exceed 30% of the average monthly net salary per employee in the economy of the City of Zagreb for multi-member households and 50% for single households. It also provides housing for people with lower and middle income at affordable prices. In this case, apartments can be rented to applicants whose income per household member ranges between 30% and 80% of the average monthly net salary per employee in the economy of the City of Zagreb in the case of multi-member households, and between 50% and 100% for single households.

Based on the aforementioned decisions of all four cities, it follows that the basic condition for renting a city-owned apartment is that the applicant's income is

98 Decision on renting city-owned apartments, Official Gazette of the City of Osijek No. 8/2008.

99 Decision on renting apartments, Official Gazette of the Primorsko-Goranska County Nos. 12/2011, 15/2011, 54/2012.

100 Ordinance for renting apartments, Official Gazette of the City of Split No. 40/2021.

101 Decision on renting apartments, Official Gazette of the City of Zagreb No. 32/2023.

related to the average monthly net salary per employee in the economy in Croatia, i.e. in the city of Zagreb. Therefore, citizens (singles) whose salary is higher than the average salary in Croatia, i.e. in the city of Zagreb, are not eligible for tenders or public calls issued by cities, and are thus unable to rent a city-owned apartment. Considering the extent of housing neglect and housing unaffordability for the wider strata of the urban population, there is a need in Croatia to pass a law that would encourage the construction of (new) social apartments and rental apartments.[102]

Therefore, if the intention of big cities is to have a more serious impact on the apartment rental market, it is necessary to find new models, which would increase the supply of apartments that can be rented to a wider class of citizens, for whom apartments should also be affordable for rent. Namely, the goal of affordable housing is to reduce inequality between people, among other things, by building public apartments for public rent, which would be cheaper for vulnerable groups and young families, especially those who are at risk of poverty and social exclusion. In Croatia, the shortage of apartments and living space is mainly present in larger cities, where the largest part of the biologically reproductive population is concentrated. In this sense, an inadequate standard of housing appears as a limitation to desirable population growth.[103]

In order to respond to this challenge, in March 2023, the four largest cities in the Republic of Croatia - Zagreb, Split, Rijeka and Osijek - launched an initiative called the Four Cities Initiative, as a platform for inter-city cooperation on topics and projects of common interest. There are three key issues that plague all large cities, including the cities in Croatia: the lack of affordable housing, the need to preserve the environment, and the transition to the systematic use of digital technologies. These topics appear as global challenges in society, but they are also important for the local population. Therefore, through working groups made up of city officials and employees, the representatives of the four cities decided to discuss the issues of affordable housing, green transition and digitalisation, and set the goal of the initiative to speed up the process and find new solutions in the topics mentioned above, while respecting the positive experiences of other cities or countries. The main task of the affordable housing working group is to answer the question as to how cities can influence housing affordability in their area and

[102] Bežovan, G., *Stambena prava u Hrvatskoj i problemi njihova ostvarenja,* Revija za socijalnu politiku, Vol. 11, No. 1, 2004, p. 98.

[103] Bežovan, G., *Stambena statistika – standard stanovanja u Hrvatskoj*, Revija za socijalnu politiku, Vol. 11, No. 2, 2004, p. 268.

which models of affordable housing are acceptable for cities.[104] At the time of writing this paper, the Four Cities Initiative has not published any official conclusions, so their analysis will be the subject of future research.

In addition to the aforementioned activities of the Four Cities Initiative, the Government of Croatia is also making an effort to solve the problem of housing availability and affordability. Namely, in 2021, the Government of Croatia adopted the Report on the Spatial Situation in the Republic of Croatia for the period 2013-2019. This Report establishes the basic goals of demographic development from a spatial aspect in Croatia, and the key recommendation is to adopt and implement a housing strategy at the national, local and regional level, especially for young people entering the labour market and starting families.[105] In line with the above, the Government of Croatia plans to adopt in 2024 the National Housing Policy Plan of the Republic of Croatia until 2030,[106] which will finally define the goals of affordable housing in Croatia. Namely, the main goal of the National Plan is to provide citizens with affordable housing that must at the same time meet the established quality standards. Rental subsidies to property owners up to the market price, activation of vacant properties and a modified programme of state-subsidised housing construction are housing policy models currently considered by the state. These models should reduce apartment rental prices on the market. The consequence of the aforementioned models will be a change in the existing legislation, so taking into account the results of the Four Cities Initiative and the activities of the Croatian Government, it follows that the year 2024 will mark the beginning of the more significant changes in Croatia regarding housing affordability in Croatia.

6. CONCLUSION

When discussing affordable housing, it should be emphasised that the issue of its realisation is a multidisciplinary area in which, *inter alia*, we must take into account social and economic policy, urbanism, environmental protection and sustainable development. As has been seen, in Croatian science, mostly social workers, sociologists and economists have primarily dealt with this topic. Until now, this area has not been the subject of more comprehensive research in Croatian

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104 Official website of the City of Zagreb, [https://www.zagreb.hr/pokrenuta-inicijativa-4-grada-sastanak-gradonaceln/186970/], Accessed 19 April 2024.

105 Report on the Spatial Situation in the Republic of Croatia for the period 2013-2019, Official Gazette No. 105/2021, p. 217.

106 Decision on the initiation of the process of drafting the National Housing Policy Plan of the Republic of Croatia until 2030, official website of the Ministry of Physical Planning, Construction and State Assets, [https://mpgi.gov.hr/print.aspx?id=15323&url=print&page=1/], Accessed 11 April 2024.

legal science. This paper aims to give an incentive to fill this gap in the Croatian legal literature.

The aim of this paper was to determine issues and challenges primarily referring to affordable housing in the Republic of Croatia. Considering the lack of legal research on this topic in the Republic of Croatia, it was necessary to lay certain foundations for such research in the future. First, according to the analysed Eurostat data, there is a concrete social problem in the EU Member States, including the Republic of Croatia. This problem is manifested in difficult access to housing, especially in cities, due to a number of factors, such as accelerated urbanisation and the lack of houses and apartments, as well as an increase in real estate prices and real estate rentals. Secondly, in order to determine what exactly we are talking about here, it was necessary to engage in terminological analyses and attempts to define the term affordable housing, which is much broader than e.g. the term social housing. We have taken a clear position that affordable housing is one in which the housing costs of a person or family do not exceed 30% of their total income. Any discussion about the adoption of new and/or application of existing legal regulations requires a (more) precise terminological definition of the term affordable housing. Thirdly, when it comes to the role of the central and local self-government of the Republic of Croatia in the realisation of the right to affordable housing, it was also crucial to see exactly what the relevant international legal obligations of states consist of. Although the provisions of some older treaties such as the ICESCR are rather short, and even do not always explicitly mention affordability as a component of the right to adequate housing, somewhat more recent treaties (such as a revised version of the European Social Charter) bring more precise and clearer provisions. In addition, the actions of the implementing bodies of such treaties as well as recent international soft law documents provide valuable guidelines on the meaning of the right to affordable housing and the ways of its realisation. Last but not least, it was necessary to analyse relevant data on housing in the Republic of Croatia, provide an overview of the arrangement of legal regulations on housing at the national and local levels, and establish to what extent this problem is recognised in the context of existing initiatives aimed at improving affordable housing.

In conclusion, it must be said that a serious housing crisis has been developing in the Republic of Croatia in the last ten years, especially in larger cities. With regard to the initiation of the aforementioned initiatives at both the national and local levels, it is evident that the problem of achieving affordable housing is recognised in the Republic of Croatia. More and more questions are being asked about ways to achieve affordable housing in larger Croatian cities. Legal science must also contribute to solving this problem. The authors of this paper will continue to re-

search this issue. It would be worthwhile, for example, to compare those countries that have good practice of solving housing affordability in cities, such as e.g. Singapore, Vienna, Copenhagen, Freiburg, Amersfoort, Eindhoven, Rotterdam and Zurich. Such research would provide a more concrete basis for the establishment of appropriate models for the realisation of affordable housing in larger cities in the Republic of Croatia.

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Original scientific paper

THE PRINCIPLE OF SOLIDARITY AND THE CHALLENGES OF SYSTEM AND SOCIAL (DIS) INTEGRATION: IN ANTICIPATION OF THE NEW EU RULES ON MIGRATION AND ASYLUM*

Adrijana Martinović, PhD, Associate Professor
University of Rijeka, Faculty of Law
Hahlić 6, HR-51000 Rijeka, Croatia
adrijana.martinovic@uniri.hr

Marko Mrakovčić, PhD, Associate Professor
University of Rijeka, Faculty of Law
Hahlić 6, HR-51000 Rijeka, Croatia
marko.mrakovcic@uniri.hr

Nikola Petrović, PhD, Senior Research Associate
Institute for Social Research in Zagreb
Ulica Milana Amruša 11, HR-10000 Zagreb, Croatia
nikola@idi.hr

ABSTRACT

In the wake of the political agreement reached in December 2023 by the European Parliament and the Council on the New Pact on Migration and Asylum, it is necessary to reconsider the concept of solidarity as its breaking point. Although it is crucial for a fair sharing of burden and responsibility among Member States in the face of persistent migratory pressure, a workable solidarity mechanism seems elusive and difficult to achieve. The Pact's intended paradigm-changing approach towards a more flexible solidarity has initially been criticised by Member States, human rights organisations, and academia alike.

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This paper aims to examine the conceptual issues surrounding the proposed solidarity mechanism from an interdisciplinary perspective, relying on the analytical distinction of the concepts of system and social integration in the understanding and explication of the processes of constitution, transformation and (dis)integration of the social order. The aforementioned distinction is conceptually useful for analysing the process of functioning and (dis)integration of the social order because it allows scholars to simultaneously analyse how different institutional solutions affect the functioning and compatibility of the social (sub)systems of that order, and how they affect the character of the relationships between social actors with different interests and identities operating within that order.

Building on the existing extensive legal scholarship on solidarity in the EU migration and asylum policy, the paper will analyse the role of solidarity in the context of processes related to constitution, transformation and (dis)integration of EU. As an underlying value and a principle, solidarity permeates numerous areas of EU law and represents the "ideological" basis legitimising the European integration. However, it is often misunderstood or implemented in the manner which accommodates current political and social circumstances. Thus, it becomes a political tool, at the expense of its legal coherence. This has a far-reaching impact on the functionality and efficiency of the legal system, and potentially disintegrating effects both on the relations between the EU and the Member States institutional systems, and on the cooperativeness between political and social actors regarding the creation and adoption of future EU policies and laws. Lessons from other fields of law, notably from institutionalisation of solidarity within the social security law, will be explored to evaluate the position of solidarity in the context of the EU migration and asylum policy. The aim is to establish whether the patterns of flexible solidarity can represent a viable option which is in line with the legal conceptualisation of solidarity, and to investigate how strong is their (dis)integrative potential. This innovative approach will offer a wider and fresh perspective to the on-going debate surrounding the institutionalisation of the principle of solidarity in the EU migration and asylum law.

***Keywords**: EU migration and asylum law; principle of solidarity; system integration; social integration*

1. INTRODUCTION

The New Pact on Migration and Asylum (hereinafter: the Pact) was presented by the European Commission in September 2020.[1] It is comprised of a series of legislative proposals for the reform of the common asylum and migration management, building on the whole of government approach and integrated policy-making in the areas of asylum, migration, return, external border protection, fight against smuggling, and building of relations with third countries. "The fresh start" on migration highlights particularly that it is "based on the overarching principles of solidarity and a fair sharing of responsibility" and seeks to promote mutual trust

[1] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23.9.2020 (COM(2020) 609 final).

between the Member States.[2] The solutions presented in the Pact were immediately criticised, especially in view of the proposed concept of return sponsorship.[3] Three years later, at the end of 2023, the European Parliament and the Council announced that they reached a political agreement on five main acts proposed within the Pact (regulations on screening, Eurodac, asylum procedures, asylum and migration management, and crisis and force majeure).[4] The debate and voting in the European Parliament on the 'package deal' including ten legal instruments took place in April 2024.[5] In anticipation of the new rules, it is important to reconsider a long standing debate on solidarity in the EU asylum and migration law from an interdisciplinary perspective.

This paper will therefore first explore the conceptual foundations of solidarity as a guiding principle of EU asylum and migration law (2.), concentrating on the most salient features of its operationalisation under the existing and the proposed rules

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2 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.9.2020, Explanatory memorandum, p. 1 (COM(2020) 610 final).

3 Maiani vividly referred to the Pact as "a jungle of extremely detailed and sometimes obscure provisions", see Maiani, F., *Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact*, in: Thym, D., Odysseus Academic Network (eds.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos, 2022, pp. 43-60, p. 44. The Pact's "vision on (flexible) solidarity" is criticised as inadequate (see Tsourdi, L., *EU Law Analysis: The EU's New Pact on Migration and Asylum: three key arguments*, 2023 [http://eulawanalysis.blogspot.com/2023/09/the-eus-new-pact-on-migration-and.html], Accessed 3 April 2023, whereby the proposed flexibility comes at the expense of predictability and the Commission's politically risky concept of return sponsorship appears "ill-suited to respond to the human rights risks", incapable of alleviating the pressure on EU border states, and as perpetuating existing tensions (see Sundberg Diez, O.; Trauner, F.; De Somer, M., *Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains*, European Journal of Migration and Law 23 (2021), pp. 219-244, p. 243.; Milazzo, E., *Asymmetric Interstate Solidarity and Return Sponsorship*, Journal of Common Market Studies 61 (2023) 5, pp. 1179–1193), as well as leading to "commodification of asylum seekers" (Brouwer, E. *et al.*, *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, Study, European Union, 2021, p. 115, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf], Accessed 20 March 2024. The Pact is seen as "repackaging old tricks rather than a fresh start", see Karageorgiou, E.; Noll, G., *What is wrong with solidarity in EU asylum and migration law?*, Jus Cogens, Vol. 4, 2022, pp. 131–154, 132.

4 European Commission, Migration and Home Affairs: Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum, 20 December 2023 [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en]; [https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20_en], Accessed 2 April 2024.

5 European Parliament, Draft Agenda 10 April 2024, [https://www.europarl.europa.eu/doceo/document/OJQ-9-2024-04-10_EN.html#D-70], Accessed 2 April 2024. This paper was submitted on 12 April 2024, two days after the debate and voting.

on migration and asylum management, and analysing the legal effects of the legislative solutions and their capability to achieve their stated purpose. It will than proceed with the social and political contextualisation of the debate on solidarity mechanisms (3.), applying the analytical distinction of the concepts of system and social integration in the understanding and explication of the processes of constitution, transformation and (dis)integration of the social order. The purpose is to investigate the (dis)integrative potential of the solidarity mechanisms, as a way to explain the (in)efficiency of institutionalisation of the principle of solidarity in the field of EU asylum and migration, and to investigate whether the newly proposed patterns of flexible solidarity are in line with the conceptual foundations of solidarity (4.). Concluding remarks (5.) summarise the insights arising out of this interdisciplinary perspective with the aim of contributing to the ongoing debate on solidarity mechanisms in EU asylum and migration law.

2. CONCEPTUALISING SOLIDARITY IN EU ASYLUM AND MIGRATION LAW

2.1. General remarks on solidarity in EU law

As an underlying value and a principle, solidarity permeates numerous areas of EU law and represents the "ideological" basis legitimising European integration. However, it is often misunderstood or implemented in the manner which accommodates current political and social circumstances. Thus, it becomes a political tool, at the expense of its legal coherence.

Solidarity is a core value of the European Union (see Article 2 TEU),[6] which defines specific Union's objectives (see Article 3(3) and (5) TEU), as well as a guiding principle for the Union's actions (see, e.g. Article 21(1) TEU, Article 67(2) TFEU,[7] Article 80 TFEU). Along with human dignity, freedom, and equality, it is acknowledged as an 'indivisible, universal value' on which the Union is founded (CFREU,[8] see Preamble and Title IV). A 'spirit of solidarity' infuses especially sensitive Union policies and activities, such as external and security policy (Ar-

[6] Treaty on European Union (consolidated version 2016) OJ C 206, 7.6.2016 (TEU). For a wider narrative on European values and the mechanisms of their transmission into national contexts see Čepo, D., *European values in Croatia and the European Union: The state of affairs*, in: Čepo, D. (ed.), *European values and the challenges of EU membership. Croatia in comparative perspective*, Centar za demokraciju i pravo Miko Tripalo, 2020, pp. 15-34. See also McCormick, J., *Europeanism*, Oxford University Press, 2010, p. 2.

[7] Treaty on the Functioning of the European Union (consolidated version 2016) OJ C 206, 7 June 2016 (TFEU).

[8] Charter of Fundamental Rights of the European Union (2016) OJ C 206, 7 June 2016 (CFREU).

ticle 24(3) TEU), supply crisis (Article 122(1) TFEU), energy policy (Article 194(1) TFEU), or situations of natural disasters or terrorist attacks (Article 222(1) TFEU). The development of 'mutual political solidarity' between Member States is the basis for the Union's international relations (Article 24(2) and (3) TEU). The abundance of references and contexts for solidarity in primary EU law reflects the elusive and versatile nature of solidarity as a social and legal construct and concept.[9] Solidarity in EU law plays different roles,[10] and has been recognised as carrying either constitutional-institutional functions (solidarity between institutions at the level of EU and Member States), or substantive functions (solidarity between individuals, facilitated through state or EU intervention).[11] Whereas the Preamble of the Treaty on European Union highlights the desire to deepen the solidarity between peoples, while respecting their history, their culture and their traditions, the operationalisation of solidarity takes place between Member States, as evident from the provisions mentioned above. The incoherence and complexity of references to solidarity in primary EU law, coupled with the lack of clear definition, makes solidarity very difficult to operationalise, especially in highly sensitive policy areas, such as common asylum and migration policy, despite a "common

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9 See more in Sangiovanni, A., *Solidarity in the European Union*, Oxford Journal of Legal Studies 33 (2013) 2, pp. 213-241; Stjernø, S., *Solidarity in Europe. The history of an idea*, Cambridge University Press, 2004; Martinović, A., *Solidarity as key determinant of social security systems in the EU*, Rev. soc. polit. 22 (2015) 3, pp. 335-352, p. 335 and further.

10 Such as imposing of active obligations, providing value safeguards in relation to social rights, modifying market actions, building rights, and demarcating the field of application of EU rules, depending on the area. See Vanheule, D.; van Selm J.; Boswell, C. *The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration*, Study, European Parliament, Brussels, 2011 [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf], Accessed 5 April 2024, p. 27-28.

11 See Vanheule, D.; van Selm, J.; Boswell, C., *op. cit.*, note 10, p. 27-28. See also Ross, M., *Solidarity – A New Constitutional Paradigm for the EU*, in: Ross, M.; Borgmann-Prebil, Y. (eds.) *Promoting Solidarity in the European Union*, Oxford University Press, 2010, pp. 23-45; di Napoli, E.; Russo, D., *Solidarity in the European Union in Times of Crisis: Towards "European Solidarity"?*, in: Federico, V.; Lahusen, C. (eds.), *Solidarity as a Public Virtue?: Law and Public Policies in the European Union*, 2018, Nomos, pp. 195-248. In contrast, Van Cleynenbreugel identifies four prevailing solidarity concepts in EU law: liberalising (based on mutual recognition and sincere cooperation between Member States for the benefit of economic operators in the internal market), redistributive (regulatory redistribution as a means to enhance solidarity between individuals and across generations), constitutive (arising from constitutional pluralism and respect for fundamental rights as a means to enhance structural cohesion across different legal orders) and administrative (procedural solidarity as a means to ensure compliance and effective implementation of EU law). All of those concepts reflect a non-substantive understanding of solidarity as a de facto burden-sharing scheme and "as a background inspirational value for EU law and policy initiatives", without being a legal principle capable of guiding or restraining Member States' burden-sharing obligations. See Van Cleynenbreugel, P., *Typologies of Solidarity in EU law*, in: Biondi, A.; Dagilytė, E.; Küçük, E. (eds.), *Solidarity in EU Law. Legal Principle in the Making*, Edward Elgar Publishing, 2018, pp. 13-37, 36.

understanding that it is important for the functioning of these policy areas".[12] Is it 'just' a value, or a value that has the status of a general principle of EU law at the same time; is it a 'spirit' that has the status of a legal principle, or a 'spirit' in terms of political commitments; is it an objective whose achievement is to be 'promoted' or pursued with legally binding norms? What is the connection between different functions and levels of solidarity: is the realisation of a constitutional function of solidarity at the level of Member States and/or EU institutions a prerequisite for the substantive function of solidarity, between peoples of Europe?

Solidarity applies as "a matter of principle within the whole EU legal order",[13] but it is questionable whether it can be claimed that it has the status of a general principle of EU law, regardless of the strong assertions in the CJEU case law about its character and importance, including its specific expressions in particular policy fields.[14] Solidarity is instrumentalised in different EU policies primarily as a burden sharing mechanism between Member States, i.e. for allocation of responsibility (financial or other obligations), but also deployed as a trust building mechanism.[15] The issue of trust,[16] however, is arguably one of the weakest spots of effective operationalisation of solidarity in the field of asylum and migration.

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12 Goldner Lang, I., *Is there solidarity on EU asylum and migration law?*, CYELP 9, 2013, pp. 1-14, 13.

13 Klamert, M., *Loyalty and Solidarity as General Principles*, in: Ziegler, K. S.; Neuvonen, P. J.; Moreno-Lax, V. (eds.), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe*, Edward Elgar Publishing, 2022, pp. 118-135, p. 132. On the procedural aspect of solidarity in the EU citizenship law see Shuibhne, N. N., *Applying Solidarity as a Procedural Obligation in EU Citizenship Law*, CYELP 19, 2023, pp. 1-38.

14 In relation to Article 194(1) TFEU, the CJEU has held that "the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself *one of the fundamental principles of EU law*", and found that the principle of energy solidarity "…*like general principles of EU law*, constitutes a criterion for assessing the legality of measures adopted by the EU institutions", which "…requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole" (emphasis added). See Case C-848/19 P, *Federal Republic of Germany v European Commission*, EU:C:2021:598, paras. 38-53. See also: AG Sharpston in joined cases C-715/17, C-718/17 and C-719/17, *European Commission v Republic of Poland and Others*, EU:C:2019:917, para. 253 (solidarity is the "lifeblood of the European project"); AG Bot in joined cases C-643/15 and 617/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:618, paras. 17-19 (solidarity is the "bedrock of the European construction"); and AG Mengozzi in case C-226/16, *Eni SpA and Others*, EU:C:2017:616, paras. 33-38 (solidarity has the character that could be defined as "constitutional principle").

15 Throughout the Commission's proposal of the new Pact, different mechanisms and instruments designed to build and foster mutual trust among Members States, as well as citizens, are highlighted. See COM(2020)609 final, pp. 2, 4, 6, 14, 27.

16 Goldner Lang identifies four crucial 'facets' of solidarity, based on the meaning and motivation for solidarity, to include loyalty, fairness, trust and necessity; with necessity as the predominant factor, and mutual trust (i.e. a lack thereof) among Member States as potentially the most destructive force

2.2. Operationalisation of solidarity in EU asylum and migration law

Legal scholars have been tracing the elusive solidarity in EU asylum and migration law for decades. Even a random glance at the titles of influential academic papers over the years, such as: "Is there solidarity on EU asylum and migration law?",[17] "Searching for solidarity in EU asylum and border policies […]",[18] and "What is wrong with solidarity in EU asylum and migration law?",[19] reveals an alarming perception that something is amiss between the proclamation of solidarity, and its operationalisation in the legal norms and practice.

Solidarity in asylum and migration policy is without a doubt a fully-fledged legal principle which is operationalised through legal norms, despite their questionable efficiency. Pursuant to Article 67(2) TFEU, the Union "shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third country nationals". The scope of any solidarity measure in this field is clear from the wording and objective of this provision: it is limited to Member States. There is no duty of solidarity towards third country nationals: just a vague reference to the fact that policy should be 'fair' to them. It is a solidarity among Member States, not among their peoples, and certainly not solidarity with 'others' who do not belong to this community. In other words, if there is a compulsory solidarity mechanism, it is incurred upon Member States, but the positive or negative attitude of national actors within those Member States might have a significant impact on its practical realisation. An even stronger expression of solidarity is provided in the first sentence of Article 80 TFEU, which expressly invokes the principle of solidarity, with fair sharing of responsibility,[20] including its financial implications, between the Members States as the governing principle for policies on border checks, asylum and immigration,

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eroding solidarity efforts. See Goldner Lang, I., *The EU financial and migration crisis: two crisis – many facets of EU solidarity*, in Biondi; Dagilytė; Küçük (eds.), *op. cit.*, note 11, pp. 133-160, p. 150; Goldner Lang, I., *op. cit.*, note 12; Goldner Lang, I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, European journal of migration and law, 22 (2020) 1, 39-59. See also Maiani, F., *op. cit.*, note 3, p. 59.

17 Goldner Lang, I., *op. cit.*, note 12.

18 Thym, D.; Tsourdi, E., *Searching for solidarity in EU asylum and border policies: Constitutional and operational dimensions*, Maastricht Journal of European and Comparative Law Vol. 24, No. 5., 2017, pp. 605–621.

19 Karageorgiou, E.; Noll, G., *op. cit.*, note 3.

20 Karageorgiou and Noll highlight that the separation of the principle of solidarity from fair sharing of responsibility is a remnant of the development of asylum and migration policies during the 1990s, where solidarity related to the ordinary operation of the asylum and migration policy, whereas burden and fair sharing was reserved for the times of crisis. According to them, this separation seems less plausible after Lisbon, when 'crisis' seem to be an ordinary state of functioning. See Karageourgiou, E.; Noll, G., *op. cit.*, note 3, p. 137.

and their implementation. It means that Member States, especially those that are most affected by migration flows, are entitled to solidarity, but the precise content of this duty remains unclear.[21] The second sentence of this paragraph confirms that the adoption of Union acts, containing appropriate measures, is necessary to give effect to this principle. Consequently, any number of mechanisms can be deployed to operationalise this principle, from cooperation and support, financial and other types of assistance, to relocation obligation. While Article 80 TFEU does not give a specific competence to adopt legislative measures, it defines how the competences conferred in other provisions (notably in Articles 77 – 79 TFEU) should be exercised, and creates an obligation for the Union legislator to include appropriate solidarity measures, if necessary.[22] According to the CJEU, the spirit of solidarity flows from Article 80 TFEU into the Dublin III Regulation[23] as well, and allows other Member States to, unilaterally or bilaterally, help a Member State faced with an unusually large number of third-country nationals seeking international assistance, by making use of the power under Article 17(1) of Dublin III Regulation to examine applications for international protection, even if such examination is not their responsibility, and regardless whether specific measures are adopted on the basis of Article 78(3) TFEU.[24]

So, what is so problematic about solidarity in the existing legal framework in the field of asylum and migration? There is an abundance of comprehensive legal literature on this topic,[25] and given the limitations arising from the scope, aims and

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21 Kortländer, P., *Artikel 80 AEUV* in: Schwarze EU-Kommentar, 4th ed., Nomos, 2019, p. 1219.

22 See European Parliament, Committee on Legal Affairs (JURI), Opinion on the legal basis of the proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], 18 April 2022, p. 6-7, [https://www.europarl.europa.eu/doceo/document/JURI-AL-732595_EN.html], Accessed 26 March 2024. On the scope of Article 80 TFEU see more in di Napoli; Russo, *op. cit.*, note 11, p. 231.

23 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), [2013] OJ L180/31 (Dublin III Regulation).

24 Case C-646/16, *Jafari*, EU:C:2017:586, para. 100. The same discretionary clause is reflected in Article 25 of the proposal for a Regulation of the European Parliament and the Council on asylum and migration management, with additional possibility for the applicant to submit a substantiated request in writing for the application of this clause. See COM(2020) 610 final; and European Parliament, A9-0152/2023, Amendments 001-472 by the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 26 March 2024 (European parliament, A9-0152/2023).

25 In addition to the academic literature referenced throughout this paper, see in particular Mavropoulou, E.; Tsourdi, L., *Solidarity as Normative Rationale for Differential Treatment: Common but Differentiated Responsibilities from International Environmental to EU Asylum Law?*, Netherlands Yearbook of International Law 2022, 51, pp. 311-342,

methodology of this paper, we will refer only to a couple of selected issues commonly identified in scholarly writings.

As shown above, the principle of solidarity established in EU primary law provisions on asylum and migration should permeate all secondary legislation establishing entitlements and obligations of Member States, and, in principle, should govern Member States' actions even in the absence of common binding rules.[26] This can result in binding, as well as non-binding solidarity mechanisms. The problem with this is twofold. First, legally non-binding solidarity is 'just' altruism, which cannot be counted or relied on, especially in times of crisis. Second, legally binding solidarity, which appears too intrusive to (some) Member States, will remain inapplicable and ineffective.[27] These processes can be observed from a legal and sociological perspective and framed within the concepts of system and social integration. This can help explain how even some legally reasonable solutions might eventually be distorted or rejected in practice in the interrelations among the various actors which are affected by them. We will turn back to this issue in parts 3. and 4. of this paper.

2.2.1. The solidarity challenge: Asylum and migration management

The current EU secondary legislation in the field of migration and asylum falls short of the solidarity promise. The practical functioning of the Dublin system[28] on registration and processing of asylum applications perpetuates untenable systemic pressures on frontline Member States,[29] leading to covert or blatant breaches

[https://westminsterresearch.westminster.ac.uk/download/986938413392d0e51a456c5e254f447fdb98290b055223fab8099ca1138f6a81/509667/NYIL_Chap-11_Mavropoulou%20and%20Tsourdi.pdf], Accessed 3 April 2024; and Maiani, F., Responsibility allocation and solidarity, in: De Brycker, P.; De Somer, M.; De Brouwer, J.-L. (eds.), From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration, European Policy Centre, 2019, pp. 103-118, [https://www.epc.eu/content/PDF/2019/Tampere_WEB.pdf], Accessed 28 March 2024.

26 See case C-646/16, *Jafari*, EU:C:2017:586, para. 100.

27 For a political science analysis of the effects of different types of responsibility-sharing mechanisms see Thielemann, E., *Refugee protection as a public good: How to make responsibility-sharing initiatives more effective*, in: Krunke, H.; Petersen, H.; Manners, I. (eds.) *Transnational Solidarity. Concepts, Challenges and Opportunities*, Cambridge University Press, 2020, pp. 165-186, 172 and further.

28 For more on Dublin III Regulation, see e.g. Maiani, F., *The Reform of the Dublin III Regulation*, Study for the LIBE Committee, European Union, 2016, p. 12 and further [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf], Accessed 27 March 2024.

29 Santos Vara, J., *Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?*, European Papers Vol. 7, No. 3, 2020, pp. 1243-1263, p. 1250.

of EU law.[30] As evident during the refugee crisis of 2015 – 2016, the application of the responsibility of the state of irregular entry[31] for processing asylum applications was deliberately avoided by the states at the southern and eastern borders of the Union.[32] In addition, despite the existence of a hierarchy of criteria for determining the responsible state,[33] 99 % of applications are examined by the state where they are first lodged.[34] The evident failure of temporary relocation schemes which were implemented to alleviate migration pressures[35] should serve as a lesson on what works and what does not. In theory, relocation schemes were designed to reinforce solidarity among Member States. In practice, their binding nature was simply ignored by some Member States;[36] and their overall practical effect was frustrating.[37]

All of the above shows, that in the absence of effective solidarity schemes, Member States engage "in defensive rather than cooperative behaviour".[38] It shows how incredibly lightly even binding solidarity mechanisms can be avoided, without real consequences.

The until then unprecedented refugee crisis of 2015 – 2016 has fully exposed the inadequacy of the existing legal framework to deal with such migration pressure. How does the New Pact attempt to remedy this situation? Its underlying idea is that "… no Member State should shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis".[39] There

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30 For a statistical overview of increase in the infringement proceedings in the area of asylum and migration in the period between 2014 – 2018 see Goldner Lang, *op. cit.*, note 16, p. 40. On systemic violations of EU asylum law see Tsourdi, L.; Costello, C., *"Systemic Violations" in EU Asylum Law: Cover or Catalyst?*, German Law Journal (2023) 24, pp. 982–994.

31 Article 13(1) Dublin (III) Regulation.

32 Maiani, F., *op. cit.*, note 28, p. 15.

33 Article 7 Dublin (III) Regulation.

34 Maiani, F., *op. cit.*, note 28, p. 14.

35 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24 September 2015.

36 See joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland and Others*, EU:C:2020:257. Despite the fact that Poland, Hungary and Czech Republic were found in infringement of EU law, the infringement itself concerned a failure to indicate an appropriate number of applicants for international protection that can be relocated to those countries, and not the failure to actually relocate the applicants, which is dependent on the existence of prior commitment to that effect.

37 Maiani, F., *op. cit.*, note 28, p. 18-19.

38 *Ibid.*, p. 6.

39 COM (2020)609 final, p. 1. For a comprehensive analysis of the political and legal background which led to the preparation of the New Pact see Brouwer *et al.*, *op. cit.*, note 3, p. 26 and further.

is nothing new and revolutionary about this idea. The same goes for the proposed solutions and mechanisms. Out of five key proposals to overhaul the migration and asylum system regarding which the political agreement was reached between the European Parliament and the Council in December 2023,[40] this paper concentrates on the envisaged reformed solidarity mechanisms under the proposed Regulation on Asylum and Migration Management, according to the latest version of text with the proposed amendments by the European Parliament.[41] A brief legal analysis of the most important solidarity elements built into that proposal will help illustrate the conceptual issues surrounding solidarity from an interdisciplinary perspective, and explain its (dis)integrative potential.

2.2.2. The Proposal of the Regulation on Asylum and Migration Management

Under the proposal of the Regulation on Asylum and Migration Management (hereinafter: RAMM), the country of first entry remains responsible for asylum applications, meaning that the core elements of the Dublin system are actually preserved.[42] Solidarity is seen as a corrective mechanism, supplementing the ordinary rules on the attribution of responsibility.[43]

In its Explanatory Memorandum accompanying the RAMM Proposal, the Commission states that this instrument particularly aims at establishing a common framework for asylum and migration management based on comprehensive, integrated policy-making and the principles of solidarity and fair sharing of responsibility, as well as at ensuring sharing of responsibility through a new solidarity mechanism, which will be able to "deliver solidarity on a continued basis

40 See above note 5.

41 The proposed regulation aims to establish clearer rules and a new solidarity mechanism among Member States on establishing and sharing responsibility for asylum applications. See COM(2020) 610 final and European Parliament, A9-0152/2023. This paper will rely and refer to the text and numeration of the provisions of the proposed regulation, taking into account the amendments from the latter document of the European Parliament, i.e. the text of the LIBE report tabled for plenary, which will be subject to the joint debate on the Migration and Asylum package and vote in the European Parliament on 10 April 2024. See European Parliament, Legislative observatory, Procedure File 2020/0279(COD) [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0279(COD)&l=en], accessed 5 April 2024. This text can be subject to further amendments, the very least those of technical nature, but it was the latest version available at the time this paper was completed.

42 See Articles 14 - 22 RAMM; Santos Vara, *op. cit.*, note 30, p. 1252; Cornelisse, G.; Campesi, G., *The European Commission's New Pact on Migration and Asylum. Horizontal substitute impact assessment*, Study, European Parliament Research Service, European Union, 2021, pp. 132-133.

43 Part IV "Solidarity" RAMM; see also Cornelisse, G.; Campesi, G., *op. cit.*, note 43, p. 180.

in normal times" and to assist Member States faced with migratory pressure to effectively manage migration in practice.[44] The "normal times" solidarity seems nothing more than an orderly fulfilment of the obligation to establish and maintain national asylum and migration management systems, with sufficient funding and staff, and to reduce and prevent irregular migration from third states. This is reflected in Article 5 of the RAMM Proposal entitled "Principle of solidarity and fair sharing of responsibility."[45] There is no definition of these principles, but the introductory parts of Article 5 require their observance from Member States "in implementing their obligations" (paragraph 1). The accent in paragraph 1a, inserted during negotiations,[46] is again placed on the fulfilment of the Member States duties, enumerated in the following subparagraphs. The hint to the origin and spirit of these obligations seals the 'solidarity deal': it is the "shared interest in the effective functioning of the Union's asylum and migration management policies" that binds the Member States in this solidarity community, and is supposed to drive them to fulfil their 'obligations and duties'. As rightly pointed out, this type of interstate solidarity in EU asylum and migration law is not the primary objective of the policies to be developed, it is the precondition for the system to function.[47]

Paragraph 1c inserts another obligation for Member States to have "national strategies in place that establish the strategic approach to ensure they have the capacity to effectively implement their asylum and migration management system, in full compliance with their obligations under Union and international law, taking into account their specific situation, especially their geographical location".[48] These strategies should have a minimum content prescribed in this paragraph, to ensure their preparedness for situations of migratory pressure. This seems to be more an expression of principle of sincere cooperation among the EU and Member States, which ensures mutual assistance and respect in carrying out the tasks flowing from EU law, and not of the principle of solidarity.

On the other hand, the "migratory pressure" solidarity consists of providing "effective support to other Member States in the form of solidarity contributions on the basis of needs set out in Chapters I-III of Part IV" (paragraph 1, point (d)).

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44 COM(2020) 610 final, p. 4 – 5.

45 In the amended version "Principle of solidarity and fair sharing *or* responsibility and duties of Member States" (emphases added). See European Parliament, A9-0152/2023.

46 See European Parliament, A9-0152/2023.

47 Bast, J., *Deepening supranational integration: interstate solidarity in EU migration law*, in: Biondi, A.; Dagilytė, A.; Küçük, E. (eds.), *op. cit.*, note 11, pp. 114-132, p. 130.

48 See European Parliament, A9-0152/2023.

The "migratory pressure" solidarity is activated when the situation so requires,[49] but should be prepared well in advance. It is mostly based on "projected annual solidarity needs" set up for the upcoming year in the delegated act adopted by the Commission, which includes a projection of the total number of required relocations, and total need for capacity building measures, where it is anticipated that a Member State will face a situation of migratory pressure.[50] This type of solidarity mechanism is underpinned by financial incentives for contributing Member States, i.e. those Member States that demonstrate solidarity.[51] The initially proposed types of 'solidarity contributions' by the Commission included relocation, return sponsorship, and capacity-building measures.[52] However, the current version of the text completely abandons the controversial concept of return sponsorship, and substantially curtails the possibility to resort to capacity-building measures to avoid the relocation responsibility. This is a departure from the initial idea of a 'pick-and-choose', flexible solidarity, capable of adapting to "different realities and migratory flows", which has been heavily criticised,[53] as there were ample opportunities to stretch it until it becomes completely distorted and devoid of purpose. Relocation becomes the primary and practically the only type of solidarity contribution under the compromise text of Article 45(1) RAMM.[54] The other type of solidarity contribution consists in triggering the discretionary clause from Article 25 concerning the voluntary examination of applications for international protection, but this time the agreement between a contributing and benefitting Member State is necessary,[55] which is quite unusual. There is also the possibility for the contributing Member State to commit to capacity-building measures pursuant to Article 55a(1) RAMM, which are restricted to addressing the specific

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49 The definition of 'migratory pressure' is provided in Article 2(1)(w) RAMM to mean, without prejudice to the definition of crisis from the Crisis Regulation, a situation whereby arrivals of third-country nationals or stateless persons, including by sea and disembarkations, place "a disproportionate responsibility even on well-prepared asylum, reception and migration systems, which requires solidarity contributions" pursuant to Article 45 RAMM.

50 See Article 4c(2) RAMM; European Parliament, A9-0152/2023.

51 COM(2020) 609 final, p. 96; see Article 61 RAMM and Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, OJ L 251, 15 July 2021.

52 COM(2020) 610 final.

53 For an excellent and comprehensive critical evaluation of the various elements of the Pact see contributions in Thym, D.; Odysseus Academic Network (eds.) *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos, 2022. See also Mavropoulou, E.; Tsourdi, L., *op. cit.*, note 26, p. 28.

54 See also Article 45b(1) RAMM, the last sentence: "The Commission and the Member States shall at all times prioritise relocation pursuant to Article 45(1), as the primary measure of solidarity.", European Parliament, A9-0152/2023.

55 See Article 45(1a) RAMM, European Parliament, A9-0152/2023.

needs of the benefitting Member State and identified in the delegated act adopted in situation of migratory pressure.

There are various structures designed to ensure smooth transition from "normal times" to "migratory pressure" solidarity, such as Annual Solidarity Pool (Article 45b)[56], Solidarity Forum (Article 46),[57] Solidarity Response Plan (Article 52),[58] and EU Relocation Coordinator (Article 58a).[59] The Commission is responsible for preparing and adopting several important types of acts: the Annual Situational Report (Article 4b),[60] the projected solidarity needs delegated act which serves as the basis for solidarity pledges (Article 4c),[61] and the long term European Asylum and Migration Management Strategy (Article 4a).[62] Notification of a migratory pressure by the Member State under Article 49a RAMM triggers an immediate solidarity response; whereas Member States that have previously not been identified by the Commission as at risk of migratory pressure, may request such assessment (Article 50(1) RAMM), leading to solidarity response, if necessary. The European Parliament and the Council can also request the Commission to carry out such assessment (Article 50(1)(ba) RAMM). Where the Commission considers that the situation might be a crisis situation, and not a situation of migratory pressure, it will examine the applicability of the Crisis Regulation, with the agree-

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56 The Commission, led by the EU Relocation Coordinator, establishes each year the Annual Solidarity Pool, based on projected solidarity needs, consisting of the total number of required relocations and total need for capacity building measures, whereby relocations are at all times prioritised as the primary measure of solidarity.

57 Solidarity Forum shall consist of representatives of all Member States capable of pledging solidarity contributions for the creation of the solidarity pool or solidarity response in situations of migratory pressure pursuant to Article 52.

58 Following a notification of migratory pressure or the adoption of the Commission's delegated act to determine migratory pressure, solidarity response (i.e. the type of solidarity contribution and timeline for performance) is indicated in the Solidarity Response Plan (Annex II RAMM).

59 EU Relocation Coordinator shall be appointed by the Commission to support the implementation of the relocation mechanism and to coordinate the relocation activities from the benefitting Member State to the contributing Member State.

60 The Commission shall monitor and provide information on the asylum, reception and migratory situation over the previous 12 month period as a whole through annual situational reports based on qualitative data and information provided by the Member States, Union agencies, and other relevant bodies, offices, agencies or organisations.

61 The Commission shall, together with the transmission of the annual situational report, adopt a delegated act setting out the anticipated evolution of the migratory situation in the Member States and anticipated number of arrivals in the following 12 months, with the projected solidarity needs in the form of relocations and capacity-building measures.

62 The Commission shall adopt a five-year European Asylum and Migration Management Strategy setting out the strategic approach to ensure access to asylum procedures and the functioning and implementation of asylum and migration policies at Union level, and transmit it to the European Parliament and the Council.

ment of that Member State (Article 50(4a) RAMM). Following the assessment, the Commission adopts a delegated act determining whether the Member State concerned is under migratory pressure (Article 51(2a) RAMM).

At least 80 % of pledges in the solidarity pool shall be made up of relocation measures or the application of the discretionary clause pursuant to Article 25. The remaining pledges may, where applicable, consist of capacity-building measures.[63] Where the Commission considers that the Member States' pledges do not correspond to the identified need, it shall distribute the remaining needs on the basis of the reference key from Article 54, which weights the population number and GDP per capita in the relevant parts, with a possibility of a limited deduction in accordance with the amount of processed applications for international protection in the previous ten years. This is again a move towards a considerably stricter solidarity regime than initially proposed by the Commission.

Apart from compulsory solidarity explained above, Member States are able to offer voluntary solidarity contributions in the form of relocations and/or capacity-building measures at any time (Article 45a RAMM), at their own initiative or at the request of the benefitting Member State, to assist that Member State in addressing the migratory situation or to prevent migratory pressure. Member States will keep the Commission, the EU Relocation Coordinator and the European Union for Agency Asylum informed of bilateral solidarity measures, including cooperation with third countries (Article 59(1) RAMM).

2.2.3. The 'hardship' solidarity of asylum and migration law: Creating the community of tension?

The inherent tension between institutional solutions and operationalisation of solidarity, on the one hand, and the plurality of different interests of social actors involved in their implementation takes us back to wider theoretical considerations. As elaborated above, the idea of solidarity in EU asylum and migration law mostly arises out of pressure, a sense of urgency and anxiety, a hardship, a sheer necessity; and it is formally framed as such.

Bast sees the principle of solidarity in EU migration law as "a reaction to the tensions between a high degree of supranational integration and a simultaneous heterogeneity between Member States",[64] which is used to compensate for unequal distribution of costs and benefits caused by measures taken to support supranational integration. In his view, the same conclusion is applicable in all spheres of

63 Article 45b(3) RAMM, European Parliament, A9-0152/2023.

64 Bast, J., *op. cit.*, note 47, p. 131.

EU law and appears to be a corollary of the process of transitioning to federation. In other words, solidarity is a 'price' for supranationality. If so, this type of solidarity can only create a community of tension. A 'price' can be seen as a 'punishment' when supranationality is not a desired outcome, or if it is simply tolerated as a trade-off in view of economic and other gains in different areas.

To avoid such situation with potentially disintegrative effects, the compliance of the 'community' with the legal norms has to be rooted in the shared belief that each member gains a redistributive advantage within such group and because of such group. This is where, although at first glance it might appear somewhat unusual, a useful comparison can be made with the principle of solidarity in the field of social security. Social security is a predominantly national domain, but over time, we see transnational aspects of social solidarity in EU law.[65] Social solidarity is about creating inclusive risk communities, allowing for a redistribution of income, made possible through compulsory affiliation. Inclusion creates entitlement to community aid if and when a predefined risk materialises and causes a need for such aid. On the other hand, the community has a duty to satisfy that legally circumscribed need.[66] For the system to work, it requires binding rules, but the compliance is backed by a fundamental belief in social cohesion.[67] Social solidarity is primarily solidarity between individuals, but we can infer valuable lessons even when we transfer these considerations to solidarity between Member States.

The concept of solidarity in the proposed RAMM is about creating an inclusive 'risk' community, where the risk consists of an influx of migrants, asylum and international protection applicants which even a well-managed asylum and migration system of a particular Member State cannot accommodate (i.e. a migratory pressure). However, unlike social solidarity where the materialisation of the future risk (e.g. sickness) is quite certain and is bound to happen sooner or later to each and every member of the solidarity community (although not in equal manner and scope), there is nothing certain about the migratory pressure, except that it will probably not equally affect each and every Member State. This assumption may be driving certain Member States to try to avoid their obligations within the solidarity community.

The materialised risk gives rise to a 'solidarity need', which has (hopefully) been accurately predicted beforehand.[68] The 'solidarity need' triggers 'solidarity contri-

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65 Martinović, A., *op. cit.*, note 9, p. 344.

66 Baldwin, P., *The politics of social solidarity. Class bases of the European welfare state 1875-1975*, Cambridge University Press, 1992, p. 31.

67 Thuy, P., *Sozialstaatsprinzip und Marktwirtschaft*, Haupt, 1999, p. 36.

68 This implies projected solidarity needs, in accordance with the delegated act adopted by the Commission. The element of prediction is problematic by itself. Research shows that spatial dispersion of the

butions': it is time for the solidarity pledges to materialise in the form of actual help. This entire 'solidarity deal' occurs at the level of Member States, at various points in time: from preparation, negotiation, and adoption of the rules, to making pledges and providing actual assistance national circumstances change, governments change, prevailing political options change, attitudes change. Asylum and migration policy and law are sensitive and politically divisive areas, but EU citizens are not directly bound by the solidarity which is directed at interstate level. No solidarity mechanism actively takes into account social cohesion and solidarity between nationals of contributing and benefitting Member States. The proposed RAMM encourages Member States "to take into consideration the capacities and willingness of regional and local authorities to take part in relocation efforts",[69] and recognises that cities and regions are "key players in the achievement of meaningful solidarity and successful relocation and integration trajectories".[70] However, it remains up to the Member States to ensure their cooperation. This leaves room for populism. Reluctance, hesitation, uncertainty, outright rejection of the common rules and their effective application: any variance of negative attitudes will shape the solidarity response within this complex community of risk and tension, and possibly distort the initial idea behind the creation of those rules.

How can we evaluate the (dis)integrative potential and effect of the legislative solutions described in the previous parts? We will use the distinction between the social and system integration to conceptualise the mechanisms of constitution, transformation and (dis)integration of social order, and apply them in the context of our considerations about solidarity as the crucial element of the EU asylum and migration law.

3. SOCIAL AND POLITICAL CONTEXTUALISATION OF THE SOLIDARITY DEBATE

3.1. Social and system (dis)integration: conceptual issues

Lockwood builds the conceptual starting points[71] for understanding the problems of integration and disintegration of society on the basis of a broader so-

asylum applicants seems more the result of circumstances, and not of planned actions. See Rogelj, B. (2017) *The Changing Spatiality of the "European Refugee/Migrant Crisis"*, Migracijske i etničke teme 33(2), pp. 191-219, p. 213.

69 See Article 58a(2)(e) RAMM on the authorities of the EU Relocation Coordinator, European Parliament, A9-0152/2023.

70 See Recital 63a RAMM, European Parliament, A9-0152/2023.

71 When analysing and explaining social phenomena it is useful to point out the distinction between two types of theories. According to Mouzelis, the first type of theory can be seen as a set of interrelated

ciological discussion of the 'nature' of social change and the transformation of a society's institutional order.[72] He points out that normative functionalists and conflict theorists, in line with their underlying theoretical assumptions, focus on different 'parts' of the social system when trying to answer the question of how social change arises from within a society. Since they assume that the institutional patterns are the fundamental 'parts' of the social system, normative functionalists believe that change in social order is due to the incompatibility between the institutional patterns that regulate the functioning of the social subsystems. According to them, social disorder and social conflict arise from a system disorder, which in turn is due to incompatibility, tensions and contradictions between the institutional norms/patterns of the subsystems.[73] Conflict theorists, on the other hand, believe that changes in the social system are due to tensions and contradictions (or lack of fit) between the core institutional order of the social system and its material substructure. They believe that such structural contradictions promote the development of latent or manifest conflictual social relations between social strata and groups, which can threaten the existing institutional order of the social system.[74]

The aforementioned approaches not only see the 'nature' of the emergence of structural contradictions, tensions and crises in a significantly different way, but also focus on fundamentally different aspects of social life when analysing and explaining social phenomena. As they focus primarily on social stability, value consensus and the interdependence of the institutionalized 'parts' of the social system, the normative functionalists' analysis overemphasizes the aspect of systemic (dis)integration of social change. On the other hand, since conflict theorists focus primarily on social conflicts and inequalities, in terms of competing interests and power imbalances between social groups, when analysing social phenomena, they overemphasize the social (dis)integration aspect of social change. Lockwood believes that the reductionism of these approaches can be avoided by analytically distinguishing between the system and social dimensions of the process of (dis) integration of the social order. From the perspective of social integration, it is

substantive statements that attempt to tell us something about the social world, that can be tentatively proven or disproved by empirical research (substantive theory). Another type of theory can be seen as a set of interrelated terms, concepts and statements that serve as a set of tools that simply facilitate or prepare the ground for the construction of a substantive theory (theory as a conceptual framework). See Mouzelis, N., *Sociological Theory: What Went Wrong? Diagnosis and Remedies*, Routlege, 1995, p. 1. In this part (3.1.), we discuss the aspects of (dis)integration phenomena from the perspective of conceptual framework theory.

72 Lockwood, D., *Social and System Integration*, in: Zollschann, G. K.; Hirsch, W. (eds.), *Explorations in Social Change*, Routledge, 1964, pp. 244-257.

73 *Ibid.*, p. 245.

74 *Ibid*., p. 252.

necessary to analyse how social tensions and contradictions affect the 'character' of relationships between social groups, i.e., whether they promote the emergence of cooperative or conflictual relationships between actors. On the other hand, from the perspective of system integration, it must be analysed whether structural contradictions promote the creation of orderly or conflictual relationships between the institutional parts of a social system.[75]

Lockwood's distinction is important because "it provides useful guidelines, it tells one what sort of things to look at and what sort of questions to ask in studying the development or change of specific social systems – whether groups, organizations or whole societies".[76] It allows us to analyse whether an institutional 'solution' intended to regulate an aspect of social life promotes the emergence of tensions and contradictions in relation to existing norms or practices within different social (sub)systems. Furthermore, it allows us to analyse how social actors with different interests and identities position themselves in relation to an institutional solution and how this positioning influences the 'character' of their relationships with other social actors on the one hand and processes of transformation and (dis) integration of the existing social order on the other.

Although he believes that Lockwood's distinction is crucial for the analysis of the processes of constitution, transformation and (dis)integration of social order, Mouzelis makes several suggestions that he thinks could further improve the conceptualization of these processes. First, he believes that 'parts' of a social system should not be distinguished on the basis of normative/non-normative characteristics, as Lockwood does. Accordingly, he proposes that the 'parts' of a system should always be considered/analysed as wholes/structures consisting of institutionalized complexes of norms/roles that regulate social processes and moderate the agency of individual or collective actors in these processes. Consequently, he believes that systemic contradictions and tensions arise as a result of inconsistencies between different types of 'logics' that lie behind the institutionalized norms/patterns that regulate processes within or between different social structures or subsystems.[77]

Furthermore, he believes that all sets of institutionalized norms/roles should be analysed in terms of their technological, appropriative and ideological dimensions. That is, Mouzelis believes that within each social structure or subsystem one can identify norms that have a predominantly technological, appropriative or ideolog-

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75 *Ibid.*, p. 245.

76 Mouzelis, N., *Social and System Integration: Some Reflection on a Fundamental Distinction*, The British Journal of Sociology, 25 (1974) 4: pp. 395–409, p. 395.

77 Mouzelis, N., *Social Integration and System Integration: Lockwood, Habermas, Giddens*, Sociology, vol. 31, 1/1997, pp. 111-119, pp. 112-113.

ical character. The technological dimension refers to institutional means (norms and patterns) with which social actors can more or less intentionally construct, reproduce and reshape social existence and order. The appropriation dimension refers to norms that determine who and under what conditions has the right to control and manage these technological means. Finally, the ideological dimension refers to norms that justify and legitimize which social actors and groups (and under what circumstances) can use certain social technologies and institutional 'solutions' to (re)shape social life and social order.[78]

Mouzelis believes that society can be analysed in this way in constructivist categories and that one can see that institutionalized norms/roles are not only means of societal regulation of actors, but also means through which social actors constitute, reproduce and transform social order.[79] Thus, one can see that the institutional 'solutions' and patterns created by the agency of (macro-) actors who have appropriated the technologies for the construction of social reality are at the same time structural constraints that (mezzo, micro-) actors who are lower in the hierarchy of social order have to reckon with in their lives and actions.[80]

By conceptualising the processes of constitution and transformation of the social order in the way described above, one can analyse whether some institutional solutions and patterns are incompatible with other institutional patterns and whether such a situation fosters the emergence of systemic tensions and crises. At the same time, it is possible to analyse how actors with different interests, identities and values perceive certain institutional solutions and how they position themselves vis-à-vis the actors who created or supported them. That is, it can be analysed whether social actors who believe that certain institutional solutions threaten their interests, identities and values in such a situation choose strategies and agencies that create conflictual relationships with the actors who support such solutions. In this way, it can be analysed whether the strategies and agency of some actors promote the creation of conflictual relationships with other actors and whether they trigger social processes that can lead to a transformation or even disintegration of the existing social order.

3.2. The refugee crisis and challenges of social and system (dis)integration

The crises of recent years (the eurozone crisis that began in 2009, the refugee crisis that began in 2015, and Brexit referendum in 2016) exposed the problems

78 Mouzelis, *op. cit.*, note 71, pp. 87-89.

79 *Ibid.*, p. 90.

80 *Ibid.*, pp. 141-143.

of the EU's institutional set-up and the divergent views of European integration among European leaders. The crises also opened up the possibility of deeper integration. In less than a decade, the Greece's exit from the eurozone was on the table, several Member States temporarily suspended the Schengen regime and the majority of the citizens of the United Kingdom decided to leave the EU. For this reason, some authors have written about a multidimensional crisis or polycrisis.[81] The polycrisis deepened the transnational-national cleavage, with political actors positioning themselves on a Europeanist or Eurosceptic side of the cleavage. [82] The COVID-19 pandemic crisis, which began in 2020, led to new accusations that the EU was unable to cope with extraordinary situations. Particularly, crises caused by exogenous shocks (eurozone, refugee and pandemic crisis) exposed the inadequacy of the institutional order and national and supranational leaders proposed new solutions, which have had mixed results. For example, the European Stability Mechanism created during the eurozone crisis became part of the EU legal system. With the NextGenerationEU, the instrument for recovery from the pandemic crisis, debt mutualization took place in the EU for the first time. However, the temporary relocation schemes were rejected during the refugee crisis and the search for a solution to the refugee crisis is still ongoing. The refugee crisis seems to be the most disruptive part of the EU polycrisis. It still serves as one of the main causes for the rise of radical right Eurosceptic forces and was also one of the main motives of the Leave side in the Brexit campaign.

Both the use of the principle of solidarity and concepts of social and system (dis) integration can help in explaining the strong impact of the refugee crisis. As mentioned above, solidarity in asylum and migration policy is limited to Member States and the treatment of third-country nationals, i.e. immigrants, should be fair. However, radical right Eurosceptic actors saw the immigrants coming from predominantly Muslim countries not only as third-country nationals but also as agents of change bringing about dilution of their national identities.[83] In contrast to the eurozone crisis, which was about budgets and debts, entities that are usually negotiable, the refugee crisis was presented as being about national identity,

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81 Dinan, D.; Nugent, N.; Paterson, W. E., *A multi-dimensional crisis*, in Dinan, D.; Nugent, N.; Paterson, W. E., (eds.) The European Union in Crisis, Basingstoke: Palgrave, 2017, pp. 1-15. Juncker, J. C. *Speech by President Jean-Claude Juncker at the annual general meeting of the Hellenic federation of enterprises (SEV)*, 2016,
[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293], Accessed 10 April 2024.

82 Hooghe, L.; Marks, G., *Cleavage theory meets Europe's crises: Lipset, Rokkan, and the transnational cleavage*, Journal of European public policy, Vol. 25, No. 1, 2018, pp. 109-135.

83 Buonanno, L., *The European migration crisis*, in Dinan, D.; Nugent, N.; Paterson, W. E., (eds.), The European Union in Crisis, Basingstoke: Palgrave, 2017, pp. 100-130.

which radical right actors treat as non-negotiable and fixed. Faced with what they saw as an imminent threat to their national identity, Eurosceptic leaders and parties rejected applying the principle of solidarity to other Member States in solving the refugee crisis. Even when this meant helping a fellow Eurosceptic leader, the principle of solidarity was jettisoned. This was the case with the Hungarian Prime Minister Viktor Orbán, who refused to accept relocation of migrants although it would help his Eurosceptic ally Matteo Salvini after he became the Italian Minister of Interior in 2018.

Lockwood's distinction between social and system integration is highly useful in analyzing the causes and consequences of the refugee crisis. Tendencies of social disintegration of social relations and social order can be manifested as latent or manifest conflicts between actors with different interests or identities, in a situation where some of these actors begin to perceive certain institutional solutions as threatening to their own interests, worldviews and identities. These actors may then perceive such solutions, but also the whole existing order, as illegitimate. This is what happened with Central and Eastern European leaders, their rejection of temporary relocation schemes and the subsequent strengthening of their opposition to the whole EU project, which was in contrast to the more pro-European public opinion in their countries.[84] This created a major rift between the Central and Eastern European leaders and the EU.

Social dimension of the analysis is important because it shows that institutional solutions that are ineffective in practically solving the social problems they are supposed to regulate, do not in themselves have to generate disintegrative tendencies of the social order and social conflicts. It is only when the actors operating within the social order perceive institutional solutions as threatening and possess the power to fight them, can the existing institutional order descend towards disintegration.

Regarding the system disintegration, it is important to monitor the impact of crises, such as the refugee crisis, as they can best reveal structural contradictions and whether they promote the creation of orderly or conflictual relationships between the institutional parts of a social system. As shown here, the Dublin system and the reversibility of the Schengen system of free movement form the basis of a conflictual relationship between the institutional parts of the EU asylum and migration policy. This is a conflictual relationship which threatens the whole institutional order.

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[84] Petrović, N.; Mrakovčić, M.; Fila, F., *Anti-EU Backlash from Below or Above? Public Opinion in Central and Eastern Europe Prior to the 2015 Migration Crisis*, Revija za sociologiju, Vol. 51, No. 3, 2021, pp. 317-345.

4. THE (DIS)INTEGRATIVE POTENTIAL OF THE SOLIDARITY MECHANISMS

We can trace these transformative processes in the microcosm of EU asylum and migration law. We have shown how the conceptual focus on solidarity between Member States, and solidarity as a hardship measure disregards other levels and functions of solidarity, as well as the reality of the existing social order in which the envisaged legal solutions will be applicable. As argued above, solidarity as a legal principle has to be enforced through binding norms, but there also has to exist a shared belief in mutual redistributive advantages arising from adherence to those norms. If those norms are rejected or circumvented by the actors that are subject to them, instead of intended integrative and mobilising function, as a manifestation of "alliance",[85] they will have a disintegrative effect on the social order. Goldner Lang thus observes the process of "selective exit" and "spillback", which implies the political withdrawal of Member States from common rules, which is evident in the increasing number of infringements of the existing EU legal framework in the field of migration and asylum.[86] However, the Member States' readiness to abide, or on the contrary, to risk violation of common rules are shaped by the forces and actors within them, such as individuals, local authorities, administrative authorities, judiciary, civil society organisations, etc., as well as national legal traditions, culture and values. The above elaborated systemic-social distinction shows that the process of social (dis)integration presupposes the existence and interplay between a certain number of structural institutional solutions, and individual and collective actors. Nevertheless, the inherent tensions in their mutual relations do not necessarily have to lead to social disintegration.[87]

During the negotiation process, the initial Commission's proposal of RAMM has been substantially amended. Even though the document is still not adopted, the current compromise text eliminates one of the most disputed concepts proposed by the Commission, the concept of return sponsorship. In the initial Commission's proposal, it was the cornerstone of the "fresh" solidarity approach. The negotiations have shown that, apart from numerous other objections (notably from the human rights perspective), this solution could not be accepted even if its questionable normative construction could be improved. Return sponsorship was supposed to be an alternative to relocations, which are *per se* difficult to accept by some Member States. In the current text of the proposal, relocations are again the primary type of solidarity contribution, with potentially more limited room

85 See Karageorgiou; Noll, *op. cit.*, note 3, p. 147.

86 Goldner Lang, I., No solidarity…, *op. cit.*, note 16, p. 58.

87 See more in Mrakovčić, M., *Doprinosi sociološke teorije konceptualizaciji (dez)integracije društva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci 34 (2013) 2, pp. 1043-1072, 1070.

to avoid this obligation than under the currently applicable, and especially under the initially proposed rules. The normative conceptualisation of solidarity, even in the current text of the proposal of RAMM weakens its integrative potential: the "normal times" solidarity is not more than a duty to fulfil various obligations arising out of EU law; whereas the "migratory pressure" solidarity still appears as a hasty solution to impose the 'feeling' of solidarity on other Member States when times are rough for one or some of them. This is bound to perpetuate the existing conflicts and potentially reduce the effectiveness of the new solutions.

5. CONCLUDING REMARKS

This paper aims to contribute to ongoing discussions on how to frame solidarity within EU asylum and migration law, which is a particularly politically divisive issue. The above analysis suggests that legislative solutions created in the context of crisis and focused only on hardship or crisis solidarity might not be able to appropriately achieve political consensus necessary for their effective implementation. If perceived as imposed from "above", the same mechanisms can be seen either as threatening to national identities and reinforcing social movements and political parties that oppose the EU project, or as not ambitious and efficient enough to strengthen the alliance which is necessary to foster EU integration. As the discussion and the voting in the European Parliament clearly showed, the adoption of the Pact itself was simultaneously perceived by different MPs as a victory *of* the far-right and a victory *over* the far-right.[88] This is bound to dictate the practical impact of the various instruments included in the Pact.

In more general terms we can rely on Weiler's remark that "social mobilisation in Europe is at its strongest when the direct interest of the individual is at stake and at its weakest when it requires tending to the needs of the other".[89] The "needs of the other" in EU asylum and migration law need to be reframed and aligned with shared interests to include not just 'other' Member States, but other individuals, local and regional communities, to ensure the effectiveness of eventually adopted legal solutions.

A stronger emphasis on operationalisation of solidarity as a multi-level, multi-function binding legal principle could help prevent and alleviate the systemic pressures in the course of its implementation. This type of thinking effectively

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[88] See EUractiv, *EU's historic migration pact passes amidst divisions and far-right fears*, [https://www.euractiv.com/section/migration/news/eus-historic-migration-pact-passes-amidst-divisions-and-far-right-fears/], Accessed 10 April 2024.

[89] Weiler, J. H. H., *The political and legal culture of European integration: An exploratory essay*, International Journal of Constitutional Law 9, No. 3-4, 2011, p. 693.

includes voluntary and non-binding mechanisms surrounding and accompanying the binding rules. It could reinforce the shared belief in common good and wider understanding that solidarity is an obligation that brings redistributive advantages, and "not a political favour".[90]

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Review article

BETWEEN GEOPOLITICS AND LEGAL OBLIGATIONS: THE EU AND THE CONTINUATION OF THE NORMALIZATION PROCESS BETWEEN BELGRADE AND PRIŠTINA

Dragan Đukanović, PhD, Full professor
University of Belgrade – Faculty of Political Science
Jove Ilića 165, 11000 Belgrade, Serbia
dragan.djukanovic@fpn.bg.ac.rs

Mihajlo Vučić, PhD, Senior Research Fellow
Institute of International Politics and Economics
Makedonska 25, 11000 Belgrade, Serbia
mihajlo@diplomacy.bg.ac.rs

ABSTRACT

The article deals with the challenges in the implementation of the Agreement on the path to normalization of relations between Kosovo and Serbia signed on February 27, 2022, and its Implementation Annex from March 2022. There has been no significant application of these documents so far, in addition to the similar lackluster fate of numerous other documents concluded in the normalization process. Therefore, the authors argue that the EU's image of the mediator in the process, intending to bring democracy and rule of law through these agreements to both parties, is increasingly brought into question.

In relation to this, the first part of the article explains how the European Union, in the context of its policy of conditionality, increasingly exerts significant influence on Belgrade to accelerate this process. The opening of new clusters according to the Union's new methodology concerning Serbia depends on the continuation and acceleration of this process, which is now an integral part of its negotiation framework (Chapter 35). Similarly, for Kosovo, within the broader framework of conditions for future candidate status and future membership negotiations, this question of the successful normalization of relations with Belgrade is a priority. Also, in the New Growth Plan for the Western Balkans presented in November, the withdrawal of significant financial resources by the authorities in Belgrade and Pristina will depend on the further dynamics of the implementation of all previous agreements between the two parties, especially the last year's Agreement on the path to normalization of relations between Kosovo and Serbia.

This Agreement was primarily the result of the joint initiative of Germany and France, with significant diplomatic support from the United States of America.

The second part of the article deals with the issue of the legality of such EU actions. The authors argue that despite a certain objective inability to accelerate the implementation process of all the agreements reached during the thirteen-year normalization process, the European Union can condition Belgrade and Pristina regarding additional donor funds—that is, an investment and financial aid package—in line with the fact that the parties themselves have accepted and committed to it. Simultaneously, through this Agreement, in principle, the parties committed in Article 5 to harmonize their foreign policy actions with the EU's Common Foreign and Security Policy, which is particularly important for Serbia.

In conclusion, the authors point out that the EU credibility in the Western Balkans will largely depend on the successful implementation of everything agreed in the dialogue between Belgrade and Pristina. As noted in the Agreement, the issue of these relations is fundamental and closely connected to the context of broader European security. The European Union has assumed a dominant role in implementing all agreed-upon aspects between Belgrade and Pristina, thereby leaving a realistic possibility that there could be serious consequences for their EU accession process and the financial aid they are expected to receive.

Keywords: *Conditioning, European Union, Kosovo, Normalization, Serbia, Western Balkans*

1. INTRODUCTION

The unsettled relations between Belgrade and Pristina, the most important regional issue in Southeast Europe, will continue to be extremely difficult to address in the near future. In light of the broader geopolitical and global background, the resolution of this issue in the mid-2000s generated a serious rift between the West and Russia.[1] Western and Russian policies on Balkan affairs began to sharply differ as early as 2006, especially in how they approached settling the status of Kosovo and the conflict between Pristina and Belgrade. In parallel with such international relations, communication between Belgrade and Pristina has also become strained. The attempt by Martti Ahtisaari, the special envoy of the United Nations Secretary-General, to formulate a joint proposal regarding Kosovo's status within the United Nations in 2007, faced significant obstacles due to the substantial worsening of relations and divergence between the West and Russia. In such a constellation, Serbia rejected the Comprehensive Proposal for the Kosovo Status Settlement (2007), relying on the support it received from the Russian Federation.[2] That has determined Serbia's future foreign policy position, introducing a considerable reluctance, especially towards the previously declared goal of NATO membership (from late 2007).

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1 Kosovo Contact Group Statement, 31 January 2006, London.

2 Comprehensive Proposal for the Kosovo Status Settlement, United Nations Security Council S2007/168.

Moreover, the issue of European integration was brought up in a declarative manner without a clear indication of its priority. Concurrently, in 2008, the concept of the "four pillars" of Serbia's foreign policy emerged, which, in modified forms, persists to this day.[3] This development led to a shift in Serbia's foreign policy orientation from the EU integration framework, a distinctive feature of its foreign policy since the early 2000s, towards other actors, primarily Russia and China. Consequently, instead of NATO and the EU, the dominant framework of Serbia's foreign policy trajectory in the second half of that decade gradually shifted towards relations with Russia and China while preserving a somewhat fragile framework for European aspirations without substantial commitments on this matter.[4]

The article explores the role that the EU plays as a mediator of this complicated dispute, using its diplomatic, financial and legal instruments. Reflecting on contemporary global and European geopolitical events in the Western Balkans, we can observe that neoclassical realism remains the dominant theoretical paradigm through which the relations between Belgrade and Pristina and the EU's role can be analyzed, especially since the start of the Russian invasion of Ukraine in February 2022.[5] The heightened tensions between the West and Russia have, in a way, brought negotiations for the normalisation of relations between Belgrade and Pristina to the forefront. As a result of these tensions, the West insisted on reaching an agreement on the Path to the Normalisation of Relations between Kosovo and Serbia on the anniversary of the beginning of the war in Ukraine.[6] This Agreement is a specific legal instrument used to condition the process going forward. Its provisions will be detailed and commented upon in the course of the article to discern the methods the EU uses to successfully mediate between the two sides.

Furthermore, the extremely strained relations and competition between the West and Russia in certain parts of the Western Balkans, particularly in Serbia and the Bosnian-Herzegovinian entity of Republika Srpska, are pertinently reflected through neoclassical realism.[7] This entails the reinforcement of a particular type

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3 Petrović, D.; Đukanović, D., *Stubovi spoljne politike Srbije – EU, Rusija, SAD i Kina*, Institut za međunarodnu politiku i privredu, Beograd, pp. 183–227.

4 Elena G. Ponomareva, Quo Vadis, Serbia?: A Multi-Vector Policy as a Way to Retain Political Agency, *Russia in Global Affairs*, 18(1), 2020, pp. 158-179.

5 Ross Smith, N.; Dawson, G., *Mearsheimer, Realism, and the Ukraine War*, Analyse & Kritik, Vol. 44, No. 2, 2022, pp. 175–200.

6 Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia. Brussels. February 27, 2023, [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en.], Accessed 15 March 2024.

7 Veselinović, G., *Jačanje ruske 'meke moći' u Republici Srpskoj: 'Ruski svijet' u Republici Srpskoj*, Radio Slobodna Evropa, Prag, 26. oktobar/listopad 2023,

of confrontation through political and security influence in this part of Europe, often tied to the adoption of illiberal governance patterns and influence in the media realm.[8] Therefore, it is crucial to note that the People's Republic of China has joined this complex geopolitical game in the Western Balkans. China will surely exert a great deal of political influence in the near future, mostly through Serbia.[9]

After Kosovo's unilateral declaration of independence in mid-February 2008, Serbia's relations with the West experienced a new escalation, leading to a further shift in the focus of its foreign policy towards Russia and, increasingly and more rapidly, towards China.[10] These shifts were tied to the expectation that global political/international relations related to the status of Kosovo would undergo substantial and drastic changes, with the anticipation that the situation would *de facto* return to the period before NATO's intervention in the former Federal Republic of Yugoslavia in 1999. Concurrently, especially after 2008 and 2013, there was a process of effectively consolidating special political, economic, and security control over the entire territory of Kosovo by the authorities in Pristina.[11]

After the failure of Ahtisaari's plan, it appeared that the United Nations would take the lead in regulating relations between Belgrade and Pristina, based on the United Nations General Assembly resolution (2010).[12] However, the EU assumed moderation, only to prove ineffective in leading the dialogue that began in 2011, as had happened numerous times before. Over the past thirteen years, the process of normalising relations between Belgrade and Pristina has shown no significant breakthroughs, particularly regarding the implementation of earlier agreements.[13] Despite frequent mentions of toughening conditionality policies towards the dialogue parties, the EU has failed to build a clear and effective strategy to initiate the unblocking of the normalisation process.

[https://www.slobodnaevropa.org/a/rusija-republika-srpska-ruski-uticaj/32653764.html], Accessed 15 March 2024.

8 *Ibid*.

9 Rogers, S., *Illiberal capitalist development: Chinese state-owned capital investment in Serbia*, Contemporary Politics, Vol. 28, No. 3, 2022, pp. 347–364.

10 Andrić, G., *Šta je Beogradu donela inicijativa Pojas i put, a šta znače novi sporazumi sa Pekingom,* BBC na srpskom, Beograd, 30. oktobar 2023, [https://www.bbc.com/serbian/lat/srbija-67221186], Accessed 15 March 2024.

11 First Agreement of Principles Governing the Normalization of Relations, Brussels, 20 April 2013.

12 UN General Assembly Resolution 64/298 (2010).

13 Đukanović, D., *Kako do uspešnog okončanja normalizacije odnosa između vlasti u Beogradu i Prištini*, u: Kljajić, V. (ed.), Kosovo i Metohija kao nacionalno i državno pitanje Srbije, Fakultet političkih nauka, Beograd, 2018, pp. 113–146.

Furthermore, the EU grapples with contemporary geostrategic challenges related to future enlargement, continuously seeking realistic excuses to delay actual expansion—from the Berlin Process in 2014, the new methodology in 2020,[14] to the announcement of the creation of various circles of integration but with weaker forms of real internal integration (2023).[15] All of this is essentially used as a way to postpone EU enlargement until the situation in the Western Balkans fundamentally changes. However, it appears that the Western Balkans is experiencing democratic regression, and the lingering negative sentiments stemming from the dissolution of the Socialist Federal Republic of Yugoslavia continue to have significant consequences. Relations between the Serbian and Albanian factors in the Balkans remain strained overall, despite some apparent improvements between the governments in Belgrade and Tirana from 2017 to 2023.[16] Despite these developments, many unresolved issues persist in the Western Balkans, which will likely prove difficult to overcome, even with the potential complete resolution of relations between Belgrade and Pristina. The intensity and dynamics of these issues will undoubtedly impact the realistic prospects for accelerating the EU enlargement process in the Western Balkans. So, since 2011, the EU's policy of gradually pushing Belgrade and Pristina to address outstanding issues has yielded no visible results, much like other previous processes. For example, the normalisation of Serbian-Croatian relations has remained incomplete since 1996, and the EU's pressure on the parties to resolve their accumulated open issues step-by-step until the conclusion of a comprehensive, legally binding agreement has proven ineffective.[17]

The article is thus, structured in two components. In the first part is given the current geopolitical context of the EU's mediator role in the process. In the second, mechanisms of the EU's legal, financial and diplomatic influence on the normalization process between Belgrade and Priština are analyzed, with the case studies of the Agreement on the Path to Normalization and its Annex as the examples.

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14 A more credible, dynamic, predictable and political EU accession process – Commission lays out its proposals, European Commission, Press Release, Brussels, 5 February 2020. [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_181], Accessed 15 March 2024.

15 Report of the Franco-German Working Group on the EU Institutional Reforms, *Sailing on the High Seas: Reforming and Enlarging the EU for the 21st Century,* Paris-Berlin, 18 September 2023, pp. 18–40. [https://www.diplomatie.gouv.fr/IMG/pdf/20230919_group_of_twelve_report_updated14.12.2023_cle88fb88.pdf], Accessed 15 March 2024.

16 Pavlović, A.; Gazela, D.; Halili, R., *Rethinking Serbian-Albanian Relations*, Routledge: London, 2019.

17 Ponoš, T., *Kako smo se normalizirali - 25 godina od Sporazuma o normalizaciji odnosa između Republike Hrvatske i Savezne Republike Jugoslavije*, Tragovi: časopis za srpske i hrvatske teme, Vol. 4, No. 2, 2021, pp. 122–145.

2. KEY GEOPOLITICAL CHALLENGES OF THE PROCESS OF NORMALISING RELATIONS BETWEEN BELGRADE AND PRISTINA

Although the goal of the Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia from February 2023,[18] along with its implementation annex,[19] should serve as a transitional framework between the First Agreement on Normalisation in 2013 and the future comprehensive agreement on normalisation of relations (potentially in 2033), its implementation process has, for now, remained completely blocked.[20] Therefore, the predominant issue related to the further course of normalising relations between Belgrade and Pristina involves several different elements and previous conditions:

3. FLAWED IMPLEMENTATION

The entire series of documents agreed upon during the normalisation of relations has yet to be successfully implemented. This has raised significant questions about how to proceed in a process where the parties have been unable to fulfil the commitments made in 2013 as part of the First Agreement of Principles Governing the Normalization of Relations, particularly the creation of the Community of Serb-Majority Municipalities.[21] Numerous unresolved issues were reiterated across several articles of the Agreement on the Path to Normalisation of Relations between Kosovo and Serbia (Articles 1 and 7).[22] Article 7 of the APN references the norms and practices of the Council of Europe on the status of minorities in its member states (the self-management of the Serbian community in Kosovo), although Kosovo is not a member of this organization.[23] In addition, „European models"

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18 Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 6.

19 Belgrade-Pristina Dialogue: Implementation Annex to the Normalisation of Relations between Kosovo and Serbia, Ohrid, 18 March 2024, [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-implementation-annex-agreement-path-normalisation-relations-between_en], Accessed 15 March 2024.

20 *Albanian Post: 'Novi okvir': Sporazum 2023, priznanje za deset godina, Prištini članstvo u UN, Beogradu finansijska pomoć*, Kossev, Severna Mitrovica, 18 September 2022, [https://kossev.info/albanian-post-novi-okvir-sporazum-2023-priznanje-za-10-godina-pristini-clanstvo-u-un-beogradu-finansijska-pomoc/], Accessed 15 March 2024.

21 Art. 1–6 of the First Agreement of Principles Governing the Normalization of Relations, *op. cit.,* note 11.

22 Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 6.

23 In the theory and practice of the local and regional self-government the expression self-management is not widely established. It should be pointed out that the key documents of the Council of Europe on minorities are the „Framework Convention on the protection of the national minorities" (*FRY official gazette – Treaties*, no. 6/98) and the European Charter on regional and minority languages (SAM *official gazette – Treaties, no*.18/2005).

are referenced in connection with the status of the Serbian Orthodox Church in Kosovo.[24] The leading mediators in the negotiations, EU member states, the US, and the UK interpret the adequate level of self-management as similar to a previously accepted obligation to form an Association of Serbian majority municipalities under the agreements of 2013 and 2015.[25] In this context, Kosovo has to find a way around the internal legal dilemma created by the decision of its Constitutional Court that annulled the Agreement of 2015.[26]The Court did not find the idea of the Association *per se* unconstitutional but required some of its elements to be rehashed. It should be repeated that the APN requires the parties to respect all previously adopted agreements, which might indicate that the future solution would be in the form of constitutional amendments in Kosovo in line with the 2015 Agreement. However, the First Agreement of 2013 does not indicate how the self-management model should finally look and it is obvious that various models are in play. Even the EU Special Representative for the dialogue noticed that Kosovo institutions were presented with 15 various models of self-management for the Serbian community.[27] What is more, the authorities in Priština have to deal with the formalization of the Serbian Orthodox Church status. Although the

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[24] European External Action Service, "Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia." Brussels. February 27, 2023. Available at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en.], Accessed 10 May 2023.

[25] The two previous agreements are the First Agreement on the normalization of relations from 2013, and the Agreement on the Basic Principles for the Association on Municipalities: Prvi sporazum o principima normalizacije odnosa, tekst na engleskom jeziku dostupan na sajtu Vlade Republike Srbije, [https://www.srbija.gov.rs/cinjenice/en/120394; Osnovna načela/glavni elementi] Zajednice opština sa većinskim srpskim stanovništvom na Kosovu,
[https://eeas.europa.eu/archives/docs/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf], Accessed 10 May 2023.; The US Secretary of State, Anthony Blinken, is of the opinion that the implementation of these agreements will lead to the full recognition of Kosovo by the EU: "Accord leads off to Kosovo`s recognition by 5 EU countries", [https://www.rtklive.com/en/news-single.php?ID=22965], Accessed 10 May 2023.

[26] Constitutional Court of the Republic of Kosovo, Case No. K0130/15, Concerning the assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb majority municipalities in Kosovo general principles/main elements" with the spirit of the Constitution, Article 3 [Equality Before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo,
[https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf], Accessed 10 May 2023.

[27] Taylor, A., 2023. *EU Envoy Lajcak: Internationals won't repeat Balkan mistakes in Kosovo*, [https://www.euractiv.com/section/politics/news/eu-envoy-lajcak-internationals-wont-repeat-balkan-mistakes-in-kosovo/], Accessed 10 May 2023.

APN lists the obligation as a mutual one, this is not a realistic expectation.[28] This obligation was partially provided for in the Ahtisaari plan (2007), and the following special „Law on the specially protected areas" (2008), and a special unit of Kosovar police was formed to protect the objects of religious heritage. Nevertheless, under the APN stronger and more precise guarantees were given to protect Serbian cultural and religious heritage, following the existing European models.[29]

3.1. The Moscow Influence

Geopolitical pressures, primarily from official Moscow, to slow down, delay, or halt the normalisation process between Belgrade and Pristina, linked to the expectations of the outcomes of its two-year operation in neighbouring Ukraine, have also significantly impacted the dynamics of this process. Russia has endeavoured to provide Serbia with unwavering assurances that the matter of restoring relations with Pristina will be brought back onto the UN agenda.[30] However, the latest developments in the UN concerning the worsening situation for the Serbian community in Kosovo after the Central Bank of Kosovo regulation made the Euro, not the Serbian dinar, the only currency allowed for cash transactions,[31] do not leave too much room for optimism on the Serbian side. In the words of the Special Representative of the UN Secretary-General, the new regulations will affect tens of thousands of Kosovo-Serbs living in four northern municipalities and, more broadly, the economy, which depends on their purchasing power.[32] The Security Council failed to issue any resolution condemning this act, however.

3.2. The issue of recognition

The positions and attempts by certain states within the EU that have not recognised Kosovo's independence (Romania, Spain, Cyprus, Greece, and Slovakia) to

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28 European External Action Service, "Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia." Brussels. February 27, 2023. Available at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en.], Accessed 10 May 2023.

29 *Ibid*., Article 7.

30 *Bocan-Harčenko: Rusija Rusija podržava inicijativu da se pitanje Kosova vrati pred Savet bezbednosti Ujedinjenih nacija*, Blic, Beograd, 20. februar 2024. [https://www.blic.rs/vesti/politika/bocan-harcenko-pitanje-kosova-vratiti-pred-savet-bezbednosti-un/gs7k98e] Accessed 15 March 2024.

31 Oxford Analytica, Dinar ban will damage EU-led Kosovo-Serbia dialogue, [https://www.emerald.com/insight/content/doi/10.1108/OXAN-DB285888/full/html], Accessed 15 March 2024.

32 UN News, Security Council debates Kosovo's new rules on Serbian currency, [https://news.un.org/en/story/2024/02/1146382], Accessed 15 March 2024.

prolong this process are ambiguous. Some countries that have recognised Kosovo, such as Hungary, have a similar stance, arguing that the 2023 agreement should not be part of the EU negotiation framework.[33] The EU's approach to future enlargement and the method of its acceleration are insufficiently defined, revealing a certain need to keep the Western Balkans at a distance. Any potential exclusion of this part of Europe from future EU enlargements will contribute to further misunderstandings, a factual rise in Euroskepticism among the local public, and the complete marginalisation of the European idea. Additionally, it will deepen latent antagonisms existing between dominant ethnic communities in the Western Balkans and strengthen the regional aspirations and tendencies of the most numerous nations (such as "Greater Albania", "Serbian World", "Orthodox and Slavic Brotherhood", etc.).

3.3. Electoral Uncertainties

The United States is entering a period of rather uncertain presidential elections (November 2024) and the potential reshaping of its policy towards the Western Balkans in general, as well as its most significant unresolved issue—the relations between Belgrade and Pristina. The Kosovo authorities believe in the revival of the discourse on partition and demarcation in the case of a renewed victory for Donald Trump. Therefore, they have adopted particularly firm positions, including the rejection of the Statute of the Community of Serb-Majority Municipalities, risking further escalation of tensions with the EU.[34]

3.4. Mediator Credibility

The supervisory mechanism overseeing the implementation of all agreements reached in the dialogue between Belgrade and Pristina is deemed irrelevant, and the influence of the mediator, Slovak diplomat Miroslav Lajčák, appointed by the EU, lacks the desired credibility. Conversely, it is evident that this process only began to progress after the engagement of the United States. Consequently, the EU's credibility has been tarnished due to the slow and generally unsuccessful nor-

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[33] *RSE: Varhelji pokušao da blokira predloge za izmenu poglavlja 35 u pregovorima EU sa Srbijom*, Danas, Beograd, 3. februar 2024. [https://www.danas.rs/vesti/politika/rse-varheji-pokusavao-da-blokira-predlog-za-izmenu-poglavlja-35-u-pregovorima-eu-sa-srbijom/], Accessed 15 March 2024.

[34] The European Union proposal – Statute Establishing the Association of Serb-Majority Municipalities in Kosovo, 11 November 2023, [https://usercontent.one/wp/www.burimramadani.com/wp-content/uploads/2023/11/www.burimramadani.com_EU-Draft_Statue_October-2023.pdf.], Accessed 15 March 2024.

malisation process. Therefore, it is unreasonable to anticipate that the unfulfilled agreements from the first decade of the normalisation process will be enacted in the following decade.

3.5. Serbia's Foreign Policy Position

The political conditioning outlined in the instruments of the New Growth Plan for the Western Balkans, presented on November 8, 2023, is insufficient to motivate the involved countries to exhibit further collaboration.[35] Namely, the genuine geopolitical commitment of official Belgrade to join the EU of official Belgrade remains questionable due to its very intense relations with the Russian Federation, its strategic partner since 2013, and the ongoing and accelerated deepening of ties with the People's Republic of China, elevated to the level of an enhanced strategic partnership since 2016.[36] The challenging acceptance of Serbia's current geostrategic environment, given that almost all neighbouring states are NATO and EU members, coupled with the subtle nurturing of anti-Western and Euroskeptic sentiments in the public sphere, does not indicate that the West will be the geostrategic choice in the foreseeable future. This is especially true in anticipation of drastic geopolitical changes in Europe, primarily due to the Russian invasion of Ukraine. One must bear in mind that the polls show an overwhelming majority of Serbian citizens (80 %) regard the Russian Federation as Serbia's main ally.[37] Traditional Serbian foreign policy has for a while struggled to accommodate these contradictions, starting from former President Tadić's "four pillars of Serbian foreign policy".[38]

3.6. The Regional Environment

The current regional environment in the Western Balkans is also unfavourable, creating a challenging atmosphere for improving broader relations on the Balkan Peninsula. The strengthened Russian presence and the growing role of the People's Republic of China have a special bearing on this. While China currently

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35 New Growth Plan for the Western Balkans, COM(2023) 691 final, Brussels, 8 November, 2023. [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023/11/COM_2023_691_New%20Growth%20Plan%20Western%20Balkans.pdf.], Accessed 15 March 2024.

36 *Srbija i Kina potpisale ugovor o slobodnoj trgovini*, Radio Slobodna Evropa, Prag, 17. oktobar/listopad 2023. [https://www.slobodnaevropa.org/a/srbija-kina-slobodna-trgovina-sporazumi/32641003.html], Accessed 15 March 2024.

37 National(s), Kako građani vide nacionalne interese Srbije, Istraživanje, avgust 2022, [https://nationals.rs/wp-content/uploads/2022/11/NationalS-1.pdf], Accessed 15 March 2024.

38 Petrović, D.; Đukanović, D., *Stubovi spoljne politike Srbije: EU, Rusija, SAD i Kina*, Beograd: Institut za međunarodnu politiku i privredu, 2012.

lacks a clearly discernible political agenda and influence on political elites in the Western Balkans, it is poised to assume such a role in the relatively near future. The Chinese investments in the Balkans may conflict with the obligations of the candidate countries assumed under the accession process, especially in the field of environmental protection, labor relations and fight against corruption.[39] Additionally, numerous unresolved bilateral issues among the Western Balkan actors pose a significant obstacle to achieving complete normalisation of relations between Belgrade and Pristina.[40]

4. ROLE OF THE EU: IS THE EXISTING FRAMEWORK OF EU INFLUENCE ON BELGRADE AND PRISTINA SUFFICIENT?

4.1. Inflated Expectations and Disappointing Implementation

The EU has failed to establish accelerated dynamics in this process through its mediation and facilitation role in the dialogue between Pristina and Belgrade. At the beginning of the process, optimistic suggestions argued that the EU's approach has yielded concrete results, but nevertheless posited that such a top-down approach, which leaves considerable room for divergent and conflicting interpretations of key provisions, bears risks.[41] It was pointed out as well that parties regard the process as the opportunity to profit politically and economically from the EU' support, rather than the fundamental transformation of the underlying rationale of the conflict.[42] Thus, it was usually concluded in the doctrine that "fundamental differences among the two parties to the conflict and their diametrically opposed positions undermine the real perspective for lasting peace and EU integration, despite the fact that Serbia and Kosovo prepare to engage in new phases of dialogue".[43]

With Belgrade and Pristina accepting the Agreement on the Path to Normalisation of Relations in late February 2023, the expectations once more inflated, however the process nearly ground to a halt within a few months. That led to the

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[39] See more on this in Vučić, M., European Union integration and the belt and road initiative: A curious case of Serbia, *Međunarodni problemi*, Vol. 72, No. 2, pp. 337-355.

[40] Đukanović, D., *Balkan na posthladnoratovskom raskršću (1989–2020)*, Drugo izmenjeno i dopunjeno izdanje, JP Službeni glasnik, Institut za međunarodnu politiku i privredu, Beograd, 2020, pp. 171–199.

[41] Bieber, F., The Serbia-Kosovo Agreements: An EU Success Story?, *Review of Central and East European Law* Vol. 40, No. 3-4, 2015, p. 289.

[42] Economides, S.; Ker-Lindsay, J., Pre-Accession Europeanization: The Case of Serbia and Kosovo, Journal of Common Market Studies, Vol. 53, No. 5, pp. 1027-1044.

[43] Hajrullahu, A., The Serbia Kosovo Dispute and the European Integration Perspective, *European Foreign Affairs Review*, Vol. 24, No. 1, 2019, p. 101.

escalation in northern Kosovo, areas with a majority Serbian population, during May and June,[44] and particularly in the second half of September due to the events surrounding the Banjska Monastery.[45]

The only visible success of the agreements so far has been the adoption of the Declaration on Missing Persons on the 2nd of May 2023 in Brussels by the Serbian President and Kosovo's Prime minister.[46] The DMP provides that the expression „missing persons" includes the persons who were forcibly disappeared following the understanding of the International Committee of the Red Cross.[47] The Declaration offers such an understanding since the obligation to provide information on missing persons is a part of customary international law (ICRC(a)),[48] where the state detaining the prisoners of war or civilians of the opposing side is obliged to collect the information on them and relate it to the opposing side, or if those persons are killed to provide the information on their places of burial. The difference between the two terms is in the fact that missing persons' human rights are not necessarily infringed on – these can be legally captured combatants (prisoners of war), whose location is presently unknown, or legally killed combatants or civilians whose burial places are unknown.[49]

4.2. The Ability of the EU to impose Sanctions for Non-implementation

In addition to the aforementioned developments, the authorities in Pristina faced certain sanctions from the EU due to inadequate cooperation in the de-escalation

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44 *Serbia and Kosovo must work to de-escalate the situation in northern Kosovo*, European Parliament, Press Releases, 19 October 2023.
[https://www.europarl.europa.eu/news/en/press-room/20231013IPR07135/serbia-and-kosovo-must-work-to-de-escalate-the-situation-in-northern-kosovo], Accessed 15 March 2024.

45 Molonay, M., *Kosovo monastery siege ends after heavy gun battles*, BBC News, 24 September 2023. [https://www.bbc.com/news/world-europe-66905091], Accessed 15 March 2024.

46 "Belgrade-Pristina Dialogue: Statement of the high Repsresentative on the Political Declaration on Missing Persons". 2 May 2023,
[https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-statement-high-representative-political-declaration-missing-persons_en], Accessed, 22 May 2023.

47 Radio Slobodna Evropa, „Tekst Deklaracije o nestalim osobama koju su usvojili Kurti i Vučić", [https://www.slobodnaevropa.org/a/32389639.html?nocache=1], Accessed 17 May 2023.

48 International Committee of the Red Cross Rule 117: Accounting for Missing Persons, International Humanitarian Law Databases,
[https://ihl-databases.icrc.org/en/customary-ihl/v1/rule117], 17 May 2023.

49 Rome Statute of the International Criminal Court, Article 7(1),
[https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf]; International Criminal Tribunal for the former Yugoslavia, Kupreškić *et al.* (IT-95-16), para. 2437; International Committee of the Red Cross Rule 98: Enforced Disappearance, International Humanitarian Law Databases,
[https://ihl-databases.icrc.org/en/customary-ihl/v1/rule98#Fn_78FB8E2F_00010], 17 May 2023.

of tensions in northern Kosovo in mid-June 2023. However, the local authorities in the region ignored these restrictive measures, which included the suspension of meetings with EU officials and potential reductions in financial aid. Prime Minister Albin Kurti undertook these sudden actions to secure new positions effectively ahead of the 2024 US elections. The potential return of former US President Donald Trump to the presidential position is a possibility, and this may lead to the reopening of discussions about the demarcation or division of Kosovo, as was prominent during his previous term.[50] Following the events in the Banjska Monastery and the attack on Kosovo Police members, Prime Minister Albin Kurti called for similar restrictive measures against the authorities in Belgrade due to, as he often stated, their involvement in the incidents.[51] However, there was no significant interest within the EU in imposing such measures.

Despite the visible blockage of the implementation of the Agreement on the Path to Normalisation of Relations between Belgrade and Pristina (see Table 1), the EU has not yet used the possibility of reducing or suspending financial aid for the parties. This could be attributed to the lengthy process of amending the negotiation framework for the Republic of Serbia regarding Chapter 35 (Other). As the parties are expected to conclude a crucial process related to accessing funds from the EU New Growth Plan for the Western Balkans, aligned with the mechanisms for its implementation, the success of this endeavour remains uncertain, given the very complex conditioning procedure for the Western Balkan actors.[52] On the other hand, Serbian authorities often assert that these funds are not essential to them, emphasising another significant issue besides relations with Pristina: the low alignment of Serbia's foreign policy with the Common Foreign and Security Policy of the EU. This is especially evident in the absence of restrictive measures against the Russian Federation since 2014 and particularly since the Russian invasion of Ukraine in 2022.[53]

It should be emphasised that an integral part of the Agreement on the Path to Normalisation of Relations between Kosovo and Serbia is Article 5, wherein the parties committed to adhering to Article 2 and Article 21 of the Treaty on Europe-

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50 *Trampova administracija za podelu Kosova*, Radio-televizija Vojvodine, Novi Sad, 26. jul 2018. [https://rtv.rs/sk/politika/trampova-administracija-za-podelu-kosova_937587.html], Accessed 15 March 2024.

51 *Kurti: Sanctions on Serbia as punishment, to prevent repeat of violence*, N1, Belgrade, 24 November 2023. [https://n1info.rs/english/news/kurti-sanctions-on-serbia-as-punishment-to-prevent-repeat-of-violence/] Accessed 15 March 2024.

52 New Growth Plan for the Western Balkans, *op. cit.*, note 35.

53 Tuhina, G., *Ne tako laki kriterijumi da Zapadni Balkan dobije novac iz budžeta EU*, Radio Slobodna Evropa, Prag, 11. mart/ožujak 2024, [https://www.slobodnaevropa.org/a/eu-zapadni-balkan-plan-rasta/32856758.html] Accessed 15 March 2024.

an Union, which can be interpreted as acceptance of aligning their foreign policies with the Common Foreign and Security Policy of the EU.[54] In this regard, the authorities in Pristina have largely aligned themselves with the EU, unlike Belgrade, which has consistently declared its refusal to join this policy for the past two years. Hence, it is evident that a significant disparity persists between the two sides—Belgrade and Pristina—in their fundamental geostrategic perspectives.[55] While Serbia continues to remain very close to the authorities of the Russian Federation, Kosovo insists primarily on accelerated entry into NATO. Unless Serbia makes a major shift in its foreign policy approach, there is a considerable likelihood that the strategic divergence between Belgrade and Pristina will further widen.

The EU is attempting to employ a strategy similar to the one used immediately before the breakup of the Socialist Federal Republic of Yugoslavia in 1991, aiming to alleviate tensions in this part of the Balkans and Europe through economic incentives and a certain degree of additional engagement. However, it seems that conditioning financial and investment support for Belgrade and Pristina will remain a highly ineffective mechanism for implementing everything envisioned by both previously agreed frameworks and the Agreement on the Path to Normalisation of Relations between Kosovo and Serbia. In accordance with the Implementation Annex of the Agreement on the Path to Normalisation of Relations, reached in Ohrid on March 18, 2023, it was anticipated that within 150 days, a special donor conference would be held, where the EU would offer a special investment and financial aid package for Serbia and Kosovo.[56] However, that deadline expired in the middle of the past year, and it seems that none of the agreed-upon measures will be implemented soon. The precondition for organising this conference was for the EU, as the dialogue moderator, to verify that the agreement had been fully implemented.[57] However, given that less than a third of the agreement has been implemented thus far, it is unrealistic to expect that the donor conference for the funds presented in the New Growth Plan for the Western Balkans, introduced in November 2023, will be realised.[58]

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54 Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 6.

55 See: Serbia 2023 Report — Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023: Communication on EU Enlargement policy", SWD(2023) 695 final, Brussels, 8 November 2023, p. 148.
[http://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf.], Accessed 15 March 2024.

56 Point 7. – Belgrade-Pristina Dialogue: Implementation Annex to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 19.

57 *Ibid.*

58 Tuhina, G., *op. cit.*, note 53.

Another concrete framework outlined in the Implementation Annex is the mutual commitment and understanding of Belgrade and Pristina that non-compliance with their commitments "may have direct negative consequences for their EU accession processes and the financial assistance they receive from the EU."[59] However, this mechanism is potentially problematic because, *via facti* membership in the EU has not been a priority for the authorities in Belgrade for several years. Conversely, for Pristina, the primary goal is membership in NATO. Moreover, Belgrade relies on the expectation that Hungary will potentially block any decision related to the suspension of financial aid from the EU.[60] In this regard, both Belgrade and Pristina feel relatively unburdened and lack clear motivation to engage in resolving their mutual relations in line with the agreement. Furthermore, Serbia still believes that, with the help of Russia and potentially China, it could bring the issue of relations with Pristina back to the United Nations, although this expectation is rather unrealistic.

When discussing the binding nature and possible sanctions for the failure to perform the Agreement and the Annex, it must be borne in mind that both parties failed to sign the documents and that this fact opens the issue of whether the documents are legal at all. Priština insisted on signing, but Belgrade refused it. The EU as a mediator, via its High Representative for foreign and security policy, interpreted that both parties accepted the APN and are willing to fully implement it. The doctrine of international law recognizes many examples of unsigned international agreements that remained such especially because of sensitive contents, from the point of view of political images of representatives that signed them.[61] Furthermore, as far as 1933, the doctrine accepted that unilateral oral declarations might be of the same legal quality as the formally signed treaties.[62] In recent times, in his seminal work on the concept of treaty in international law, Klabbers reiterated the same position.[63] Klabbers follows the logic of the Vienna Convention on the Law of Treaties, that the intent to be bound by the parties is a constitutive element of the concept of a „treaty", regardless of the specific form that the intent

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59 Point 12 – Belgrade-Pristina Dialogue: Implementation Annex to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 19.

60 *Mađarska potvrdila da neće dozvoliti uvođenje sankcija Srbiji, izjavio Dačić,* Radio Slobodna Evropa, Prag, 9. oktobar 2023. [https://www.slobodnaevropa.org/a/dacic-sijarto-orban-sankcije-srbija-madjarska-eu/32630136.html], Accessed 15 March 2024.

61 Aust, A., *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, 2013, pp. 87-113.

62 Garner, J. W., The International Binding Force of Unilateral Oral Declarations, American Journal of International Law, Vol. 27(3), 1933, pp. 493-497.

63 Klabbers, J., *The Concept of Treaty in International Law*, Martinus Nijhoff Publishers, 1996.

takes in the issue at hand.[64] As far as it can be noticed, although the Serbian side refused to sign the APN, nowhere was it publicly stated that its provisions would not be implemented, except for Kosovo's membership in the UN, which the President declared unacceptable.[65]

What is more, the formulation of treaty provisions leads one to conclude that they are of hard legal quality, since the language used is characteristic of international treaties (the expression „shall" is used in the English language for norms of a commanding nature),[66] the provisions are detailed enough, the agreement is implemented in good faith and with the support of mediators. The term „agreement" itself does not presuppose the legal nature of the text. International law does not require a certain form of the treaty for it to be binding, except when parties expressly agree on this matter. Vienna Convention on Treaties defines the international treaty as „an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[67]

The APN lacks clear provisions on sanctions for failure to perform a treaty. However, the freezing of resources from the accession funds and discontinuation of the accession negotiations are certainly some of the possible mechanisms of pressure by the EU on the parties to fulfill this agreement, and as such they are listed in the AI and signify why the EU does not have any dilemma about its binding nature.

4.3. Expectations of the Parties regarding the Accession to the EU

On the other hand, the authorities in Pristina expect that, with significant support from Albania and the United States, particularly after the accelerated transformation of the Kosovo Security Forces since 2018, a mechanism will be found for NATO membership, despite the fact that its independence has not been recognised by four NATO member states. This possibility seems realistic, especially considering that Bosnia and Herzegovina's path to NATO membership is almost entirely halted and the regional situation requires the Alliance to find solutions

64 *Ibid.*, p. 169.

65 Vučić: Priznanje Kosova i članstvo u UN ne dolazi u obzir, [https://www.vesti.rs/Vesti/CLANSTVO-U-UN-I-PRIZNANJE-TZV-KOSOVA-NE-DOLAZI-U-OBZIR-Vucic-se-obratio-gradjanima-Teski-dani-tek-dolaze-FOTO.html], 23 May 2023.

66 Compare with the 2013 Agreement where the expression "will" was used, "not an ordinary expression for obligations of a legal nature, that usually use the form shall", Vladimir Đerić, Tatjana Papić, „Međunarodnopravni aspekti odluke Ustavnog suda Srbije o ustavnosti i zakonitosti Briselskog sporazuma". *Anali Pravnog fakulteta u Beogradu* 2, 2016, p. 211-.212.

67 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, p. 331.

for further expansion.[68] The NATO expansion process in the Western Balkans excludes Serbia, which has been militarily neutral since 2007 and has been regarded by some influential NATO member states as a "Russian proxy".[69] Additionally, since 2013, Serbia has been the only country in the Western Balkans with observer status in the Collective Security Treaty Organization (CSTO), which operates under the control and supervision of the Russian Federation.

Kosovo is already a member of the IMF, the World Bank, the EBRD, the International Olympic Committee and several regional initiatives. The asterisk behind Kosovo's name as a member of these international organizations so far has indicated that its status, at least when regional representation is concerned, is regulated following Resolution 1244 of the Security Council of the United Nations, which means it is a territory under international supervision by the UNMIK (United Nations Mission in Kosovo).[70] In addition, it confirmed that Kosovo's status is in international relations regulated in accordance with the International Court of Justice's Advisory opinion on the issue of the legality of the Declaration of Independence (although the ICJ's opinion is not really meaningful for the purpose).[71] The asterisk has seemingly disappeared in the APN With it, changes the position of the Republic of Serbia as well. Previously, it argued that Kosovo could be a member only of regional international organizations (Council for Regional Cooperation, CEFTA, etc.), but with a clear designation of its special status in international relations marked by the asterisk. Now, Kosovo can be a member not only of regional but any other international organization, while its special status is not designated by any symbol. The only remaining reservation is that Kosovo is not mentioned in the APN under its constitutional name „Republic of Kosovo".[72]

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68 Đukanović, D., Bosna i Hercegovina na neizvesnom putu ka članstvu u NATO, *Međunarodni problemi*, vol. LXXI, No. 3, 2019, pp. 335–361.

69 *Vučić on Cameron's statement: Serbia is not Russia's proxy in the Balkans*, Vijesti, Podgorica, 10 January 2024. [https://en.vijesti.me/world/balkan/689256/vucic-about-Cameron%27s-statement-that-Serbia-is-not-Russia%27s-proxy-in-the-Balkans], Accessed 15 March 2024.

70 See S/RES/1244, 1999, available at: [https://unmik.unmissions.org/united-nations-resolution-1244]. The Agreement on the Regional Representation of Kosovo signed under the auspices of the EU is available at: [https://dialogue-info.com/wp-content/uploads/2011/02/Sporazum-o-regionalnom-predstavljanju-i-saradnji-24.02.2012.pdf], 5 June 2023.

71 ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010, [https://www.icj-cij.org/case/141].

72 Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia, *op. cit.*, note 6. See more in Vučić, M., Đukanović, D., The Challenges of Normalization of Relations between Belgrade and Priština: Implications of the "Agreement on the Path to Normalization (2023)", *Journal of Liberty and International Affairs* Vol. 10, No. 1, 2024, pp. 20-36.

In addition, this is the first agreement of the two sides that expressly mentions the „accession of Kosovo to the EU".[73] So far, the used expressions were more descriptive than legally meaningful, such as „road of Kosovo to the EU", „convergence", „the future of Kosovo in the EU", etc. Does the use of a formal legal term for EU membership mean that Kosovo has now indisputably attained the elements of statehood needed for a candidate? This is indeed only a hypothetical question as long as five EU member states refuse to recognize Kosovo's independence.

The EU is progressively losing legitimacy in the Western Balkans, particularly in countries where tendencies towards reliance on the East are growing (Ukraine and Moldova), such as in a significant part of the public in Serbia and Bosnia and Herzegovina and increasingly in North Macedonia and Montenegro.[74] The ambitious goals of the EU, which should have been achieved through the policy of conditionality within the Stabilization and Association Process over the past two and a half decades, are now being questioned to some extent.[75] Therefore, we can conclude that its strategy to implement all agreements reached in the dialogue between Belgrade and Pristina since 2011 is entirely inadequate and ineffective. Restoring the EU's credibility would require providing full guarantees related to EU membership to the authorities in Belgrade and Pristina. However, at the moment, that seems highly unrealistic.[76]

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73 *Ibid.*

74 Already back in 2009 Noutcheva was arguing the EU's normative power was unable by itself to bring about reforms in the region, Noutcheva, G., Fake, partial and imposed compliance: the limits of the EU's normative power in the Western Balkans, *Journal of European Public Policy*, Vol. 16, No. 7, 2009, pp. 1065-1084.

75 Richter, S.; Wunsch, N., M*oney, power, glory: the linkages between EU conditionality and state capture in the Western Balkans*, Journal of European Public Policy, Vol. 27, No. 1, 2020, pp. 41-62.

76 Indeed, the very concept of the "Western Balkans" is "often associated with the pejorative concept of balkanization", while the other countries from the geographical region that have already joined the EU "are no longer qualified as Balkan but as European", see more in Lika, L., The meaning of the Western Balkans concept for the EU: genuine inclusion or polite exclusion?, *Southeast European and Black Sea Studies,* Vol. 24, No. 1, 2024, pp. 63-78.

Table 1: *Overview of the specific obligations of the authorities in Belgrade and Pristina assumed by the "Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia" and the "Annex on Implementation" (Brussels, February 27, 2023/Ohrid, March 18, 2023)*

JOINT OBLIGATIONS	SPECIFIC OBLIGATIONS-BELGRADE AUTHORITIES	SPECIFIC OBLIGATIONS-PRISTINA AUTHORITIES
Article 1 - "normal, good-neighbourly relations... The parties will recognise relevant documents and national symbols..."	—	—
Article 2 - "act according to the purpose and principles of the UN Charter..."	—	—
Article 3 - "the parties shall resolve any disagreement...by peaceful means and shall refrain from the threat or use of force"	—	—
Article 4 - The parties "shall not represent the other in the international sphere"	"Serbia will not oppose Kosovo's membership in any international organisation"	—
Article 5 - absence of mutual blockade on the way to EU membership; respecting the values from Articles 2 and 21 of the Treaty on the European Union	Serbia has not harmonised its foreign policy with the Common Foreign and Security Policy, which is implied by Article 21 of the EU Treaty (primarily related to EU restrictive measures towards the Russian Federation)	The authorities in Pristina have an almost complete degree of compliance with the EU CFSP
Article 6 - joint work on a future comprehensive legally binding agreement; conclusion of numerous mutual agreements in the following period	—	—
Article 7 - The parties undertake to work to achieve "the appropriate level of self-governance of the Serbian community in Kosovo"; "formalize the status of the Serbian Orthodox Church in Kosovo"	—	Establishment of "self-governance" for Serbs – Communities of Serb-Majority Municipalities and dialogue on the status of the Serbian Orthodox Church with the leaders of this religious community
Article 8 - establishment of permanent missions to the Governments in Belgrade and Pristina and related agreements	—	—
Article 9 - The parties note the efforts of "the EU and other donors to establish a special package of investments and financial support"; condition - full implementation of everything agreed	—	—
Article 10. - Establishment of the Joint Committee under the presidency of the EU; Enforcement of prior binding agreements	—	The focus is primarily on the establishment of the Community of Serb-Majority Municipalities in Kosovo in accordance with earlier agreements
Article 11 - The annex on implementation is a part of the agreement ((adopting the "Declaration on Missing Persons"; the Agreement becomes part of the negotiation framework; conditionality of financial and investment assistance; establishment of the Joint Implementation Commission; EU donor conference;	—	Pristina immediately begins with the formation of the Community of Serbian Majority Municipalities.
Source: *The author of the table is Dragan Đukanović. The table was created based on the content of the Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia and the Annex on Implementation, as well as a review of the obligations performed so far (18 March 2024).*		

5. CONCLUSION

Considering the upcoming European Parliament elections in June 2024, it is evident that the EU's short-term focus on relations between Belgrade and Pristina will diminish. The current administration in Brussels will primarily prioritise preventing potential open conflicts. Any new dynamics in the normalisation process can be expected in the second half of the year, after the establishment of new European institutions. However, if the EU fails to achieve significant results in this process within a relatively short period, it will find itself in a rather precarious situation, thus weakening its capacity to influence the Western Balkans. Moreover, there is a risk that, with the strengthening roles of Russia and China, it could be largely marginalised as an actor in the long term. Therefore, a specific test of success for the EU is the comprehensive regulation of relations between Belgrade and Pristina, primarily the implementation of everything agreed upon in the normalisation dialogue since March 2011. These relations have indeed become a vital question for broader European security, as confirmed in the preamble of the Agreement on the Normalisation of Relations between Kosovo and Serbia.[77] However, the effectiveness of the concept of financial and investment conditioning for Belgrade and Pristina is highly questionable, both in the context of the broader Stabilisation and Association Process and the November 2023 New Growth Plan for the Western Balkans.

On the other hand, the potential dismissive attitude of the authorities in Belgrade and Pristina concerning financial and investment relations with the EU could leave them on the margins of European events, in a state of partial or reinforced isolation, which would weaken their position in regional and European frameworks. Therefore, waiting for a more favourable status for themselves would effectively deprive them of the opportunity to leverage the potential for accelerated economic growth, especially in the challenging economic situations in most European countries. This would also imply a simultaneous and drastic change in the demographic structure in Serbia and Kosovo, exacerbated by the already significant number of their citizens emigrating, primarily to Western European countries.[78] Additionally, it should be noted that the EU and the US have not fulfilled an earlier promise to assist the parties regarding infrastructure connectivity through the construction of roads and the reconstruction of railway networks. This has been reiterated several

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77 Preamble of the Agreement on the Path to the Normalisation of Relations between Kosovo and Serbia, *op. cit*., note 6.

78 Vučković, B., '*Mladi odlaze trajno*': *Migracije sa Zapadnog Balkana*, Radio Slobodna Evropa, Prag, 7. januar/siječanj 2023, [https://www.slobodnaevropa.org/a/mladi-zapadni-balkan-odlazak/31642674.html], Accessed 15 March 2024.

times within the Berlin Process and the Washington Agreement as of September 2020.[79] Moreover, the establishment of air routes between Belgrade and Pristina, agreed upon earlier in the normalisation process under the auspices of the former administration of US President Donald Trump, has not been revived.[80]

The research has shown that the EU credibility in the Western Balkans will largely depend on the successful implementation of everything agreed in the dialogue between Belgrade and Pristina. As noted in the Agreement, the issue of these relations is fundamental and closely connected to the context of broader European security. The EU has assumed a dominant role in implementing all agreed-upon aspects between Belgrade and Pristina, thereby leaving a realistic possibility that there could be serious consequences for their EU accession process and the financial aid they are expected to receive.

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Review article

REMEDYING THE JUDICIARY SYSTEM IN POLAND – RESTORING THE RULE OF LAW

Tadeusz Zembrzuski, PhD, Full Professor
University of Warsaw, Faculty of Law and Administration
ul. Krakowskie Przedmieście 26/28 00-927 Warszawa, Poland
zembrzuski@wpia.uw.edu.pl

ABSTRACT

A European Union member state since May 2004, Poland has in recent years been repeatedly challenging fundamental values and principles of European Union law: the rule of law, loyal co-operation, and the primacy of applying EU law. The significance of multiple international agreements binding for Poland has been depreciated, the constitutionally guaranteed tripartite division of power and hierarchy of legal acts seriously distorted.

According to the prevailing consensus, the judiciary is one of the areas to the greatest extent affected by far-reaching violations and problems. Amendments to the Common Courts Law (so-called muzzle law) made it possible to penalise judges for rulings designed to implement standards arising from international agreements Poland is signatory to and the Treaty on European Union, or even implement international courts' case law. Consequently, disciplinary proceedings had been initiated against judges referring to European Union law and/or the European Convention on Human Rights in their rulings. Poland's Constitutional Court – the correctness of its staffing procedures questionable – has issued judgements undermining the validity of European Union law and the European Convention on Human Rights in Poland.

Issues of appointing justices and the consequences of their rulings have triggered greatest doubt in Poland. Circumstances of post-2017 changes to the composition of the National Council of the Judiciary (NCJ) have undermined the body's independence from legislative and executive powers. Most lawyers believe that the Council's composition contradicts Article 187 of the Constitution of the Republic of Poland: justices making up the NCJ are selected by representatives of political parties rather than the judicial community. The situation has impacted the capacity for proposing independent and impartial candidates to judicial positions at Polish courts of law, currently involving as many as around 3,000 judges on all levels of the judiciary. Many believe that they have been appointed in violation of fundamental national regulations governing the procedure for judicial appointments.

In a ruling in Case C-718/21 of December 21st 2023, and in reference to the European Court of Human Rights' ruling of November 8th 2021 in the case of Dolińska-Ficek and Ozimek (Application Nos. 49868/19 and 57511/19), the Court of Justice of the European Union

found that the panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland, the panel having been appointed by the politicised NCJ, is not an independent or impartial court previously established pursuant to legislation, as required by European Union law. It has been recognised that the totality of circumstances behind the appointment of justices forming the panel who had submitted questions in the case may – in the eyes of the public – raise reasonable doubt with regard to the independence and/or impartiality of aforesaid judges. It may further undermine the confidence that the judiciary should inspire in any democratic society or a state of law.

Poland's parliamentary elections of October 15th 2023 brought a change in government, the established majority facing the task of remedying the judiciary and restoring the rule of law. Notable early announcements include measures intended to block the works of the National Council of the Judiciary, by preventing the Minister of Justice from publishing announcements concerning new judicial competitions. The Council has been continuing operations and making decisions crucial to the community, with the likely consequence of slowing down the tempo of expected changes in Poland. Such changes should be achieved through the systemic introduction of remedial laws accounting for the importance of the rule of law and principles resulting from European Union membership.

Keywords: *Judiciary system, National Council of the Judiciary, Rule of law, Poland, Supreme Court*

1. INTRODUCTION

Europe has been experiencing benefits arising from an order based on specific principles for decades. The principle of the rule of law is of fundamental importance, having been placed at the very pinnacle of the European Union's legal order[1] as a *"union of values"*[2], founded on respect for human dignity, freedom, democracy, human rights and *Rechtsstaat*. Aforementioned values are based on shared roots, giving rise to obligations addressing all member states. The weight and importance of respect for the rule of law ought to be the focus of incessant attention and care. Once a governance system loses its attribute of legality, all aforesaid values are undermined, turning into meaningless slogans and postulates.

The purpose of this paper is to shed light on the legal situation in Poland, a country which has in recent years been exposed to a multifaceted rule of law crisis. A presentation of rule of law crisis, especially with regard to issues pertaining to independence of the judiciary, is of considerable significance to how the European Union operates as a whole. Not only have consequences of the crisis impacted the internal situation of Poland – they have also been influencing the order and functioning of other EU member states.

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1 Lenaerts, K., *The Rule of Law within the EU*, "Europejski Przegląd Sądowy", No. 7, 2023, p. 4 *et seq*.

2 Lenaerts, K., *The European Union as a Union of Democracies, Justice and Rights*, "International Comparative Jurisprudence", No. 2, 2017, p. 132.

A European Union member state since May 2004, Poland had in recent years been repeatedly challenging fundamental values and principles of European Union law: the rule of law, loyal co-operation, and primacy of applying EU law. A Central European country with a population of nearly 38 million had been affected by a grave and multifaceted crisis of the state's government and political system. Multidimensional and controversial action taken by individual centres of power formed part of so-called constitutionality of *"positive change"*[3], i.a. abusive constitutionality[4] expressed in ostentatious negligence of the rules and principles of law. Blatant exemplars thereof included modified practices of applying the Constitution[5], reformulated interpretations of sovereignty, and manipulative and subversive propositions of the Constitution's primacy over international agreements. The significance of multiple international agreements binding on Poland had been depreciated, constitutionally guaranteed tripartite division of power and hierarchy of legal acts seriously distorted. The issue of the judiciary's independence was recognised as one of the most significant aspects of the multifaceted crisis of the rule of law.[6] Post-2015 years brought a profound constitutional crunch, its significance and outcomes by no means limited to domestic issues, having carried major repercussions in the European Union and international relations alike.

Notably, European courts[7] have referenced the circumstances and multiple legal issues in Poland[8] on a number of occasions over recent years. Occasionally universal in nature, case law-related conclusions may be useful guidelines to the restitution and

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3 Piotrowski, R., *Konstytucjonalizm „dobrej zmiany"* (*The Constitutionality of "Positive Change"*), "Państwo i Prawo", No. 10, 2022, p. 351.

4 Wyrozumska, A., *Wyrok Trybunału Konstytucyjnego (K 6/21) dotyczący orzeczenia Europejskiego Trybunału Praw Człowieka w sprawie Xero Flor, które rzekomo „nie istnieje"*, (*Constitutional Court Ruling (K 6/21) regarding the ostensibly 'non-existent' European Court of Human Rights Judgement in the case of Xero Flor v. Poland*), "Europejski Przegląd Sądowy", No. 2, 2023.

5 Constitution of the Republic of Poland of April 2nd 1997, *Journal of Laws* 1997, No. 78, item 483.

6 Kocjan, J., *Znaczenie orzecznictwa Europejskiego Trybunału Praw Człowieka dla naprawy wymiaru sprawiedliwości po kryzysie praworządności w Polsce* (*Significance of European Court of Human Rights Case Law to the Effort of Remedying the Judiciary Following the Rule of Law Crisis in Poland),* "Europejski Przegląd Sądowy", No. 12, 2023, p. 18 *et seq*.

7 There are currently several hundred proceedings pending before European courts (Court of Justice of the European Union and European Court of Human Rights), regarding individual aspects of how the judiciary functions in Poland.

8 Rakowska, A., *Czy Europejski Trybunał Praw Człowieka jest zgodny z Konstytucją RP? – czyli o reakcjach władzy publicznej na orzeczenia trybunału strasburskiego w sprawach dotyczących praworządności w Polsce* (*Does the European Court of Human Rights Conform to the Constitution of the Republic of Poland? – or on State Authority Reactions to the Strasbourg Tribunal's Judgements Regarding the Rule of Law in Poland*), "Europejski Przegląd Sądowy", No. 12, 2023, p. 43 *et seq*.

strengthening of the rule of law[9]. Noteworthy European Court of Human Rights statements include judgements in the following cases: *Broda and Bojara v Poland*, of June 29th 2021[10]; *Reczkowicz v Poland*, of July 22nd 2021[11]; *Dolińska-Ficek and Ozimek v Poland*, of November 8th 2021[12]; *Advance Pharma sp. z o.o. (Co. Ltd.) v Poland*, of February 7th 2022[13]; *Grzęda v Poland*, of March 15th 2022[14], and *Wałęsa v Poland*, of November 23rd 2023[15]. The statement of the Court of Justice of the European Union of November 19th 2019 is notable as well[16], as is the judgement of the Grand Chamber of the Court of Justice of the European Union of October 6th 2021[17]. Polish reality was referenced and the experience of other countries analysed in a number of cases, the latter especially observable in the judgement of the Grand Chamber of the European Court of Human Rights of December 1st 2020, in the case of *Guðmundur Andri Ástráðsson v Iceland* (Application No. 26374/18)[18], which has served to systematise the interpretation of the right to fair trial before a duly constituted court of law. Statements by domestic courts – the Supreme Court[19] and

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9 Górski, M., *Perspektywa prawa jednostki do sądu należycie ustanowionego: zastosowanie testu Ástráðsson w Polsce* (*The Perspective of an Individual's Right to Fair Trial before a Duly Constituted Court of Law: Applying the* Ástráðsson Test in Poland), "Europejski Przegląd Sądowy", No. 11, 2021, p. 33.

10 Judgment, *Broda and Bojara v Poland,* European Court of Human Rights, (29 June 2022), Applications Nos. 26691/18 and 27367/18.

11 Judgment, *Reczkowicz v Poland,* European Court of Human Rights, (22 July 2021), Application No. 43447/19.

12 Judgment, *Dolińska-Ficek and Ozimek v Poland,* European Court of Human Rights, (8 November 2021), Applications Nos. 49868/19 and 57511/19.

13 Judgment, *Advance Pharma sp. z o.o. (Co. Ltd.) v Poland,* European Court of Human Rights, (7 February 2022), Application No. 1469/20.

14 Judgment, *Grzęda v Poland*, European Court of Human Rights, (15 March 2022), Application No. 43572/18.

15 Judgment, *Wałęsa v Poland*, European Court of Human Rights, (23 November 2023), Application No. 50849/21.

16 Case of AK pursuant to joined actions C-585/18, C-624/18 and C-625/18 [2019] ECLI:EU:C:2019:982.

17 Case C-487/19, W.Ż [2021] ECLI:EU:C:2021:798.

18 Wrzołek-Romańczuk, M., *Glosa do wyroku z 1.12.2020 r. wydanego przez Wielką Izbę Europejskiego Trybunału Praw Człowieka w sprawie Guðmundur Andri* Ástráðsson *przeciwko Islandii (skarga nr 26374/18)*, (*Glossary to the Judgement of the Grand Chamber of the European Court of Human Rights of December 1st 2020 in the Case of Guðmundur Andri Ástráðsson v Iceland (Application No. 26374/18)*), "Iustitia", No. 1, 2021, p. 43; Garlicki, L., *Trybunał Strasburski a kryzys polskiego sądownictwa. Uwagi na tle wyroku Europejskiego Trybunału Praw Człowieka z 1 December 2020 r.* Ástráðsson *przeciwko Islandii* (*The Tribunal in Strasbourg in the Context of the Crisis in the Polish Judiciary. Background Comments to the Judgement of the European Court of Human Rights of December 1st 2020 in the Case of Guðmundur Andri Ástráðsson v Iceland*), "Przegląd Sądowy", No. 4, 2021, p. 5 *et seq.*

19 Supreme Court ruling of December 5th 2019, Ref. No. III PO 7/18, OSNP (*Supreme Court Case Law – Chamber of Labour Law* etc.) 2020/4 item 38, Supreme Court decision of January 15th 2020, Ref. No. III PO 8/18, OSNP 2020/10 item 114, resolution of joined Supreme Court Chambers of January 23rd 2020, Ref. No. BSA 1-4110-1/20, OSNC (*Supreme Court Case Law – Civil Law Chamber*) 2020/4 item 34.

Supreme Administrative Court[20] - have been profuse as well. Not only did Polish authorities challenge their case law – they also resorted to the ostentatious depreciation of European tribunal rulings, refusing to act on them on a number of occasions.[21] Effective ruling implementation was repudiated, European standards and principles blatantly opposed. Any attempts to point out that the dismantling of the rule of law, the principle of the independence of the judiciary in the European Union legal order included, is a matter affecting the entire European community rather than the domestic system of a single state, were shouted down and mocked. Such attitudes swayed Poland's position and authority as a member state of an international community, while exacerbating rule of law issue-related disputes.

Poland's parliamentary elections of October 15th 2023 brought a change in government and a new parliamentary majority[22], all of whom charged with restoring the rule of law and remedying the judiciary. Meeting expectations of the public will require more than the transformation of individual state institutions – rebuilding public trust remains a priority. Wide-ranging, comprehensive legislative and organisational measures will be mandatory, their consistent implementation certainly requiring time and difficult decisions alike, the effort to restore rule of law in Poland a multi-stage, complex and time-consuming task.[23] Potential difficulties impacting the legislative process in Poland are of significance as well.[24]

Polish politicians and lawyers will be expected to work on new regulations, attention paid to their quality – and consistency in their implementation – of particular

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20 See Supreme Administrative Court judgements of October 11th 2021, Ref. No. 9/18, as well as judgements of September 21st 2021 in cases II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, and II GOK 14/18.

21 Piaskowska, O., *Polska dołącza do grupy państw ignorujących wyroki ETPCz* (*Poland Joins the Group of States Ignoring ECHR Judgements*), Prawo.pl [https://www.prawo.pl/prawnicy-sady/polska-ignoruje-wyroki-etpc,512819.html], Accessed 26 March 2024.

22 The Polish Parliament consists of the *Sejm* (Lower House – 460 deputies) and Senate (Upper House – 100 senators).

23 In the early days of the new government in office in Poland, National Recovery Plan funds were successfully unblocked after months of having been withheld; moreover, the European Commission decided to confirm Poland's participation in the European Public Prosecutor's Office.

24 Adam Bodnar (Minister of Justice) points out that *"today, Poland has four main legal blocking mechanisms – the president, National Council of the Judiciary (which continues taking assorted action, especially with regard to submitting opinions concerning new judicial appointments), Constitutional Court, and neo-justices. Each of these institutions are the source of some form of objection. All we can do is handle the situation without getting discouraged, which means we may ultimately have to wait*". See: Rojek-Socha, P., *Kolejni sędziowie z pozytywną opinią KRS – m.in. do rejonu i apelacji* (*Successive Justices with Positive NCJ Opinions, i.a. for District and Appellate Court Appointments*), Prawo.pl, [https://www.prawo.pl/prawnicy-sady/krs-opiniuje-kolejnych-kandydatow-na-sedziow,526128.html], Accessed 26 March 2024.

importance at the drafting stage. The above gives rise to a natural question concerning options of reaching for other measures and solutions – not in breach of the law; in other words, consummately lawful. It is noteworthy that the rule of law cannot be built on unlawfulness or restored with the use of methods potentially triggering grave doubts or controversies.

2. ASPECTS OF THE RULE OF LAW CRISIS

Any presentation of the assorted aspects of the rule of law crisis affecting Poland ought to open with a reflection regarding sources of law, and systemic conjectures of the state. The Constitution is an act of law of the highest order; pursuant to Article 2 thereof, the Republic of Poland is a democratic state governed by the rule of law and exercising social justice norms. The aforesaid provision expresses the principle of legalism, and assumes that the state and its bodies should function in respect of values securing the rule of law. The state ought to be governed by law recognised as a guideline for public authorities as well as a point of reference for the public.

Pursuant to Article 87 of the Constitution of the Republic of Poland, sources of universally binding law – the constitution apart – include laws, ratified international agreements[25] and regulations, the latter considered lower-level transposition legal measures.[26] Over recent years, the catalogue of sources of law was impacted by manipulative behaviour on a number of occasions, introducing unconstitutional laws having become unhappy Polish reality. Breaching universally recognised standards and rules of interpreting the Constitution brought modifications to the state's government and political system without any amendments to the Basic Law. The aforesaid tied in with restrictions to – or outright marginalisation of – effective constitutional controls, as a direct outcome of activities[27] which had rendered the Polish Constitutional Court dysfunctional.[28] The constitutionally guaranteed tripartite division of power was seriously distorted, safeguards of the judiciary's independence – judicial impartiality included – considerably weakened. All aforementioned activities and considerations were designed as a staged

[25] With prior consent of the *Sejm* of the Republic of Poland.

[26] Acts of local law are also sources of universally binding law – within territorial jurisdiction of authorities who had introduced them.

[27] Wróbel, W., *Skutki rozstrzygnięcia w sprawie 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych* (*Consequences of Decisions in Case 3/21 in the Context of the Supreme Court and Common Courts*), "Europejski Przegląd Sądowy", No. 12, 2021, p. 19.

[28] Appointing so-called doubles as Constitutional Court justices despite the respective positions having been duly filled beforehand remains Poland's fundamental problem. The filling of the Constitutional Court's presidential position and the way of designating adjudication panel for purposes of individual cases have triggered controversies as well.

and consistent takeover of all and any institutions constituting rule of law foundations, especially those potentially equipped to exercise independent control of centres of power. The undermining of legislative hierarchies and disassembly of institutions intended to guarantee the rule of law were accompanied by a depreciation of international agreements and obligations binding on Poland.

For aforementioned reasons, Polish relations with the European Union[29] became an incendiary area as well. Polish authorities went as far as to challenge the authority of the Court of Justice of the European Union and the European Court of Human Rights as bodies authorised to interpret law binding on Poland. The competencies and authority of European tribunals were occasionally ignored or questioned[30], the Polish Constitutional Court's statement[31] that statutory foundations for the Court of Justice of the European Union and the European Court of Human Rights' adjudication do not conform to the Constitution of the Republic of Poland[32] considered something akin to an apogee.

The instrumental abuse of provisions underlying the state's government and political system and destruction of international relations were accompanied by efforts to antagonise the public, obtuse and omnipresent propaganda, pressure, hate speech and harassment.[33] Aforesaid measures extended beyond individual social groups, targeting lawyers openly questioning and contesting changes introduced in Poland in violation of standards of the rule of law. The authorities' consistency in presenting the community itself – and representatives of so-called evil elites – as odious undermined the judiciary's authority and its public perception. This applied in particular to judges whose image (alongside the image of the entire judiciary) was regularly and purposely destroyed.[34]

3. THE INDEPENDENCE OF THE JUDICIARY

Domestic courts of law and the Court of Justice of the European Union should safeguard thorough and unquestioned application of European Union law, war-

29 And with other international entities and institutions.

30 Rakowska, A., *op. cit.,* note 8, p. 43 *et seq*.

31 In rulings of March 10th 2022, Ref. No. K 7/21, OTK-A (*Constitutional Court Case Law, group A*) 2022/24, and of October 7th 2021, Ref. No. K 3/21, OTK-A 2022/65.

32 Wyrozumska, A., *op. cit.,* note 4, p. 14.

33 See e.g. Judgment, *Żurek v Poland*, the Court of Justice of the European Union judgement of June 16th 2022 in Case No. 39650/18.

34 Bodnar, A., *Sędzia powołany z neoKRS nie może być uznany za niezawisłego* (*A Justice Appointed by the neo-NCJ Cannot Be Considered Impartial*) Prawo.pl, [https://www.prawo.pl/prawnicy-sady/adam-bodnar-o-sedziach-powolanych-przy-udziale-neokrs,524437.html], Accessed 26 March 2024.

ranting efficient judicial protection of individual rights arising therefrom as well as any standards associated with rule of law-related issues. As it is, the Polish judiciary is an area which had suffered farthest-reaching breaches and problems. Post-2015, the ruling camp generated an intricate administrative-and-disciplinary system designed to introduce political control of the judiciary and prosecution services. Politicising the broadly defined judiciary negated the very notion of a democratic state, turning it into something closely resembling a caricature.

Legislative amendments stood in blatant opposition to the world of science, remaining deaf to any form of constructive criticism. They were pushed through hastily, without actual or broadly-defined consultation, with no heed for – or outright ignoring – critical voices of the legal community. Amendments to the Common Courts Law (so-called muzzle law) made it possible to penalise judges for rulings designed to implement standards arising from international agreements Poland is signatory to and the Treaty on European Union, or even to implement international courts' case law. To that end, a Disciplinary Chamber – an extraordinarily tribunal banned in times of peace – had been established at the Supreme Court.[35] As a result, disciplinary proceedings were taken against justices referencing European Union law and/or the European Convention on Human Rights when adjudicating. In extreme cases, the instrumental use of the disciplinary accountability system equipped executive powers with a capacity to influence the adjudication and professional standing of individual justices. Last but not least, it triggered a so-called chilling effect not only in the legal community but throughout the general public, including citizens contesting action taken by public authorities.

Legislative changes in Poland had been intended to challenge the independence of the judiciary by politicising the course and manner of electing justices. In that particular context, issues of judicial appointments and consequences of individual adjudication have become a trigger for the majority of prevailing doubts. Circumstances of post-2017 changes to the composition of the National Council of the Judiciary (NCJ)[36] have undermined that body's independence from legislative and executive powers. The vast majority of lawyers believe that the Council's composi-

[35] Resolution of January 23rd 2020 passed by a panel acting jointly on behalf of Civil, Criminal, and Labour & Social Insurance Chambers of the Supreme Court, Ref. No. BSA I-4110–1/20, *LEX* No. 2784794.

[36] Pursuant to Article 186 of the Constitution of the Republic of Poland, the National Council of the Judiciary shall safeguard the independence of the judiciary, and impartiality of justices; The National Council of the Judiciary model was introduced by virtue of the Law of December 8th 2017 on amendments to the National Council of the Judiciary Law and selected other laws (*Journal of Laws* 2018 item 3).

tion contradicts Article 187 of the Constitution of the Republic of Poland: justices making up the NCJ are selected by representatives of political parties rather than the judicial community.[37] It noteworthy that the fact of the legislative or executive power(s) participating in the judicial appointment process is not in itself tantamount to making justices subordinate to public authorities. Yet that subordination does arise from factors depriving judges of protection against external pressures, and/or from instructions regarding their professional performance. Writings on the matter emphasised that contemporaneous state authorities intended to "replace key actors of the judiciary with individuals approved or outright nominated by the Minister of Justice".[38]

The Parliament electing judicial National Council of the Judiciary members compromises aforementioned Article 2 of the Constitution of the Republic of Poland as well as Article 10 ("The governance and political system of the Republic of Poland shall base on the distribution and balance of legislative, executive and judiciary powers") and Article 173 ("Courts and Tribunals shall be a separate power, independent of other authorities") of the Constitution of the Republic of Poland. Introducing a term of office uniformity for the National Council of the Judiciary in 2018 by reducing said term for selected Council members at the time[39] was another issue. In consequence, the effectiveness of appointing the National Council of the Judiciary was questioned, the Council itself thus recognised as a body differing from the one referred to in the Constitution of the Republic of Poland[40]. Polish adjudicature developed a position pursuant to which the premise of judicial composition's incompatibility with provisions of the law – the underlying cause for the nullity of proceedings[41] – shall be found in case of a court's adjudicating panel being joined by an individual with a judicial appointment tied to a motion of the National Council of the Judiciary.[42]

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37 The legislative power (*Sejm* of the Republic of Poland) elected a so-called safe majority of 19 of 25 members, albeit Article 187 clause 1(3) of the Constitution of the Republic of Poland authorises the lower house of the Parliament to elect 4 members only.

38 Śledzińska-Simon, A., *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, German Law Journal, No. 7, 2019, p. 1852.

39 Judgment, *Grzęda v Poland*, European Court of Human Rights judgement of 15 March 2022, Application No. 43572/18.

40 Wawrykiewicz, M.; Gregorczyk-Abram, S., *Konsekwencje niewłaściwie obsadzonego sądu* (*Consequences of Improper Judicial Appointments*), in: Bojarski, Ł.; Grajewski, K.; Kremer, J.; Ott, G.; Żurek, W. (eds.), *Konstytucja. Praworządność. Władza sądownicza* (*Constitution. Rule of Law. The Judiciary*), Warsaw 2019, p. 547.

41 Zembrzuski, T., *Nieważność postępowania w procesie cywilnym* (*Nullity of Civil Proceedings*), Warsaw 2017, p. 215 *et seq*.

42 Resolution of joined Supreme Court Chambers of January 23rd 2020, Ref. No. BSA 1-4110-1/20, OSNC 2020/4, item 34.

The afore-described situation impacted the capacity for proposing independent and impartial candidates for judicial positions in Polish courts of law, giving rise to a grave *"systemic flaw"*.[43] The issue currently applies to as many as around 3,000 judges on all levels of the judiciary; many believe they have been appointed in breach of fundamental domestic regulations governing the judicial appointments procedure.[44] Even without focusing on individual circumstances, it ought to be concluded that Poland has become a stage for a systemic and not easily resolvable issue of a politicised judicial appointments process.

4. INFLUENCE OF THE JURISPRUDENCE OF EUROPEAN COURTS

A determination was required to the effect of the aforementioned phenomenon constituting a major threat to the principle of the rule of law, upon which the functioning of the European Union and individual member states is based. While neither swift nor prompt[45], the reaction of European courts was, in its own way, consistent – it may thus be argued that it had to some extent contributed to transformations ultimately achieved.

Of the many statements, the European Court of Human Rights judgement of November 23rd 2023[46] in the case of Wałęsa v. Poland is particularly notable. In this case, the Court decided to apply a pilot procedure, which consists of indicating in the operative part of the judgement that violations of the Convention are (in the given case) sourced in specific systemic problems, authorities of the given state obliged to remedy them. Attention was drawn to the need to amend the National Council of the Judiciary Law: in the Court's view, the currently applied judicial appointments method constitutes precisely such a systemic issue arising from the manner of establishing the body responsible for the overall form of the Polish judiciary. It was pointed out that the violation of the right to fair trial, guaranteed under Article 6(1) of the Convention for the Protection of Human Rights and

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43 Warecka, K., *Polskie sądownictwo obarczone „wadą systemową". Omówienie wyroku ETPC z dnia 3 lutego 2022 r., 1469/20 (Advance Pharma sp. z o.o.)* (*The "Systemic Flaw" of the Polish Judiciary. Commentary on the European Court of Human Rights Judgement of February 3rd 2022, application 1469/20 (Advance Pharma sp. Z o.o. [Co.Ltd.])*), *LEX* Legal Information System 2022.

44 Markiewicz, K., *Sądy powinna nadzorować KRS, a neosędziowie muszą wrócić tam skąd przyszli* (*The NCJ should supervise courts of law, neo-justices returning to where they came from*) Prawo.pl [https://www.prawo.pl/prawnicy-sady/iii-kongres-prawnikow-polskich-wywiad-prof-krystian-markiewicz,521806.html], Accessed 26 March 2024.

45 Krzyżanowska-Mierzewska, M., *Proceduralna reakcja Europejskiego Trybunału Praw Człowieka na kryzys praworządności w Polsce* (*Procedural Reaction of the European Court of Human Rights to the Crisis of the Rule of Law in Poland*), "Europejski Przegląd Sądowy", No. 2, 2023, p. 16 *et seq*.

46 Application No. 50849/21.

Fundamental Freedoms, ties in i.a. with the flawed judicial appointments procedure. This ruling alone should play an important role in restoring the rule of law in Poland, the process intended to ensure the national legal system's conformity to requirements of an *"independent and impartial court established by law"* and the principle of legal certainty alike.

Also the Court of Justice of the European Union – in its judgement in Case C-718/21 of December 21st 2023 (Grand Chamber), and in reference to the European Court of Human Rights' judgement of November 8th 2021 in the case of Dolińska-Ficek and Ozimek[47] – found that the panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland, the panel having been appointed by the politicised National Council of the Judiciary, is neither an independent nor an impartial court previously established pursuant to legislation, as required by European Union law. The judgement was based on a conclusion that *"appointments of the members of the Chamber of Extraordinary Control and Public Affairs in question were made in manifest breach of fundamental national rules governing the procedure for the appointment of judges".*[48] A belief was expressed that the circumstances of 2017 changes to National Council of the Judiciary membership had undermined its independence from the legislative and executive powers, impacting the Council's capacity for proposing independent and impartial candidates for judicial positions in Poland.

The judgment of the Court of Justice of the European Union in Case C-718/21 is one of the Court's most significant rulings. While concerning the application of the preliminary ruling mechanism (keystone of the European judicial system), the judgement recognises that the totality of circumstances behind the appointment of justices forming the panel who had submitted questions in the case may – in the eyes of the public – raise reasonable doubt with regard to the independence and/or impartiality of aforesaid judges. It may further undermine the confidence that the judiciary should inspire in any democratic society or a state of law.

Any beliefs or assessments presented notwithstanding, the referenced rulings have made it clear to the entire legal community that systemic changes are an unquestionable necessity for Poland. The prevalent chaos and ever-more profound difficulties have been noted by radical solution supporters and recommenders of

47 Application Nos. 49868/19 and 57511/19.

48 It has been further pointed out that judges were appointed by the President of the Republic of Poland pursuant to a National Council of the Judiciary resolution, the exercising of which had been suspended by the Supreme Administrative Court as of the date of said judges' appointment until the time of said resolution's assessment in terms of legitimacy. The Supreme Administrative Court ultimately repealed the resolution.

extensive prudence alike. "The necessity of introducing legislative changes[49] to dispose of procedural defects" has been observed i.a. by judges owing their appointments to the aforesaid body.[50] This lays down a premise for systemic changes to the Polish judiciary.

5. LEGISLATIVE AND ORGANIZATIONAL ACTIVITIES UNDERTAKEN IN POLAND

The Polish *Sejm* has resolved to the effect of concluding that preceding resolutions to elect members of the questionable National Council of the Judiciary had been passed with blatant breach of the Constitution. Early actions ought to include efforts designed to block any works of that body, including i.a. the Minister of Justice stopping the publication of new judicial competition announcements. As a result, we are facing attempts at a gradual shutdown of an improperly established body. Nonetheless, the National Council of the Judiciary continues operating and making decisions vital to the community, which development will in all probability slow down the process of changes necessary to and expected by Poland, ideally achievable through the systemic introduction of remedial acts of law, accounting for the significance of the principle of the rule of law as well as for other rules arising from European Union membership.

The shortage of swift and radical solutions seems to be arising from the risk of potential changes being blocked by the president, who has been afforded the so-called power of veto in the legislative process pursuant to the Constitution of the Republic of Poland. Potential difficulties notwithstanding, the *Sejm* of the Republic of Poland has been proceeding a draft act of law to amend the National Council of the Judiciary Law[51] since February 2024. The said draft assumes i.a. that fifteen judges – National Council of the Judiciary members will be elected directly (in secret ballot) exclusively by justices[52] rather than by the legislative body, as is the case today. Once new National Council of the Judiciary members are elected, former Council members shall lose their mandate.

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[49] The aforementioned can be proven i.a. by the suspension of proceedings concerning decisions passed by the National Council of the Judiciary.

[50] Rojek-Socha, P., *"Nowy" sędzia zawiesza postępowanie w sprawie decyzji neo-KRS* (*"New" Judge Suspends Proceedings Regarding the neo-NCJ's Decision*), Prawo.pl, [https://www.prawo.pl/prawnicy-sady/sedzia-leszek-bosek-zawieszenie-postepowania-ws-odwolania-od-decyzji-neo-krs,526167.html], Accessed 26 March 2024.

[51] [https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-krajowej-radzie-sadownictwa], Accessed 26 March 2024.

[52] The following are to be elected: one Supreme Court judge, two appellate court justices, three regional court justices, six district court justices, one military court judge, one Supreme Administrative Court judge, and one voivodship administrative court judge.

It goes without saying that unless the National Council of the Judiciary Law is amended, the Polish judiciary will not be sustainably remedied. Other legislative action has to be taken. Target solutions cannot only include attempts at improving the functioning of specific solutions by amending the operating rules and regulations for common courts[53] – formally a regulation: an implementation provision accompanying an act of law. Any compulsory legislative changes[54] should be based on attempts to provide members of the public with a right to have their cases tried by impartial, independent, properly established courts of law. Other essential activities include efforts to rebuild public trust in courts of law and the judiciary in its entirety.

6. VERIFYING JUDGMENTS ISSUED BY INCORRECTLY APPOINTED JUDGES

The matter of rulings passed by justices whose legal status will need to be verified remains a separate issue.[55] Without anticipating whether Poland will face a systemic or individual case-based review of judicial appointments of recent years, a grave risk to procedural law ought to be accentuated, arising from the menace of breaches to the validity and/or stability of legally valid rulings.[56] This raises the question of the capacity to appeal against and contest court rulings passed by judges appointed by the National Judicial Council post-2017. The issue of the status of justices and their adjudication is repeatedly raised by plaintiffs and applicants reaching for ordinary and extraordinary legal remedies.[57] The prospect of filing complaints with requests to reopen proceedings on grounds of nullity[58]

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53 Including the scope of assigning cases to justices depending on their status and National Council of the Judiciary appointment.

54 Rojek-Socha, P., *Wymiar sprawiedliwości w naprawie - czas rozliczyć tych, którzy go psuli (rozmowa z Ministrem Sprawiedliwości)* (*The Judiciary in Remedy Mode – It's a Time of Reckoning for Those who Harmed It (A Conversation with the Minister of Justice)*), Prawo.pl [https://www.prawo.pl/prawnicy-sady/minister-adam-bodnar-o-planowanych-zmianach-w-sadach-sytuacji-w-prokuraturze,526096.html], Accessed 26 March 2024.

55 Kappes, A.; Skrzydło, J., *Czy wyroki neo-sędziów są ważne? – rozważania na tle uchwały trzech połączonych izb Sądu Najwyższego z 23.01.2020 r. (BSA I-4110-1/20)* (*Are Judgements Issued by Neo-Judges Valid? – Deliberations in the Context of the Resolution Passed by Three Joined Supreme Court Chambers on January 23rd 2020 (Ref. No. BSA I-4110-1/20)*), "Palestra", No. 5, 2020, p. 136; A. Bodnar, *Poland After Elections in 2023: Transition 2.0 in the Judiciary*, in: Bobek, M.; Bodnar, A.; Bogdandy, A.; Sonnevend, P. (eds.), Transition 2.0. Re-establishing Constitutional Democracy in EU Member States, Baden-Baden 2023, p. 30.

56 In civil and criminal law cases alike.

57 Kocjan, J., *op. cit.,* note 6, p. 19.

58 Zembrzuski, T., *op. cit*., note 32, p. 422 *et seq*.

would in particular entail destabilisation of the justice system and disruption to legal transactions, the scale of which carrying grave social consequences.

Legal discourse occasionally points to the forgotten term of *"healing law"* which takes on the form of legal convalescence.[59] The structure itself is controversial, *prima facie* ostensibly clashing with *Rechtsstaat* principles, and evoking doubt from the vantage point of the tripartite division of powers, a notion Poland has found difficult to preserve or respect in recent years. Convalescence ought to stand for the legislator interfering with jurisprudence (judgement content and/or validity) under exceptional circumstances. It seems that particular situations might justify the appropriateness of resorting to mechanisms ultimately *"curing"* preceding judgments issued by justices with questionable status. The notion ensconced herein involves a systemic *"subjugation"* of a complaint or application for the reopening of proceedings through the legal convalescence of rulings issued by judges whose appointment has triggered doubt in terms of validity. While giving rise to a certain sense of discomfort for an individual wishing to use any opportunity to challenge a ruling unfavourable to him or her, the aforesaid does not interfere with assumptions of procedural law, which does not include the concept of processually vested rights.

7. TRANSFORMATION OF CIVIL PROCEDURAL LAW

Given the above, it is worthwhile to point out that separate issues have arisen from transformations to procedural law in recent years, civil law in particular[60]. The decline in Poland's lawmaking culture has become apparent in general, the process having become hasty and careless.[61] The 2019 and 2023 amendments to the Code of Civil Procedure were by no means a sound response to contemporary challenges in this particular field of law, well-defined by science before.[62] Not only have these amendments failed to improve or expediate the quality or swiftness of litigation

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59 [https://www.prawo.pl/prawnicy-sady/konieczna-zmiana-procedury-cywilnej-sedzia-gudowski,525781.html], Accessed 26 March 2024.

60 Weitz, K., *Współczesne wyzwania prawa postępowania cywilnego* (*Contemporary Challenges of the Civil Procedure Law*), "Forum Prawnicze", No. 2, 2020, p. 28 *et seq.*

61 Gudowski, J., *Tradycja, postęp i coś jeszcze. Czy konstytucja uratuje Kodeks postępowania cywilnego?* (*Tradition, Progress, and Something Else. Can the Constitution Save the Code of Civil Procedure?*), [in:] Orzeł-Jakubowska, A.; Zembrzuski, T. (eds.), *Konstytucyjne aspekty procesu cywilnego* (*Constitutional Aspects of Civil Law Proceedings*), Warsaw 2023, p. 24 *et seq*.

62 Ereciński, T., *Ocena skutków nowelizacji Kodeksu postępowania cywilnego z 4.07.2019 r.* (*Evaluation of Consequences of Amendments to the Code of Civil Procedure of July 4th 2019*), [in:] Dziurda, M.; Zembrzuski, T. (eds.), *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian* (*Legal Practice in the Context of Amendments to Civil Proceedings. The Consequences of Change*), Warsaw 2021, p. 19 *et seq*.

proceedings – they have actually caused a degradation of the civil procedural law system.[63]

Chaos and wreckage brought about by aforesaid amendments have marked the beginning of a process of decodifying the civil procedural law in Poland[64]. In their Code-specified format, procedural institutions no longer carry organisational qualities, the Code itself not meeting the requirements of functions ascribed to a law of this kind. It has to be concluded that the condition of the institution of judicial civil law proceedings – systemic issues regardless – is highly unsatisfactory, requiring comprehensive repair. Not only have all factors outlined herein undermined the standard of the right to a fair trial – they have also lowered the overall level of protection of civil rights and freedoms in Poland.

8. CONCLUSIONS

The rule of law is a condition for European Union membership as well as a basis for the Union's functioning, and its ultimate foundation.[65] The rule of law is a universal meter for how democracy operates, one which ought to apply to all European Union member states for review and performance assessment purposes.[66] It demands accountability and constancy.

This paper has made it possible to shed light on the legal circumstances in a European Union member state affected by a grave and multifaceted rule of law crisis, the judiciary independence crisis seemingly the most important aspect of all, not least from an international perspective. It demonstrates that while long-term and complex, restoring the rule of law and remedying the justice system is a feasible process. Polish experience may serve as a guideline concerning the restitution and reinforcement of the rule of law. Legal professionals may reference the case study as food for thought regarding reasons behind such state of matters, and when pondering the extent to which such threats have arisen in individual states, or solutions to be put in place in order to prevent similar crises, their outcomes inevitably a challenge for the entire European Union. The matter becomes more important

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63 Zembrzuski, T., *Koncentracja materiału procesowego – w poszukiwaniu właściwej drogi* (*Concentrating Processual Substance – a Quest for the Correct Path*), in: Dziurda, M.; Zembrzuski, T. (eds.), *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian*, Warsaw 2021, p. 47 *et seq*.

64 Kulski R., *Upadek Polskiego Kodeksu Postępowania Cywilnego* (*Decline of the Polish Code of Civil Procedure*), "Monitor Prawniczy", No. 8, 2023, p. 463 *et seq*.

65 Grzelak, A., *Praworządność tematem wiodącym Konferencji w sprawie przyszłości Europy?* (*Rule of Law as the Leitmotif for a Conference on the Future of Europe?*), "Europejski Przegląd Sądowy", No. 9, 2021, p. 19.

66 Lenaerts, K., *op. cit.*, note 1, p. 4.

once we realise that the issue of conforming to the principle of the rule of law is exacerbating across Europe, and as such ought to become a premise for a debate regarding ways of reinforcing the European community's capacity for handling crises, the avoidance and total eradication of which is not and will never be an option. In all actuality, an unavoidable crisis of the rule of law may be predicted with great certainty.[67]

Polish experience with the rule of law, destruction and restoring the judiciary may well serve as a warning for other European Union member states. It has made us realise how fragile values and solutions developed over the years can be, their erosion giving rise to serious complications whenever attempts are made to restitute them. It showcases mechanisms and paths leading to a destabilisation of the *Rechtsstaat*, involving challenges to fundamental principles, such as the tripartite division and balance of powers, especially if taking on the form of harming the separateness and independence of the judiciary. The experience raises awareness of the rank and significance of the aforementioned *"union of values"*[68], and of the need to continually care for and reinforce principles the European Union and its activities stand on.

Poland is facing the need to repeal former and create new statutory regulations, conforming to the spirit of the rule of law and values proclaimed throughout the European Union member states' family. Any changes ought to account for the interest of the state and rule of law, and of the citizens. Notably, more than the individual interest of individual persons is at stake – attention has to be paid to community interest – the interest of the general public – blatantly observable whenever public or private law is introduced or amended. Primary importance and priority ought to be given to systemic issues: activities and measures affecting the form and functioning of constitutional bodies, and organisation of the broadly defined judiciary.

It goes without saying that the process of remedying and restoring the rule of law in Poland will be a lengthy one. It will take more than the parliamentary majority secured or public approval to repair institutions systematically destroyed over multiple years. The average citizen cannot count on rapid or radical changes noticeable in the expedient and swift handling of court cases – a factor usually considered the

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67 Safjan, M., *Rządy prawa a przyszłość Europy* (*The Rule of Law in the Context of Europe's Future*), [in:] Studia i Analizy Sądu Najwyższego. Przyszłość Europy opartej na rządach prawa (*Studies and Analyses of the Supreme Court. The Future of Europe Based on the Rule of Law*), Warsaw 2019, p. 28 *et seq*.

68 von Bogdandy, A., *Towards a Tyranny of Values?*, in: von Bogdandy, A.; Bogdanowicz, P.; Canor, I.; Grabenwarter, Ch., Taborowski, M.; Schmidt, M. (eds.), Defending Checks and Balances in EU Member States, Berlin 2021, p. 73.

primary indicator of change. Under such circumstances, a quest for temporary, provisional legal solutions will give rise to a temptation to simplify and shorten the winding and intricate path currently faced by Polish legislators. Nonetheless, conscious efforts ought to be made to follow the legislative path in its entirety, to be duly crowned by statutory solutions evoking no doubt or objection in terms of the principle of the rule of law.

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Review article

THE COST OF HUMAN RIGHTS FOR THE EU IN POST-CONFLCIT SOCIETIES: THE CASE OF EULEX IN KOSOVO

Attila Nagy, PhD Researcher
University in Jena, Faculty of Law, Jena Centre for Reconciliation Studies
Leutragraben 1, 07743 Jena
E-mail address: attila.nagy@uni-jena.de

ABSTRACT

The EU invests immense resources to promote human rights in a number of societies outside of its borders. Notably, the European Neighbourhood Policy and Enlargement focus on societies right next to the EU and with the potential to become an EU member states. In this chapter, we will focus on the cost of human rights in post-conflict societies, with a focus on the Western Balkans and Kosovo. If we understand the case of Kosovo, we will be better prepared to understand the costs the EU is ready to invest in countries such as Ukraine or any other country in its neighbourhood. The non-recognition of Kosovo by the UN and the EU places it in a very interesting legal and political disambiguation that makes the assistance of the EU vital. The EU-run EULEX mission in Kosovo, its mandate, costs and also corruption scandals put an additional burden and cost on its work. The future success and integrity of the EU run Kosovo Specialist Chambers, which should finalise the justice efforts in Kosovo are at stake due to a declining support for EULEX from both the Kosovo Serbs and Albanians. The corruption allegations of EULEX put in danger the future work of the Kosovo Specialist Chambers and the costs the EU bears. If EULEX fails it will come at a very high cost for the EU and even the already very low level of human and minority rights in Kosovo could not be further guaranteed. The final implementation of informal agreements regarding Kosovo in the form of The Brussels Agreement from 2013 and The Washington Agreement from 2020 having only a partial implementation success is a challenge for the rule of law in Kosovo. The future of post-conflict development is gaining a new shape and its formation is something we are able to witness and follow in Kosovo, through the lenses through which the EU supports is coming with all its various challenges and possible shortcomings.

Keywords: *EULEX mission, Human Rights costs, Kosovo, Post-Conflict,*

1. INTRODUCTION

In Kosovo, the EU (EULEX)[1] has taken over duties and mandates from the UN (UNMIK)[2] mission earlier established by the UN Security Council Resolution 1244[3] and also established new ones by mutual agreements between the Serbian and Kosovo governments (Brussels Agreements). The most important tool in human rights development where the EU has a very active role is the implementation of the Brussels Agreement from 2013[4], which obviously also represents a cost for the EU. The long ago established EU mission in Kosovo, The European Union Rule of Law Mission in Kosovo (EULEX), has served and also cost the EU such amounts of money that would be hard to understand by an ordinary EU citizen. Accordingly, the main topic our paper will deal with is the cost EU is investing in societies with the aim of promoting human rights and for this we will mainly deal with the post-conflict Kosovo as our main case study. The EULEX mission itself with all its aims, targets and budget is hard to understand, not just for EU citizens but even for many legal professionals. We will not deal just with numbers but also with policies, influence and the possible future and the role of post-conflict societies form the perspective of the EU. The case of Kosovo is important since after a frozen conflict it became a widely debated issue by both the Serbian and Kosovo governments, therefore influencing the development of other similar post-conflict societies. Duties and obligations taken over by both governments in The Brussels Agreement from 2013 (BA) go deep into their constitutional systems and eventually change them. A very strong division line, as it is present in every post-conflict society, is visible in Kosovo regarding the differences regarding institutional development in Serbian municipalities north and south of the Ibar river. Agreements such as the BA and WA have been made with the aim for loosening this division while also to some extent formalizing it by envisaging the establishment of the e.g. Associa-

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1 EULEX stands for European Union Rule of Law Mission, it was established in 2008 the same year when Kosovo self-declared independence from Serbia.

2 UNMIK stands for United Nations Interim Administration Mission in Kosovo which was established by the Security Council Resolution 1244 in 1999 after the NATO intervention (bombing campaign).

3 UNMIK, Resolution 1244 (1999), [https://unmik.unmissions.org/united-nations-resolution-1244], Accessed 4 April 2024.

4 First agreement of principles governing the normalization of relations is better known as The Brussels agreement from 2013, In Kosovo it is Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia,
[https://www.peaceagreements.org/viewmasterdocument/2022] also available at [https://www.srbija.gov.rs/cinjenice/en/120394] and [http://old.kuvendikosoves.org/common/docs/ligjet/Law%20on%20ratification%20of%20agreement%20-normalization%20of%20relations%20between%20Kosovo%20and%20Serbia.pdf], Accessed 4 April 2024.

tion/Community of Serbian municipalities in exchange for Serbia giving up the maintenance of its institutions in North Kosovo. While some division lines are still maintained it is the aim of the EU to make them as smooth as possible and also most importantly make them work and function within the EU made legal framework while also being ready to cover up for costs in regard to their formation, maintenance and future development as well. What is the fair price for post-conflict societies and their future and development after all? Are the EU mechanisms going to be able to guarantee human and minority rights in accordance with EU standards in the future? We will answer such questions and many other similar ones in the following chapters.

2. HUMAN RIGHTS COSTS AND SPENDINGS FOR THE RIGHT CAUSE

Human rights were gained by people with means that were not always in harmony with those rights, and many bloody events precluded their establishment. On the world stage today we have many international and inter-governmental organisations that implement and protect human rights in various countries and situations. Still, violations of human rights continue to occur and in fact we were never in a position to have all the rights fully guaranteed to every human on the globe. 'However, the solution would be simple; States must fulfil the decisions of the international institutions (eg UN Security Council, International Courts etc) and have to respond to each recommendation (eg UNHCR, CoE, Venice Commission and EU etc) and implement them.'[5] The system of human rights or at least their protection is more advanced and developed in the EU than in many other states, the EU also has a share and considerable efforts in financing and promoting the development of human rights. Obviously, many human rights today get contested, questioned and frequently even denied, the EU institutions can hardly guarantee such rights in the framework of their engagement in post-conflict societies, for which Kosovo is also an example.

'The content of European values is, to say the least, a subject to dispute even within the Union itself.'[6] Whereas the EU tries to get the best for its citizens, it does not succeed all the time. Considering the big disparity among EU member states the perfect balance cannot be easily achieved and causes many problems

[5] Kardos Kaponyi, E., *Cost of Human Rights*, in: Smuk, P. (eds), Costs of Democracy, Gondolat Budapest 2016, pp. 11-33.

[6] Tohidipur, T., *The European Union and the constitution-making Processes in the Arab World*, in: Grote, R.; Roder, T. (eds.), *Constitutionalism, Human rights, and Islam after the Arab Spring,* Oxford University Press, 2016, pp. 879-905.

on both the EU and local levels. Monetary issues were also the cornerstone of the BrExit which has shaken the value of the EU system in regard to its citizens, equality and also financing. The UK's contribution to the EU budget was a subject of great interest in the UK media, which typically referred to the gross, rather than the net figure[7] and therefore caused some unnecessary confusion. BrExit has seriously shaken the understanding of the EU in the region and globally, while some could see it as a mega union where certain people and rights are held and controlled by a few and not by all of its citizens, also as it is viewed in the democratic deficit phenomenon. Together with this distrust we have other issues, as some EU countries see the EU migration policy very differently. While inequalities rise the division lines in the EU became stronger so countries start asking themselves what the cost, or the hidden cost of joining the EU could be? The EU path on the east was an escape route from the prior influence of Russia, but has that influence just shifted to another side? The EU is not just an economic union it has strong ties with NATO as well and serves as an economical counterbalance to Russian influence in Europe, where the obvious border is now being redrawn in Ukraine. Regarding Kosovo and its separation from Serbia NATO has played a crucial role. New NATO member states in Central Europe: Hungary, Poland and The Czech Republic have joined NATO and thus the alliance got a land connection to Serbia (at that time Yugoslavia) before its bombing campaign against Serbia in 1999. 'The air campaign, coming less than two weeks after the Central European countries had officially joined NATO, caught them unprepared—politically, militarily, and psychologically— despite the fact that NATO closely consulted with all three members about its plans.'[8] The cost of joining NATO was visible very quickly then in 1999 and it is also one of the pending questions today with the recent NATO enlargement on the Russian borders. Also, the cost of joining the EU is still to be seen, although the big EU free market is very harsh to farmers, small businesses and the social needs of citizens in many aspects. The EU is trying to financially cover this gap and is investing huge efforts in the development of both member states and its potential and future member states. 'With more than EUR 3 billion in non-refundable aid over the past 15 years, the European Union is the biggest donor in Serbia and the country's number one partner in supporting development and ongoing reforms.'[9] Serbia is benefiting economically from its partnership with the EU but is still maintaining good relations with The Russian Federation

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7 Bootle, R., *The Trouble with Europe*, Third edition, Nicholas Brealey Publishing, 2016, p. 246.

8 Larrabee, S. F., *NATO's Eastern Agenda in a New Strategic Era*, RAND Corporation,2003, p. 27.

9 The Delegation of the European Union to the Republic of Serbia, EU and Serbia at work, [http://europa.rs/eu-assistance-to-serbia/eu-and-serbia-15-years-of-partnership/?lang=en], Accessed 4 April 2024.

amidst the conflict in Ukraine. Therefore, Serbia is standing in between east and west benefiting from both partnerships, economically and also politically. Also there is a danger of such a policy which can be seen in the case of Ukraine which has decided to distance itself from the east. 'On a deeper level, the Ukraine crisis indicated that the costs of a pro-western foreign policy could be prohibitive while the benefits were considerably less than many had expected.'[10] In fact, Russia supported Serbia and still supports it in preventing Kosovo from becoming a full UN member state. For the sake of advancing the issue of Kosovo, the EU tolerates Serbia's relationship with Russia, although Russia is now one of the biggest EU foreign enemies (Ukrainian war). The EU mission in Kosovo would have barely any success in bringing the Kosovo divide to an end and incorporating the Serbian minority to Kosovo institutions almost 25 years after the conflict if Serbia did not cooperate. In addition to the efforts of the EU to implement human rights in Kosovo, there are also various Non-Governmental Organizations (NGOs) which also invest huge efforts and finances to build the new Kosovo society. Consultation between donors and civil society occurs both formally and informally, with several donors reporting that leading civil society organizations are included as stakeholders in planning and programming [11] which guarantees access to the local communities in the process of decision making. Overall considering the efforts made to implement human rights in Kosovo, the outputs are still not at a satisfactory level. The reasons for missed investments are various and among many local ones, International Organizations are also contributing to them. 'The structure of the administration and the high turnover of inexperienced staff are additional major problems.'[12] The UN, EU, OSCE and other organizations implementing human rights suffer from the same cause in Kosovo while they are not able to fully implement the rule of law norms and capacity into institutions. If this is the case here, it could potentially be the same problem elsewhere. 'The EU's handling of the Nagorno-Karabakh war situation could well be classified as an act of strategic misconduct, which has come at a high geopolitical cost for the EU leaving the Union sidelined in the

[10] Cornell, S., *The Impact of the Ukraine and Syria Conflicts on the Geopolitics of the South Caucasus,* in: Kakachia, K.; Meister, S.; Fricke, B. (eds.), Geopolitics and Security: A New Strategy for the South Caucasus, Konrad-Adenauer-Stiftung, 2018, pp. 231-266.

[11] Fagan, A., *Democracy promotion in Kosovo: mapping the substance of donor assistance and a comparative analysis of strategies*, Cambridge Review of International Affairs, Vol. 28, No 1, 2015, pp. 115–135.

[12] Lazowski, A.; Blockmans, S., *Between dream and reality: challenges to the legal rapprochement of the Western Balkans*, in: Elsuwege, P. Van.; Petrov, R. (eds.), Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union, Towards a Common Regulatory space?, Routledge, 2014, pp. 108-133.

South Caucasus.'[13] Therefore, at the moment EU has very little influence in the Caucasus region, but it is also losing its stake in Turkey which is one of the gateways towards the Caucasus. 'Keeping conflicts frozen could be more costly and risky than bringing about reconciliation to those conflicts in a way that would allow Moscow and Ankara to maintain influence.'[14] Also, there is a risk that when a certain solution is reached in a conflict the EU or the West remains outside of such a framework, distancing it and its interests in such a region respectfully. 'Russia is pursuing its strategic objectives in the South Caucasus through a strategy of hard hegemony, complementing its military presence with a strong economic and diplomatic presence, both to ensure compliance and signal the costs of adopting policies that run counter to Moscow's interests.'[15] Therefore, it is in the clear interest of Russia to leave out the EU and any other possible stakeholder in the conflicts, originating from a territory that it maintains as its own sphere of interest. The EU should accordingly focus on balancing its spending and efforts in order to achieve a more sustainable democratic level of standards in its neighborhood, which also counts in the Caucasus region. These are just some of the reasons for failed and endless spending and efforts by the EU which need to be discussed again for their future possible maximum use.

3. HUMAN RIGHTS IMPLEMENTATION AND SUPPORT FROM THE EU INTO ITS NEIGHBOURHOOD

Taking into consideration all the problems the EU is facing at home, we can see that it puts a lot of effort into solving problems in its surroundings as well. In fact as long as the EU has some control over its neighbourhood, it can exist as a Union of common (foreign) interests as well. 'The European Union's relationship with the ENP region has evolved in broad and rich cooperation, encompassing political, strategic and security dimensions, including human rights, democracy and the rule of law issues.'[16] In its foreign affairs, the EU is protecting its own values and

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13 Khachatryan, H., *The Nagorno-Karabakh War: A New Reality in the South Caucasus and Its Implications for the EU*, 2020, Institute of European Democrats, [https://www.iedonline.eu/download/geopolitics-values/36-Khachatryan_The_Nagorno-Karabakh_war_A_new_reality_in_the_South_Caucasus_and_its_implications.pdf] Accessed 4 April 2024.

14 Yıldız, G., *Turkish-Russian Adversarial Collaboration in Syria, Libya, and Nagorno-Karabakh*, 2021, SWP Comment, [https://www.swp-berlin.org/publications/products/comments/2021C22_Turkish-Russian_Collaboration.pdf] Accessed 4 April 2024.

15 German, T., *Russia and the South Caucasus: The China Challenge,* 74 Europe-Asia Studies, 2022, pp. 1596–1615.

16 The Diplomatic Service of the European Union, European Neighbourhood Policy, [https://www.eeas.europa.eu/eeas/european-neighbourhood-policy_en#7120], Accessed 4 April 2024.

even more its interests. The EU needs its neighbours as much as they need the EU, but still EU is the one who dictates the rules and roles. For example in the case of Norway, the dissatisfaction is mainly on the Norwegian side, as it is obliged to accept EU legislation and regulations but has no say in them, an arrangement that has been described as "government by fax from Brussels".[17] After the last EU enlargement with Croatia, where the EU supported the war torn state it has also invested much in neighbouring states like Bosnia and Herzegovina which actually never got on the straight track of joining the EU. As Bosnia can now be considered a 'stable' state much more efforts are being made to align all the other Western Balkan states and maybe one day include them in the EU in one package. The granting of EU candidate country status to Bosnia and Herzegovina and the agreement on visa liberalization for Kosovo starting by 1 January 2024 [18] puts an encouraging future EU prospects for these countries. After the 1999 NATO military intervention in Kosovo, no military efforts were in place to overthrow the Milosevic dictatorship. 'This is a reasonable approach as we look back on the unforeseen costs and balance future interests against declining resources.'[19] At the time of the fall of Milosevic it was not known that Kosovo would declare independence and it was just a later punishment for the Serbian political establishment. It can be observed that territorial losses pose a threat to every country that is hesitant to align its policies with a major UN Security Council state member in its region. Whereas the leaning of the Ukrainian government towards the West was the main cause of the Russian aggression and also a similar Western prospects as sought in Armenia have produced an instant resolution of The Nagorno-Karabakh conflict by granting full control over this territory to Azerbaijan. While Russians are making quick and many times painful clear cuts in their foreign policy, the EU is more careful in implementing and building the rule of law in Kosovo for almost two decades now. 'Sovereignty costs are at their highest when international arrangements impinge on the relations between a state and its citizens or territory, the traditional hallmarks of (Westphalian) sovereignty.'[20] Apart from the partial recognition of its independence in 2008, Kosovo has not gained guarantees regarding its potential EU or even UN membership. 'The EU Office plays a key role in the implementa-

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17 Bootle, R., *The Trouble with Europe*,(Third edition, Nicholas Brealey Publishing, 2016, p. 254.

18 European Union External Action, Annual Activity Report 2022, [https://www.eeas.europa.eu/sites/default/files/documents/2023/2022%20EEAS%20Annual%20Activity%20Report.pdf], Accessed 4 April 2024.

19 Schulte, G. L., *Regime Change Without Military Force: Lessons from Overthrowing Milosevic*, Vol. 4 No.2, Prism, 2013, pp. 45-56.

20 Abbott, K. W.; Snidal, D., *Hard and Soft Law in International Governance,* 2000, 54 International Organization, pp. 421-456.

tion of the EU's substantial financial assistance to Kosovo.'[21] This new challenge of building and to some extent financing a post-conflict state is a challenge for the EU as well, considering improvements of human rights and state building efforts. The EU is learning as well, but unfortunately mainly on its own mistakes. Still the EU stays as an important regional and global stakeholder with the aim of investing overwhelmingly in the rule of law and democracy. The European Neighbourhood Policy overall allocation is set at EUR 79.462 billion out of which EUR 19.3 billion are earmarked for its Neighbourhood.[22] Also, states that do not fall under the enlargement area are receiving funds, especially in the Mediterranean area. While the question can be raised why after all the experience we have in conflict prevention conflicts still occur with the same cruelty and in such an inhuman way, in Israel after Syria or also after the Donbas region on the whole territory of Ukraine. 'The science of comparative law has a key role in the process of conflict resolution in a legal way, because it can make comparison among the pre-conflict, the current and the required legal outcomes.'[23] As the pre-conflict environment is differently presented by the media and influenced by the foreign policies of some EU member states, we usually do not know the whole story behind. E.g. was Gaddafi's Libya better before or now after the intervention or what will happen when Assad is gone from Syria or Putin from Russia? Can we expect the rise of human rights and at what costs? 'From an exclusively western point of view, we cannot decide what is important and what is not so important for the local people involved in the conflict.'[24] We cannot treat everyone like they are an average EU citizen or a nation with the same cultural mindset as in the EU. On the other hand, the way to implement foreign missions is also often questionable. So was the recent case of the involvement in Afghanistan where it is now hard to measure what democratic, rule of law or human rights norms have remained after the Taliban have taken over the country again. As in every conflict the human factor plays one of the most important roles, as we will also see later in the case of Kosovo. 'The human capacities are limited and, due to the budgetary restraints, it remains a major challenge to create and to staff all national authorities that are necessary for the successful enforcement of EU law.'[25] Various human rights can cost different amounts of

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21 European Union Office in Kosovo/European Union Special Representative in Kosovo, Who we are, [https://www.eeas.europa.eu/kosovo/who-we-are_en?s=321], Accessed 4 April 2024.

22 European Neighbourhood Policy and Enlargement Negotiations, European Neighbourhood Policy, [https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy_en], Accessed 4 April 2024.

23 Spindler, Zs., *International conflicts and the Export of Democracy*, in: Smuk, P. (ed.), Costs of Democracy, Gondolat, Budapest 2016, pp. 195-209.

24 *Ibid.*

25 Lazowski, A.; Blockmans, S., *op. cit.,* note 12, pp. 108-133.

monetary efforts and the time necessary for their implementation in every single conflict that is happening is different.

4. EULEX MISSION IN KOSOVO

The EULEX mission is a special mission supporting the building of institutions in Kosovo. The initial work of the UNMIK (United Nations Interim Administration Mission in Kosovo) was partially taken over by EULEX and it is now dealing with the most important problems present today in Kosovo. 'The European Union Rule of Law Mission in Kosovo (EULEX) was launched in 2008 as the largest civilian mission under the Common Security and Defence Policy of the European Union.'[26] EULEX is in some way limiting the sovereignty and full independence of the Republic of Kosovo, for which it actually has full support from both the Kosovo and Serbian governments. One of the arguments Serbia has regarding Kosovo's independence is that it is not independent, since it is under EU administration. The idea of having an independent state with an administration coming from outside is really interesting from the perspective of sovereignty. 'EULEX has been accorded immunity against local legal and administrative processes.'[27] If we know that Kosovo laws are made in The Kosovo Parliament by elected representatives and that they are enforced by the administration, which is under the everyday influence and control of the EU, we really cannot blame the Kosovo government for any possible failure and rule of law shortcomings. Even if Kosovo is lagging behind with reforms it is really not solely a Kosovo problem and the EU should take responsibility for that as well. Initially, EULEX was not planned to last that long or cost that much. In the Council decision founding EULEX and its article 16. about financial arrangements, it says: 'The financial reference amount intended to cover the expenditure related to a period of 16 months starting from the approval of the OPLAN shall be EUR 205 000 000.'[28] The mission has overrun by many months this timeframe and the prescribed budget as well. Similarly Article 20. about entry into force and duration: 'It shall expire 28 months from the date of approval of the OPLAN.'[29] Now, almost 20 years later the EU is approving the EULEX mission and supporting its work as a keystone for the democratic development and the enforcement of the rule of law in Kosovo. 'The financial reference

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26 European Union Rule of Law Mission, What is EULEX?, [https://www.eulex-kosovo.eu/?page=2,16], Accessed 4 April 2024.

27 European Union Rule of Law Mission, EULEX Accountability, [http://www.eulex-kosovo.eu/?page=2,23], Accessed 4 April 2024.

28 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2024] OJ L 042 16.2.2008, p. 92.

29 *Ibid.*

amount intended to cover the expenditure of EULEX KOSOVO from 15 June 2023 until 14 June 2025 shall be EUR 165 310 000.'[30] As compared to the previous efforts by EULEX and the International Criminal Tribunal for the Former Yugoslavia (ICTY) judiciary system which was dealing with war crime cases, the formation of the new Kosovo Specialist Chambers (KSC) really came as a surprise. It is also one of the preconditions for the integration of the Kosovo Serb population into the Kosovo run administration, especially in North Kosovo. Previous efforts to do so have failed and among the critics was also the fact that the government in Prishtina is traditionally made up of ex-KLA members who allegedly committed war crimes. 'The Mission also assists the Kosovo Specialist Chambers and Specialist Prosecutor's Office by providing logistic and operational support in line with relevant Kosovo legislation.' [31] The incapacity of Kosovo institutions and courts to process the war crimes cases that happened some decades ago is an alarming situation in both terms of the time and problem matter which both get such a late identification. In the end we will note that the EULEX has decreased in recent years, especially considering its staff. Right now the numbers show an authorized strength of 396 staff members of EULEX.[32] The focus of the EULEX will now be mainly on North Kosovo, where the addition of the four Serbian municipalities with a huge Kosovo Serb population into the Kosovo governmental system will be an additional burden on the Kosovo state, its democracy, budget but mostly the rule of law.

5. HUMAN RIGHTS IN KOSOVO – TO WHAT LEVEL DO THEY EXIST AND AT WHAT COST?

If we try to look at Kosovo from a financial perspective, we really cannot expect much success from such a young post-conflict society. The Yugoslav era in Kosovo was dominated by a huge number of rights, among which were the very high employment, family support, social and health care. Even minority issues in Yugoslavia were not such an issue and among others Kosovo also had its administration, prior to the 1990 dissolution of Yugoslavia and the start of the conflicts in its republics. The EU support for Kosovo is very evident but still not producing as many results considering economic development as in, e.g. Serbia. 'In the context of the Stabilization and Association Process (SAP, see above) that is seeking to bring Kosovo in line with European norms, the EU has several mechanisms to promote economic development on top of our financial assistance, such as trade concessions, and treaties (Stabilisation and Association

30 *Ibid.*

31 European Union Rule of Law Mission, *op. cit.,* note 26.

32 *Ibid.*

Agreements).'[33] Financial assistance is a great tool for development, but it has to be targeted at some kind of business development and trade potentials. Kosovo is not a country where many foreign investors endeavour and is also lacking local production facilities and thus heavily depending on imports. 'Kosovo made limited progress on its overall track record on fighting organized crime and should step up its efforts on proactive investigations, convictions and confiscations of criminal assets, which remain very low.'[34] Also it has been reported that there is money laundering in Kosovo[35] which is a present threat for every post-conflict society but a surprise concerning the presence of the EU mission in Kosovo. Opportunities regarding regional cooperation are not fully used in Kosovo. Apart from not respecting CEFTA standards, Kosovo is also refusing to join the Open Balkan initiative, which is encouraged by the EU and USA respectively. 'From Belgrade's perspective, what makes Open Balkan stand out in comparison with other initiatives is that it is "locally owned"; representing the region's answer to the apparent deadlock in the European accession process.'[36] The Open Balkan Initiative is clearly opening the door for better regional cooperation and connectedness, it can also connect more Serbia and Kosovo and their respective minorities across the borders.

The somewhat stabilized situation of the Serbian minority in enclaves in the south, and the four municipalities in the north of Kosovo is not even close to the standards of living and rights before the conflict in 1999 or during the Yugoslav era before 1990. 'Given the nature of ethno-territorial divisions in Kosovo, it is unsurprising that work on minority rights and inter-ethnic cooperation takes precedence.'[37] The extremely large number of various organizations, NGOs both local and international and donations from the EU are still far from reaching the level of any EU member state as related to human rights standards. The completely non-existing system of any kind of state administration created by the Kosovo Albanians in 1999 has demanded extraordinary efforts, training and support to build its state administration in Kosovo. Still, the Kosovo administration is not yet able to cope with most of the challenges a state could have and has additionally become a

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33 The European Union and Kosovo, An overview of relations between the EU and Kosovo (*), [https://www.eeas.europa.eu/kosovo/eu-and-kosovo_en?s=321], Accessed 4 April 2024.

34 European commission, 2023 Communication on EU Enlargement Policy, [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/COM_2023_690%20Communication%20on%20EU%20Enlargement%20Policy_and_Annex.pdf], Accessed 4 April 2024.

35 *Ibid.*

36 Savković, M.; Nikaj, B., *Opportunity Costs of the Kosovo-Serbia Stalemate*, 2021, Sbunker [https://sbunker.net/uploads/sbunker.net/files/2022/October/28/Opportunity-Cost-of-the-Dialogue-Between-Kosovo-and-Serbia1666958448.pdf], Accessed 4 April 2024.

37 Fagan, A., *op. cit.,* note 11, pp. 115–135.

source of corruption, which is a symbol of every poor society nowadays. 'Whereas large multilaterals still deploy their resources through short-term projects, smaller foundations provide institutional support for civil society organizations not tied to specific projects.'[38] The very big disharmony of donations and various goals and targets they have made cause a chaos on the donation market, obviously the existing human rights from the EU cannot be easily projected on Kosovo. For instance, the empowerment of women is falling behind since the society can't offer jobs for women and in rural areas still follow the old patriarchal lifestyle. The right to work is disregarded following the very poor economic conditions and is just frustrating the youngsters, who usually see and plan their future outside of Kosovo, especially after the visa liberalization starting now in 2024.

5.1. Human Rights in the Republic of Kosovo-South of River Ibar

Considering the status of Kosovo, its partial recognition, the UN Security Council Resolution 1244 and the 25th anniversary of the NATO bombing in 1999, we will aim to look at its sustainability from democratic, human rights and especially the rule of law perspectives. No one in the EU or even in the Western Balkans doubts that Kosovo should and will become an EU member state, even Serbia has agreed in the BA of 2013 that it will not block[39] its integration into the EU. In order to achieve the EU accession Kosovo needs to improve its lagging human rights prospects which are now at a very low level and also have a certain level of economic development, which is an even more troublesome case. 'Kosovo data are available only for government debt to 2020 and not for its annual deficit or surplus.'[40] In 2020, Kosovo's debt ratio was 21.8% of GDP, the lowest among the Western Balkans and Türkiye[41] which shows that while it has no debts, it also does not maintain an infrastructure investment friendly policy, which should be necessary to catch up with other regional infrastructure developments. On the other side, big infrastructure projects are financed from outside, as it was also outlined in the WA.[42] While Kosovo wants to benefit from its EU integration, it should start depending less on donations and more on income, although at

38 *Ibid.*

39 First agreement of principles governing the normalization of relations., *op. cit.,* note 4.

40 Eurostat, Enlargement countries - finance statistics, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enlargement_countries_-_finance_statistics#Foreign_direct_investment], Accessed 4 April 2024.

41 *Ibid.*

42 Washington Agreement, Economic Normalization, 2020 [https://www.new-perspektiva.com/wp-content/uploads/2020/09/Washington-Agreement-Kosova-Serbia.pdf], Accessed 4 April 2024.

this moment its development cannot be imagined without foreign investments, which actually have not even started. 'Regional cooperation should be treated as an opportunity, not a threat.'[43] Contrary to other Western Balkan countries, investors do not invest in Kosovo, again due to its poor legal system and lack of law enforcement mechanisms. 'In the short term, the Government intends to finance the resulting budget deficits from accumulated savings and borrowing, as well as through the sale of assets and donor budget support.'[44] It looks like every effort to invest in Kosovo is doomed to end up in a corruption scandal, not that other neighboring countries do not have similar problems. One of the examples was also the company supplying temporary accommodation to returnees, which was embroiled in a corruption scandal and lost its contract with the ministry of internal affairs.[45] Investments or aid of large amounts of money on the Balkans are always connected to scandals and corruption, in some way, and it is also hard to prevent the money leaking from such big funds which do not have a thoroughly regulated control mechanism as, e.g. corporations do have. In the following paragraphs we will examine the responsibility on the part of EULEX and its international staff regarding some corruption scandals that have seriously undermined the mission and its presence in Kosovo.

5.2. Human Rights on North Kosovo in Four Serbian Municipalities-North of the Ibar River

After the 2008 Kosovo Proclamation of Independence the Serbian community from the North has chosen a completely different way of life that is outside of the newly established Kosovo 'state' system. Now some 20 years later the situation is changing which is due to the influence from the EU on to the Serbian government. As an outcome of the BA in 2013 Serbs from North Kosovo have to take part in Kosovo institutions, elections and all this is supported and encouraged by the Serbian government. The 'Independence' of North Kosovo was until The Brussels Agreement from 2013 financed by Belgrade and its help will continue but in a different way, which will now be controlled by Kosovo institutions. The financing of Serbian institutions in Kosovo was a very big issue in Serbia and

43 Savković, M.; Nikaj, B., *op. cit.,* note 31.

44 The World Bank, Kosovo - Public expenditure review (English), [https://documents.worldbank.org/en/publication/documents-reports/documentdetail/252491468047082839/kosovo-public-expenditure-review], Accessed 4 April 2024

45 Report from the Commission to the European Parliament and the Council on progress by Kosovo* in fulfilling the requirements of the visa liberalisation roadmap, Brussels, 8.2.2013 COM(2013) 66 final, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0066], Accessed 4 April 2024.

a source of money laundering and financial machinations as many journalists have pointed out, but full investigation has never been carried out. After 2013 many financial mechanisms are changing and money has to be directed through the Kosovo financial system, which also does not recognize the Serbian Dinar as a means of payment in Kosovo. The Development Fund, a special fund made to finance projects in North Kosovo, derives its revenues from taxes collected at crossing points and is used to support the socio-economic development of the four northern Kosovo municipalities[46] which in turn serves as a tool to lower the smuggling attractiveness in North Kosovo and encourage payments into this special budget line of the Kosovo customs system. A very large amount of goods and fuel in particular has been imported or smuggled into Kosovo and sold without paying taxes to either Serbian or Kosovo. The need to establish control over such activities and also to take control over the border crossings in North Kosovo by Kosovo border forces came as an obvious outcome of the Brussels agreements. This very interesting trade-off is an example of compromise and also an example how similar problems can be solved to make citizens benefit the most, obviously Kosovo would never allow bigger investments from its budget into a region outside of its control. This step was one of the initial moves to make and form the future special status of the North municipalities, they will soon probably get more rights when the A/C[47] will be formed and which would be some kind of a hybrid autonomous entity. As many years have passed since the signing of the BA in 2013 it is very interesting to follow the steps of forming the A/C in a context of mutual demands from both the Serbian and Kosovo governments. On a local level the political life is not any less turbulent. In January 2018 Oliver Ivanović[48] a founder of the political party of Srbija, Demokratija, Pravda (SDP) who also ran for the position of mayor of North Mitrovica was killed. He was at that time the biggest opposition leader among Kosovo Serbs and in opposition to the ruling Serbian government supported 'Srpska Lista'. A similar previous case of a political party leader Dimitrije Janićijević[49] of a Kosovo Independent Liberal Party was also assassinated in North Mitrovica, his work was also not supported by the Belgrade government as he was taking part in the work of Kosovo institutions which at that time was contrary to the interests and

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46 European Union External Action, 700,000 euro awarded to two projects in northern Kosovo municipalities from Development Fund [https://www.eeas.europa.eu/node/7235_en], Accessed 4 April 2024.

47 First agreement of principles governing the normalization of relations., *op. cit.,* note 4.

48 EULEX, EULEX strongly condemns the murder of Oliver Ivanovic, 16 Januray 2018, [http://www.eulex-kosovo.eu/?page=2,10,762], Accessed 4 April 2024.

49 European integration process of Kosovo, European Parliament resolution of 16 January 2014 on the European integration process of Kosovo (2013/2881(RSP)), P7_TA(2014)0040, [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0040+0+DOC+PDF+V0//EN], Accessed 4 April 2024.

instructions of the government in Belgrade. Even today, Serbs in North Kosovo do not participate in the government neither they take part in the administration of the four Serbian municipalities, which can be seen as a democratic deficit of the whole Kosovo system. Obviously Kosovo is not able and competent to ensure the participation of the Serbian minority for which also EULEX takes part in the responsibility as a guarantor of human rights standards. Still there are some development projects and the investment does not stop in North Kosovo. 'Since 2013, the Fund has collected over 16.2 million EUR, of which 14.5 million have been allocated towards the socio-economic development of the four municipalities in northern Kosovo.'[50] Such investments are not made into local infrastructure and business development, which are truly a precondition for the overall economic development.

6. LESSONS FOR FUTURE HUMAN RIGHTS INVOLVEMENTS IN SIMILAR POST-CONFLICT SITUATIONS

The EU involvement in Kosovo is tremendous and we can just imagine what the needs and expectations could be if the EU deployed a mission in countries like Ukraine, Palestine or Syria, which are much bigger and more complex. Also the EU will have to deal with stakeholders such as Russia which does not suffer as much as expected due to the recent EU sanctions. The problems that the EU is facing are numerous and it is hard to expect that they could be solved more effectively in Kosovo than in any other member state. Some analysis suggests rather chaotic or, at least, comparatively unsystematic coverage of corruption and misuse of EU funds.[51] As we have outlined earlier and will discuss later, corruption is more of a trend than an exception on all levels of governance today. Due to the specific way democracy functions and the open requests of political parties for various donations and sponsorships. 'Private interests find an easy way to influence potential candidates and parties, which is to be controlled in order to prevent these interests from corrupting future governing parties.'[52] To come back to Kosovo, we can see that it is trying to find its foundations on grounds that are not stable enough. Also the EULEX mission had some issues with corruption which will be the topic

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50 European Union Office in Kosovo European Union Special Representative in Kosovo, Management Board to Development Fund awards 3.5 million EUR for construction of Culture Centre in Mitrovica North, [https://www.eeas.europa.eu/delegations/kosovo/management-board-development-fund-awards-35-million-eur-construction-culture_en], Accessed 4 April 2024.

51 Školkay, A., *Media's Controversial Roles/Impact on/in Examples of (Un)Covering Fraud with EU Funds*, in: Smuk, P. (ed.), Costs of Democracy, Gondolat, Budapest, 2016, pp. 151-178.

52 Smuk, P., *Constitutional Approach to Public Financing of Political Parties and Election Campaigns,* in: Smuk, P. (ed.), Costs of Democracy, Gondolat, Budapest, 2016, pp. 178-195.

of our next chapter. 'Just as the feasibility and cost of a residential construction project would depend on its architectural plan, so the feasibility and cost of a state-building mission can depend crucially on the constitutional structure of the state that is being established.'[53] Kosovo state building has so far caused more misunderstandings in both the UN and EU and therefore it has a path that is hard to follow from a usual state-building perspective. 'The case of Kosovo is of particular importance in the context of post- conflict reconstruction because that case has been understood to be both exceptional and exemplary.'[54] Huge efforts were made into the most important aspect of stability, rule of law while all is still at a very low level of development in Kosovo. It is not a surprise since various organizations had different targets and invested without harmonizing their activities and consulting the local stakeholders. 'Only one of the donors interviewed (Kosovo Foundation for Open Society [KFOS]) reported that they have no consultation with civil society organizations.'[55] This huge imbalance of finances has widely opened the door for fund misuse on both a local and state level. As the crown of the whole problem with corruption, as we will deal with it in the next chapter, the EULEX and its officials have taken a role in a corruption case that has shaken the whole mission. Jaroslava Novotna[56] the Chief EULEX Prosecutor and Francesco Florit the former chairman of EULEX's Assembly of Judges[57], were accused of bribery. Flori allegedly received a bribe of some €300,000 to cover up evidence and ensure the insufficient protection of witnesses against individuals suspected of organized crime, among whom are well-known businessmen and politicians. [58] This was a turning point in the work of EULEX and came at the worst possible time, just before the very important tool in the Kosovo rule of law system was being formed, the foundation of the Kosovo Specialist Chambers. What are the chances that this court will succeed? It solely depends again on the EULEX whose capacity and preconditions we will examine in the following chapter.

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53 Myerson, R., *How to Prepare for State-Building*, Vol. 7, No. 1, Prism, 2017, p. 2.

54 Herscher, A., *Reconstruction Constructing Reconstruction: Building Kosovo's Post-conflict Environment*, in: Monk, D. B.; Mundy, J., (eds.), The Post-Conflict Environment, University of Michigan Press, 2014, pp. 158-187.

55 Fagan, A., *op. cit.,* note 11, pp. 115–135.

56 EULEX, Jaroslava Novotna – Lady Prosecutor, 30 December 2013, [http://www.eulex-kosovo.eu/?page=2,26,89], Accessed 4 April 2024.

57 Republic of Kosovo, Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, 2008, Law No. 03/L-053, 13 March 2008.

58 EURACTIV, EU to appoint legal expert to investigate Kosovo mission, 5 November 2014, [https://www.euractiv.com/section/global-europe/news/eu-to-appoint-legal-expert-to-investigate-kosovo-mission/], Accessed 4 April 2024.

7. LESSONS FOR FUTURE HUMAN RIGHTS ENFORCEMENT ORGANIZATIONS LIKE EULEX IN POST-CONFLICT SOCIETIES

The work and future success of the EULEX mission in Kosovo was never very straight forward, it had more or less turbulent times. 'The high turnover rate among EULEX staff causes a number of complications, preventing the formation of trust and strong ties between EULEX staff and the staff of local institutions.'[59] EULEX has been present in Kosovo since it declared independence and it is hard to say who is to blame for anything wrong that has happened so far. For Serbia, it is easy to criticize since both the Kosovo government and EULEX have constantly failed to maintain the rights of the Serbian minority and its peaceful return and possible re-integration. The biggest shock regarding EULEX was still a recent allegation of an internal whistle blower who has claimed that some EULEX officials misused their mandate. 'Elmar Brok (EPP, DE), chair of the Foreign Affairs Committee, underlined the importance and urgency of shedding light on the recent allegations of corruption within the EULEX Kosovo mission.'[60] Such a small and important institution as EULEX cannot be easily suspended, and this is one of the biggest threats to independent investigation. In order to find out what has happened Federica Mogherini, at the time the EU High Representative for common foreign and security policy, appointed a sole person to investigate this case, a law professor Mr. Jean Paul Jacqué. An investigation of a law professor is unclear since investigating corruption requires police techniques, for which EULEX is specially formed and also employs many experts in this field. The professor's task was the following: Review of the EULEX Kosovo Mission's Implementation of the Mandate with a Particular Focus on the Handling of the Recent Allegations[61], although as said before, we are of the opinion that the first part of the task is indeed a work for a law professor but the investigation of corruption can't be done by someone who does not have the necessary expertise. The report has in the end found some mistakes in the work of EULEX but has not maintained the EULEX staff allegations of corruption. 'Further, the corruption scandals affecting EULEX itself that resonated

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59 Cierco, T.; Reis, L., *Eulex's Impact on the Rule of Law in Kosovo*, Vol. 34, No 3, Revista de Ciencia Politica, 2014, pp. 645-663.

60 European Parliament Press Release, EULEX Kosovo allegations: MEPs demand transparent investigations, 4 November 2014, [http://www.europarl.europa.eu/news/en/press-room/20141104IPR77202/eulex-kosovo-allegations-meps-demand-transparent-investigations], Accessed 4 April 2024.

61 Review of the EULEX Kosovo Mission's Implementation of the Mandate with a Particular Focus on the Handling of the Recent Allegations, Prof. Jean-Paul Jacque, 31 March 2015, [https://www.eulex-kosovo.eu/eul/repository/docs/150331_jacque-report_en.pdf], Accessed 4 April 2024.

widely in post-conflict Kosovo, leading to vigorous reactions of the locals who once believed EULEX could also heal society from other problems—not just those covered by its mandate.'[62] The various forms of control and a particular organization that deals with questions regarding the integrity and independence of EULEX is The European Union Human Rights Review Panel (HRRP)[63]. This panel needs to be further explained and its role more accurate with all the problems EULEX may face in its everyday tasks and mission implementation. 'Although HRRP claims to be an independent, which performs its functions with impartiality and integrity, the financial dependency on the EULEX and the appointment of HRRP members by the EULEX raises legitimate concerns on the institutional independence and the efficiency of performing the mandate.'[64] The control of EULEX, which is an institution partially out of control (from EU and Kosovo citizens), requests that we approach such problems from a more serious perspective and be more prepared for similar future challenges. In this regard, the loopholes have been filled by some soft law agreements such as The Brussels Agreement and The Washington Agreement. 'As this example demonstrates, soft law provides a means to lessen sovereignty costs by expanding the range of available institutional arrangements along a more extensive and finely differentiated tradeoff curve.'[65] There is also an evident and clear need that the EU by means of EULEX should do more to implement, and when necessary enforce the soft law agreements in order to advance the developments regarding democracy, human rights and the rule of law accordingly.

8. CONCLUSION

As we have outlined it from the beginning, the costs of human rights implementations are various and the mere amount of money does not mean much considering the special background a certain post-conflict society might have. The level and success of democracy, human rights and the implementation of the rule of law can't be guaranteed, nor can their form of implementation be pre-planned. The very specific case of Kosovo, with all its legal ambiguities and by now crucial partial UN and EU recognition has served as a very good example of peace building efforts from which many have learned a lesson. It is hard to find a state or international organization that has not seen its stake in

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62 Zupančič, R.; Pejič, N., *Limits to the European Union's Normative Power in a Post-conflict Society: EULEX and Peacebuilding in Kosovo*, Springer Briefs in Population Studies, Cham, 2018, p. 2.

63 Human Rights Review Panel, European Union Human Rights Review Panel, [http://www.hrrp.eu/index.php], Accessed 4 April 2024.

64 Visoka,G., *The EULEX Accountability in Kosovo*, 2013, Brief Study, no. 2, Kosovo Institute of Peace, p. 11.

65 Abbott, K. W.; *op. cit.,* note 20, pp. 421-456.

the Kosovo peace-building process. While the most important role in Kosovo belongs to EULEX, and it is even more powerful than the Kosovo government itself. EULEX together with the EU, can contrary to some democratic principles force the Kosovo government to make laws and apply them in a manner they would never normally do. The EU has forced the establishment of the Kosovo Specialist Chambers and the obligation to form the Association/Community of Serbian Municipalities which is right now contrary to Kosovo laws. Therefore the influence of the EU in its neighbourhood and the agreements it makes with governments are seen as more demanding and taking pieces of sovereignty from its potential member states even before EU accession happens. In all the work, the EU made many mistakes and the EULEX corruption scandals urge us to change the way of controlling the EU and give a better understanding of how it works to both its citizens and the outside world. The burden on the EU is very heavy and it is hardly coping with all the challenges it faces from both inside and outside. For this reason, Kosovo is a great place to test its ability, institutions and personnel for the possible upcoming challenges. The work of EULEX is now limited again, but as it has been active for more than 10 years and the situation is not changing so rapidly, we could expect its presence in Kosovo for a longer period of time, with a limited re-shaping of its mandate and influence. The presence and slow penetration of the Serbian minority into Kosovo institutions is a precondition for a successful EULEX mission and Kosovo state-building, but considering the initial and completely different viewpoints regarding the future Kosovo state, we cannot expect much at this point. This case study has served us with many very important facts from which we could see how the EU will and could cope with its future challenges, in particular the costs related to democracy, human rights and the rule of law in post-conflict societies.

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Chapter 6

UDK 004.738.5:342.7(4-67EU)
Review article

THE COMPATIBILITY OF RESTRICTIVE MEASURES REGARDING CYBERATTACKS WITH THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

Eimys Ortiz-Hernández, PhD, Serra Húnter Tenure-Eligible Lecturer of Public International Law and International Relations
University of Lleida
Jaume II, 73., 25001, Lleida, Spain
eimys.ortiz@udl.cat

ABSTRACT

The realm of cyberspace presents a landscape of both promise and peril, spanning economic domains to matters of security. In response, the EU has diligently crafted a comprehensive cybersecurity framework, rooted in cyber diplomacy, to mitigate and counter cyber disruptions and threats. This work embarks on an exploration of the legal underpinnings of restrictive measures or sanctions as outlined in Council Decision 2019/797 and Council Regulation 2019/796. Through a thorough analysis of this framework, the paper scrutinizes the compatibility of unilateral cyber sanctions with the fundamental rights enshrined in the Charter of Fundamental Rights of the EU. It underscores the imperative of clear and unambiguous legislation in upholding due process, safeguarding the rule of law, and preserving the core values of the EU.

Keywords: *Common Foreign and Security Policy, Court of Justice of the EU, cyber sanctions, fundamental rights, judicial review, restrictive measures*

1. INTRODUCTION

In the midst of spring 2022, the Council of the European Union (hereinafter referred to as the Council) resolved to extend until May 18, 2025, the restrictive measures designed to address the threats posed by cyberattacks within the organization and its Member States.[1] This framework empowers the European Union (EU) to enforce targeted restrictive measures against individuals and/or entities implicated in cyberattacks originating beyond the Union's borders, which have

[1] Council of the EU, *Cyber-attacks: Council extends sanctions regime until 18 May 2025*, press release, 16.05.2022, [https://www.consilium.europa.eu/en/press/press-releases/2022/05/16/cyber-attacks-council-extends-sanctions-regime-until-18-may-2025/], Accessed 10 April 2024.

caused or possess the potential to cause substantial disruptions to cybersecurity, thus posing a threat to its own stability and security. Moreover, aligned with the objectives of the Common Foreign and Security Policy (CFSP), there exists the avenue to counter such nefarious activities by imposing sanctions, provided the attack is directed towards third States or international organizations. Presently, eight individuals and four entities are under the purview of restrictive measures, including travel bans to the EU territory and/or asset freezes.[2]

The EU's commitment to transnational cooperation regarding restrictive measures is rooted in Brussels' imperative to firmly oppose cyberattacks. Consequently, it decided to provide itself with specific instruments to be activated when necessary.[3] In light of the escalating quantity and sophistication of cyberattacks, the necessity for cyber deterrence tools was acknowledged.[4] It is worth noting that the European regime was not fortuitous but rather, in a way, the culmination of efforts that began to take shape some years earlier, specifically in 2013. At that time, the Cybersecurity Strategy was launched -updated in 2020- emphasizing the importance of achieving greater coordination within the Union through a coherent international cyber policy.[5] The EU Cyber Defence Policy Framework, adopted in 2014 and revised in 2018, reiterated cybersecurity as a priority of the EU's Global Strategy on Foreign and Security Policy[6], emphasizing the necessity to strengthen the Union as a "security community".[7] In light of these circumstances, it was crucial to supplement the EU's existing instruments, such as the cybersecurity regulation and the directives on network and information systems security, with a joint diplomatic approach, as emphasized by the 2015 Cyber Diplomacy Conclusions, which insisted on the essential nature of formulating a comprehensive action plan

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2 Council Regulation 2019/796/EU concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ L129 I/1.

3 Borrell, J., *Cyber sanctions: time to act*, 30.07.2020, [https://www.eeas.europa.eu/eeas/cyber-sanctions-time-act_en], Accessed 10 April 2024.

4 Arteaga, F., *Sanciones contra los ciberataques: la UE enseña las uñas*, Real Instituto Elcano, Comentario Elcano 19/2019, 11.06.2019, [https://media.realinstitutoelcano.org/wp-content/uploads/2021/11/comentario-arteaga-sanciones-contra-los-ciberataques-la-ue-ensena-las-unas.pdf], Accessed 10 April 2024.

5 Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Cybersecurity Strategy of the EU: an open, safe and secure cyberspace*, JOIN(2013)1 final, Brussels, 07.02.2013. Joint communication to the European Parliament and the Council, *The EU's cybersecurity strategy for the digital decade*, JOIN(2020) 18 final, Brussels, 16.12.2020.

6 European Commission, *A global strategy for the European Union's Foreign and Security Policy*, 2016, [https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf], Accessed 10 April 2024.

7 European Council, *EU Cyber Defence Policy Framework*, 18.11.2014, 15585/14. European Council, *EU cyber defence policy framework (2018 update),* 19.11.2018, 14413/18.

covering accountability for illicit activities.[8] The Council's work continued, and thus, in June 2017, it adopted a set of cyber diplomacy instruments known as the EU Cyber Diplomacy Toolbox.[9] As autumn progressed, the Political and Security Committee approved the implementation guidelines for this set of instruments, addressing five categories of measures, including restrictive measures. With the framework in the making and little time to bolster it, the Union had to face the attacks of WannaCry and NotPetya.[10] Thus, on May 17, 2019, Decision (CFSP) 2019/797 and Regulation (EU) 2019/796 were ratified, both pertaining to restrictive measures against cyberattacks posing a threat to the Union or its Member States. Both legislative frameworks included a blank annex intended for the listing of recipients of the measures, which was expeditiously completed. Subsequently, in July 2020, the initial punitive measures were sanctioned against individuals and corporate entities of Chinese, Russian, and North Korean citizenship, in accordance with a distinctive and intricate regulatory framework.[11]

In essence, the legal framework, predicated on the allocation of competences between Member States and the Union, encompasses the identification of recipients, the nature and victims of cyberattacks, the modalities and scope of restrictive measures, as well as the stipulated safeguards, controls, and legal assurances to ensure the conformity to law of measures enacted by the Council.[12] However, despite Brussels' advocated safeguarding process, what would happen if an individual or entity subject to the described restrictive measures challenged their compatibility with the EU Charter of Fundamental Rights (ECFR)? Which fundamental rights could potentially be undermined by the imposition of sanctions in the context of combating cyber threats? If ambiguity or obscurity were to characterize the future legal response, the effectiveness of the Union's purpose would be eroded. Hence, it

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8 Council Conclusions on Cyber Diplomacy, Brussels, 11.02.2015.

9 Council Conclusions on a Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities ("Cyber Diplomacy Toolbox"), 19.06.2017. Vid., Kasper, A.; Osula, A.M.; Molnár, A, *EU cybersecurity and cyber diplomacy,* Revista d'internet, dret i política, Dossier "Europe facing the digital challenge: obstacles and solutions", No. 34, December, 2012, pp. 1-15; Miadzvetskaya, Y.; Wessel, Ramses A., *The externalization of the EU's cybersecurity regime: the cyber diplomacy toolbox*, European Papers, Vol. 7, No. 1, 2022, pp. 413-438; Moret, E.; Pawlak, P., *The EU Cyber Diplomacy Toolbox: towards a cyber sanctions regime?*, European Union Institute for Security Studies (EUISS), Brief Issue No. 24, 2017, [https://ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/EUISS-Brief_24_Cyber_sanctions.pdf] Accessed 10 April 2024.

10 Council conclusions on malicious cyber activities, 16.04.2018, 7925/18.

11 Concerning EU cyber-sanctions *vid.,* [https://www.sanctionsmap.eu/#/main/details/47/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D], Accessed 10 April 2024.

12 Robles Carrillo, M., *Sanciones contra ciberataques: la acción de Unión Europea*, Documento de Opinión IEEE 143/2020, [http://www.ieee.es/Galerias/fichero/docs_opinion/2020/DIEEEO143_2020MARROB_ciberUE.pdf], Accessed 10 April 2024.

is worth conducting an analysis of the current legal framework to assess the consistency of the system with the rule of law that the EU upholds as an intrinsic value.

2. LEGAL REGIME ANALYSIS PERTAINING TO THE IMPOSITION OF SANCTIONS AGAINST CYBERATTACKS

Initially, European sanctions practices emerged in response to serious violations of international law, primarily targeting third States.[13] However, the scope later expanded to include the possibility of imposing sanctions on individuals and/or legal entities, aligning with mandates issued by the United Nations Security Council in the aftermath of September 11th.[14] Thus, recourse to primary law becomes imperative to grasp the nuances of the system itself. Article 215 of the TFEU is crafted to reconcile the competences vested in the EU with those retained by Member States in the realm of foreign policy when imposing sanctions on third parties. Under this provision, when a decision is adopted within the framework of the CFSP foreseeing the interruption or reduction, total or partial, of economic and financial relations with one or more third countries or against individuals or legal entities, groups, or non-state entities, the Council shall adopt the necessary measures. Hence, two distinct legal acts with separate procedures are necessitated, albeit both originating from the Council.[15] Accordingly, while article 24 of the TEU mandates unanimity for decisions within the CFSP, article 215 of the TFEU requires qualified majority voting.

Considering these intricacies, the legal framework governing sanctions imposed within the EU framework against malicious activities in cyberspace is delineated by the 2019 Decision and Regulation, which establish the overarching normative framework. Subsequent implementing Decisions and Regulations, adopted in 2020, 2021, 2022, and 2023 respectively, serve to organize the list of individuals, legal entities, entities, and organisms, as well as cyberattacks, targeted by these measures. Additionally, they fulfil the obligation of annual review or adaptation to evolving legislative circumstances. It becomes evident, thus, that the examination

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13 Hörbelt, C., *A comparative study: where and why does the EU impose sanctions*, Revista Unisci/Unisci Journal, No. 43, January 2017, pp. 53-71.

14 Pawlak, P., *The EU's Role on Shaping the Cyber Regime Complex*, European Foreign Affairs Review Vol. 24, No. 2, 2019, pp. 167-186.

15 Robles Carrillo, M., *op. cit.,* note 12, pp. 5-6. See also, Case C-134/19 P *Bank Refah Kargaran v Council of the European Union* [2020] ECLI:EU:C:2020:793, par. 41 "As the Council itself acknowledges, CFSP Decisions, and the regulations enacted pursuant to Article 215 TFEU to implement them, may not be substantively identical. In particular, as far as natural persons are concerned, restrictions on admission to the territory of the Member States are likely to be included in CFSP Decisions, without necessarily being included in regulations based on Article 215 TFEU […]". See also, Case C-72/15 P *JSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236, par. 89 and 90.

of these instruments facilitates the identification of the key components of the legal framework.

Firstly, within the preamble, the political process underpinning the formulation of both legal instruments is set forth. It is imperative to underscore that the restrictive measures are portrayed as an additional tool in the collective diplomatic response against malicious cyber activities. In essence, authorities sought to achieve two particularly intricate objectives: facilitating the mitigation of immediate threats on the one hand, and shaping the behaviour of potential aggressors in the long term on the other. Thus, the capacity for responsiveness and deterrence would delineate the trajectory to be pursued, while ensuring the preservation of fundamental rights and adherence to the principles enshrined in the ECFR. However, a crucial caveat is introduced, aiming to dissociate the restrictive measures from the attribution of responsibility to a third State for cyberattacks. Alternatively, it is asserted that the application of these measures does not automatically attribute responsibility to the State whose nationality the individual or entity subject to such measures holds. The decision was made in accordance with the principle of sovereignty, whereby States retain the freedom to determine their own stance regarding the attribution of cyberattacks to a third state. Indeed, this provision mitigated the potential political ramifications associated with the issue of third-party State responsibility. Nevertheless, part of the academic discourse has underscored that attribution remains one of the most significant challenges within the established system.[16]

Secondly, the scope of application of the regime is set out, wherein the machinery is activated in response to cyberattacks with significant effects, encompassing attempts that may result in such consequences and also pose an external threat to the

[16] With respect to attribution vid., Bendiek, A.; Schulze, M., *Attribution: a major challenge for EU cyber sanctions*, German Institute for International and Security Affairs, SWP Research Paper No.11, December 2021, Berlin; Delerue, F., *Cyberoperations and international law*, Cambridge University Press, 2020, p. 513; Kijeweski, P.; Jaroszewski, P.; Urbanowicz, J.A.; Armin, J., *The never-ending game of cyberattack attribution*: *Exploring the threats, defenses and research gaps* in: Akhgar, B; Brewster, B (eds.), Combatting cybercrime and cyberterrorism, Springer International Publishing, 2016, pp. 175-192; Neil C. R., *The attribution of cyber warfare*, in: Green, J.A., Cyber warfare. A multidisciplinary analysis, Routledge, 2015, pp. 61-72; Guitton, C., *Inside the enemy's computer: identifying cyber attackers*, Oxford University Press, 2017, 320p; Tsagourias, N., *Cyber attacks, self-defence and the problem of attribution*, Journal of Conflict and Security Law, Vol. 17, No. 2, 2012, pp. 229-244; Kavaliauskas, A., *Can the concept of due diligence contribute to solving the problem of attribution with respect to cyber-attacks conducted by non-State actor which are used as proxies by States?*, Law Review, Vol. 26, No. 2, 2023, pp. 4-30; Eichensehr, K.E., *Decentralized cyberattack attribution*, American Journal of International Law, Vol. 113, 2019, pp. 213-217; Finlay, L.; Payne, C., *The attribution problem and cyber armed attacks*, American Journal of International Law, Vol. 113, 2019, pp. 202-206 and Healey, J.: *Beyond Attribution: Seeking National Responsibility in the Cyber Attacks*, Atlantic Council Issue Brief, [http://www.atlanticcouncil.org/images/files/publication_pdfs/403/022212_ACUS_NatlResponsibilityCyber.PDF] Accessed 10 June 2024.

Union, its Member States, or even to third countries or international organizations. There is undoubtedly a detailed clarification of the definition of a cyberattack[17], the factors[18] qualifying it as an external threat[19], and moreover, various essential concepts are defined to preclude any semblance of arbitrariness. For instance, the terms "freezing of funds"[20] or "freezing of economic resources"[21] are explicitly defined. In this paragraph, it is appropriate to address the territorial scope of the measures, as they extend beyond the territory or airspace of the Union. These measures may apply to aircraft or vessels under the jurisdiction of a Member State. Additionally, they are intended to encompass any natural or legal person who is a national or registered or incorporated under the laws of a Member State, or who conducts commercial activities, either wholly or partially, within the Union.

Thirdly, the recipients of the measures are specified: natural and/or legal persons, entities, or bodies, whether accountable for the action or attempt, included in the relevant annex.[22] Furthermore, the application of the measures will encompass those natural and/or legal persons who have provided financial, technical, or material assistance, or who have otherwise been implicated, for instance, through planning, preparation, or facilitation of such attacks by commission or omission. Finally, it was noted that if any form of association with natural or legal persons engaged in malicious activity were identified, those entities would be subject to the provisions of the established framework.

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17 "[…] cyber-attacks are actions involving any of the following: a) access to information systems; b) information system interference; c) data interference; or d) data interception, where such actions are not duly authorized by the owner or by another right holder of the system or data or part of it, or are not permitted under the law of the Union or of the Member State concerned"

18 "[…]The factors determining whether a cyber-attack has a significant effect as referred to in Article 1(1) include any of the following: a) the scope, scale, impact or severity of disruption caused, including to economic and societal activities, essential services, critical State functions, public order or public safety; b) the number of natural or legal persons, entities or bodies affected; c) the number of Member States concerned; d) the amount of economic loss caused, such as through large-scale theft of funds, economic resources or intellectual property; e) the economic benefit gained by the perpetrator, for himself or for others; f) the amount or nature of data stolen or the scale of data breaches; or g) the nature of commercially sensitive data accessed"

19 "[…] Cyber-attacks constituting an external threat include those which: a) originate, or are carried out, from outside the Union; b) use infrastructure outside the Union; c) are carried out by any natural or legal person, entity or body established or operating outside the Union; or d) are carried out with the support, at the direction or under the control of any natural or legal person, entity or body operating outside the Union".

20 "[…] 'economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but may be used to obtain funds, goods or services"

21 "[…] freezing of economic resources' means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them"

22 Vid. Case T-125/22 RT France v Council [2022] ECLI:EU:T:2022:483, para. 102.

Fourthly, the regulatory framework details the restrictive measures, comprising both the prohibition of entry or transit within Member States and the freezing of all funds and economic resources. However, nuanced exemption criteria were devised. For instance, nationals of Member States subject to these measures may have restrictions lifted regarding entry or transit. Additionally, compliance with consular/diplomatic law regarding privileges and immunities could lead to exemptions, particularly if a Member State hosts an international organization or an UN-sponsored conference attended by individuals subject to restrictions. Moreover, humanitarian justifications or legal proceedings may warrant the lifting of sanctions. Regarding exemptions for the freezing of funds and economic resources, a comprehensive range of exclusionary circumstances is contemplated. Verification may prompt the authorization of funds release to meet basic needs or cover reasonable professional fees and expenses for custody or maintenance services. Further exemptions encompass arbitral awards issued prior to inclusion, judicial or administrative resolutions issued by the Union or Member States, contracts concluded pre-inclusion, and allowance for third-party funds transfer into immobilized accounts, provided they are also retained. Lastly, provisions are established to absolve individuals or entities executing fund immobilization from liability if done in accordance with European regulations and in good faith.

In the fifth and final instance, the collaboration among the diverse implicated institutions - the Council, the Commission, and the Member States - at every phase of the sanctioning process is addressed. Communication coupled with coordination stands as a foundational pillar of the collective system. Consequently, they will exchange all pertinent information related to the execution and potential breaches of the provisions established both in the Regulation and the Decision. Accordingly, when a proposal for inclusion on the list is made by a Member State, the High Representative, or the Council, and it is deemed appropriate, the latter will communicate the decision, affording the opportunity to present relevant observations. Undoubtedly, in cases where observations are put forward or significant new evidence is presented, the Council will proceed with its examination. Hence, the list will undergo periodic review, at minimum every twelve months. The list will delineate the grounds for inclusion, as well as furnish the requisite details to identify the natural or legal persons, entities, or organisms concerned. Concerning natural persons, this information may encompass their full name, aliases, date and place of birth, nationality, passport or identity document number, gender, known postal address, and occupation or profession. As for legal persons, entities, or bodies, the list may encompass their full name, date and place of registration, registration number, and registered office address. With regard to the Member States, aside from endorsing regulations on sanctions for breaches of the prescribed provisions, they

will undertake the requisite measures to ensure their implementation.[23] In turn, the Commission will handle personal data within the purview of its competencies.[24] In summary, the cooperative framework among the implicated institutions underscores the importance of communication and collaboration in ensuring the effective implementation of the established measures. The periodic review of the list, along with the provision of comprehensive information, serves to maintain transparency and accountability within the regulatory regime. Moreover, the delineation of responsibilities between the Council, the Commission, and the Member States contributes to the overall efficacy and legitimacy of the sanctioning process.

The initial inclusion of six individuals and three legal entities took place through the mandatory Decision and implementing Regulation in July 2020.[25] Subsequently, the number rose the eight individuals and four legal entities within a few months.[26] These listings have been subject to annual extensions as prescribed by the regulatory framework. However, toward the end of 2023, a new exemption was introduced to enhance coherence and consistency between the Union's regime of restrictive measures and those adopted by the United Nations Security Council.[27] This exemption aimed to ensure the timely provision of humanitarian assistance or support for other activities addressing basic human needs. Specifically, an exemption from asset freezing measures and restrictions on making funds and economic resources available to designated individuals, entities, or bodies was instituted. This exemption benefited entities established under UN Security Council Resolution 2664 (2022), organizations and bodies granted the humanitarian partnership certificate by the UE, and organizations and bodies certified or recognized by a Member State or specialized agency thereof. Moreover, it was agreed to introduce an exception mechanism, or modify the existing one, for organizations and entities engaged in humanitarian activities ineligible for the exemption. Finally, it

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23 The penalties provided for shall be effective, proportionate and dissuasive.

24 The Commission will carry out the following tasks: on the one hand, it will add the contents of the annex to the electronic, consolidated list of persons, groups and entities subject to Union financial sanctions and to the interactive sanctions map, both publicly available. On the other hand, it will be charge of processing.

25 Council Decision (CFSP) 2020/1127 of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2020] OJ L246/12. Council implementing Regulation (EU) 2020/1125 of 30 July 2020 implementing Regulation (EU) 2019/796 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2020] OJ L246/ 4.

26 Council Decision (CFSP) 2020/1537 of 22 October 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2020] OJ L I/351/5.

27 Resolution 2664 (2022) on humanitarian exemptions to asset freeze measures imposed by UN sanctions regimes, adopted by the Security Council at its 9214th meeting, on 9 December 2022.

was deemed necessary to introduce review clauses concerning these exemptions. These clauses would facilitate periodic assessments of the exemption mechanism's effectiveness and relevance, ensuring alignment with evolving humanitarian needs and international security considerations. Therefore, this development signifies a proactive approach by the Union to harmonize its sanctions framework with global humanitarian imperatives, reflecting a commitment to balancing security objectives with humanitarian principles.[28]

3. THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS: A SAFEGUARD AGAINST SANCTIONS FOR MALICIOUS CYBER ACTIVITIES?

In examining the issue at hand, it becomes evident that safeguarding fundamental rights is paramount in mitigating the adverse effects of sanctions levied against both individuals and legal entities in the realm of cyber activities. Of particular importance are the rights to good administration (as enshrined in article 41 of the ECFR) and to a fair trial (as articulated in article 47 ECFR).[29] Yet, equal attention must be given to the right to personal data protection (articulated in article 8 ECFR), especially concerning the assignment of malicious actions, the potential undue restriction on property rights (as stipulated in article 17 ECFR), and the adherence to the principle of proportionality (outlined in article 52 ECFR). Consequently, it becomes imperative to scrutinize the rationale put forth by the European Court of Justice (ECJ) regarding the criteria for including individuals or legal entities in sanction lists. This scrutiny not only ensures compliance with fundamental rights but also serves to uphold the integrity of the judicial process within the Union.[30] By carefully examining these legal principles and their application in the context of cyber-related sanctions, policymakers and legal practitioners can better navigate the complex landscape of cyber governance while upholding the values and principles outlined in the ECFR. Such an approach not only fosters a

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[28] Council Decision (CFSP) 2023/2686 of 27 November 2023 amending certain Council Decisions concerning restrictive measures in order to insert provisions on humanitarian exceptions [2023] OJ L2023/2686. Council Regulation (EU) 2023/2694 of 27 November 2023amending certain Council Regulations concerning restrictive measures in order to insert provisions on humanitarian exceptions [2023] OJ L2023/2694.

[29] Bannelier, K., *Le standard de due diligence et la cyber-sécurité*, in: Société française pour le droit international, Le standard de due diligence et la responsabilité international, Journée d'études franco-italienne du Mans, Ed. A. Pedone, Paris, 2018, pp. 67-91.

[30] Cremona, M., *Effective Judicial Review Is of the Essence of the Rule of Law: Challenging Common Foreign and Security Policy Measures Before the Court of Justice*, 2 European Papers (2017), p. 671–697.

more just and equitable system but also strengthens the rule of law and promotes trust and confidence in European institutions.[31]

Whilst American judges has opted to apply lenient standards when deciding upon the imposition of restrictive measures, the ECJ has espoused the principle of comprehensive and rigorous judicial oversight to safeguard fundamental rights.[32] Consequently, the Council has encountered considerable setbacks in cases concerning sanctions.[33] A prime illustration of this **rigorous judicial scrutiny** within the EU framework is exemplified by the Kadi saga, a series of cases emblematic of the exhaustive judicial control exerted by the ECJ in matters involving the curtailment of individual rights.[34] Hence, the Court of Justice asserted in Kadi I that "the Community judicature [...] must ensure the full review of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order" (par. 326).[35] Regarding **the right to defence**, Kadi II concluded that it "includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality" (par. 99).[36] In accordance with the requirements for considering a fair and due process, the judgment determined that it "requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either

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31 Lazzerini, N., *Fundamental rights as constraints on the power of the European Union to impose sanctions*, in: Montaldo, S.; Costamagna, F.; Miglio, A., EU law enforcement. The evolution of sanctioning powers, Routledge, London, 2021, pp. 93-114.

32 Vid., Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La Neuve v Moussa Abdiva* [2014] ECLI:EU:C:2015:650, para. 45 and Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, para. 95. See also Cantwell, D., *A tale of two Kadis: Kadi II, Kadi v. Geithner and US counterterrorism finance efforts*, The Columbia Journal of Transnational Law, Vol. 53, No. 3, 2015, pp. 653-700. Bogdanova, I.; Vásquez Callo-Müller, M., *Unilateral cyber sanctions: between questioned legality and normative value*, Vanderbilt Journal of Transnational Law, Vol. 54, No. 4, 2021, pp. 911-954.

33 Miadzvetskaya, Y., *Cyber sanctions: towards a European Union cyber intelligence service?*, College of Europe Policy Brief, No. 1, February 2021, [https://www.coleurope.eu/sites/default/files/research-paper/miadzvetskaya_cepob_1-2021_final_0.pdf], Accessed 10 April 2024; Simon, D., Rigaux, A., *Le jugement des pourvois dans les affaires "Kadi" et "Al Barakaat": "smart sanctions" pour le Tribunal de première instance?*, Europe 2008, Vol. 18, pp. 5-11.

34 Fabbrini, F.; Larik, J., *Global counter-terrorism sanctions and European due process rules: the dialogue between the CJEU and the ECtHR*, in Avbelj, M.; Fontanelli, F.; Martinico, G. (eds.), Kadi on trial: a multifaceted analysis of the Kadi judgment, Routledge, Abingdon: 2014, pp. 137- 156. Harpaz, G., *Judicial review by the European Court of Justice of UN "smart sanctions" against terror in the Kadi dispute*, European Foreign Affairs Review, Vol. 14, No. 1, 2009, pp. 65-88; Chachko, E., *Foreign Affairs in court: lessons from CJEU targeted sanctions jurisprudence*, Yale Journal of International law, Vol. 44, No. 1, 2018, pp. 1-51.

35 Join Cases C-402/05 & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union,* [2008] ECR I-06351.

36 Join Cases C-584/10 P, C-593/10 P & C-595/10 P *European Commission and Others v Yassin Abdullah Kadi*, [2013] ECR – general.

by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question" (par. 100).[37]

Therefore, the decision to subject an individual or entity to specific restrictive measures requires clear criteria tailored to each specific case to determine which individuals and entities may be included in the list, which must also apply to the effects of their removal from the list.[38] Furthermore, the Council is bound by the obligation of reasoning established in article 296 of the TFEU, which implies that the reasoning identifies "not only the legal basis of that measure but also the individual, specific and concrete reasons why the competent authorities consider that the person concerned must be subject to restrictive measures" (par. 70).[39] The obligation of reasoning entails a robust argumentation which, however, could become vague and confusing considering the terms of the framework. Miadzvetskaya emphasizes that the flexibility inherent in the thematic sanctions system entails that concepts such as "significant effect" or "external threat" are not adequately defined.[40] Indeed, the Council set forth elements to assess whether an attack could be considered significant based on the scope, scale, impact, or severity of disruption caused and the number of "victims". However, as the author argues, ambiguity increases the risk of arbitrariness in decision-making and, consequently, increases the likelihood of being subject to judicial review.[41]

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37 *Ibid*.

38 Vid., Case C-348/12 P *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co., Tehran* [2013] ECLI:EU:C:2013:776, par. 73: "[…] Furthermore, the effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the Courts of the European Union are to ensure that the decision, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis. That entails a verification of the allegations factored in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated".

39 Join Cases T-533/15 & T-264/16 *Il-Su Kim & Korea National Insurance Corporation v Council of the European Union & European Commission*, [2018] ECR-general.

40 Miadzvetskaya, Y., *op. cit.,* note 33, p. 3.

41 *Ibid.*

Much more has been decided regarding the right to defence and to be heard, for instance, in the RT France v Council case[42], the Court asserted that, although both rights are enshrined in the CFR as well as in jurisprudence, they are also subject to limitations or exceptions within the context of restrictive measures adopted under the CFSP.[43] On the one hand, it underlined that the existence of a violation of the right to defence must be assessed based on the specific circumstances of each case, particularly considering the nature of the act in question, the context in which it was adopted, and the legal norms governing the relevant matter.[44] On the other hand, with regard to the right to be heard, jurisprudence indicates that the Council is not obliged to inform the affected person or entity in advance of the reasons for their inclusion, as this would undermine the effectiveness of the measure. Consequently, the Court held that "such a derogation from the fundamental right to be heard during a procedure preceding the adoption of restrictive measures is justified by the need to ensure that the freezing measures are effective and, in short, by overriding considerations to do with safety or the conduct of the international relations of the Union and of its Member States" (par. 81).[45] In other words, the Court noted that the context made it difficult to adjust the restrictive measures due to the rapid deterioration of the situation and the severity of the violations committed. Indeed, the measures were adopted immediately after the onset of the military aggression, which was expected to be of short duration, thereby justifying the limitation (par. 87). [46] Therefore, the Court found that, given the "exceptionally urgent context" in which the contested acts were adopted, the right to be heard was not violated (par. 92).

With regard to the principle of good administration, according to established jurisprudence[47], the Council is obligated to thoroughly and impartially examine

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42 Case T-125/22 *RT France v Council* [2022] ECLI:EU:T:2022:483.

43 *Ibid*., par. 77 "(see, to that effect, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C27/09 P, EU:C:2011:853, paragraph 67 and the case-law cited) and in other spheres (see, to that effect, judgments of 15 June 2006, *Dokter and Others*, C28/05, EU:C:2006:408, paragraphs 75 and 76, and of 10 September 2013, *G. and R.*, C383/13 PPU, EU:C:2013:533, paragraph 33).

44 *Ibid*., par. 78.

45 See to that effect, Case C27/09 P *France* v *People's Mojahedin Organization of Iran*, EU:C:2011:853, par. 67.

46 Case T-125/22, op. cit., note 42, par. 87. "Thus, in the context of the European Union's overall strategy of responding in a rapid, united, graduated and coordinated manner, the requirements of urgency and effectiveness of all the restrictive measures adopted justified the limitation, on the basis of Article 52(1) of the Charter (see paragraph 77 above), of the application of Article 41(2)(a) of the Charter, inasmuch as they responded effectively to objectives of general interest recognised by the European Union, such as protecting the Union's public order and security, as stated in recital 8 of the contested acts".

47 Case T-545/13 *Fahed Mohamed Sakher al Matri v Council of the European Union* [2016] ECLI:EU:T:2016:376.

all relevant circumstances of the case when adopting restrictive measures. In the Kaddour case[48], it was held that the mere inclusion of the applicant's name on the lists could not, by itself, be sufficient to question the Council's impartiality. Furthermore, the Court clarified that the prolonged presence of his name on the lists could not, in itself, be considered indicative of partial or inequitable treatment, nor of unreasonable delay in the handling of his case (par. 55).

Another important aspect lies in the evidence, as elucidated in Kadi II, it must be "substantiated and that it constitutes in itself sufficient basis to support that decision" (par. 130).[49] Hence, when transposed into our cyber realm, this obligation becomes intricate due to the inherent challenges in gathering evidence, particularly concerning anonymity. Moreover, another increasingly significant challenge emerges: attribution, or establishing the link between malicious activities and their perpetrators. In this context, the right to personal data protection assumes crucial importance, as evidence collection may necessitate confidentiality, potentially leaving individuals vulnerable.[50] It is notable that the EU has ruled that imposing restrictive measures does not imply attributing international responsibility to third States.[51] Therefore, the Union is empowered to target the perpetrators of attacks (be they individuals or non-state entities) based on technical attribution, reserving the invocation of international responsibility for States. However, Brussels' stance, while politically motivated, adds complexity in pinpointing the true culprits behind cyberattacks. The evidentiary challenges might be addressed by adhering to the criterion established in the Anbouba case[52], where it was specified that the Council had met the burden of proof by presenting to the Union judge a set of sufficiently concrete, precise, and consistent evidence. This evidence allowed for the establishment of a sufficient link between the individual subject to a restrictive measure (par. 53).[53]

The **restriction of property** could likewise be subject to review by the Court. However, in Kadi I, it was prescribed that such a measure was not intended nor had the effect of subjecting individuals listed in the consolidated list to inhuman or degrading treatment. In the Rosneft case[54], the Court underscored the extensive

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48 Case T-461/15 *Khaled Kaddour v Council of the European Union* [2018] ECLI:EU:T:2018:316.

49 Join Cases C-584/10 P, C-593/10 P & C-595/10 P…, *op. cit.,* note 36.

50 Case C-280/12 P *Council v Fulmen and Mahmoudian* [2013] ECLI:EU:C:2013:775, par. 59 and 60.

51 Poli, S.; Sommario, E., *The rationale and the perils of failing to invoke State responsibility for cyber-attacks: the case of the EU cyber sanctions*, German Law Journal, Vol. 24, 2023, pp. 522-536.

52 Case C-630/13 P *Issam Anbouba v Council of the European Union* [2015] ECLI:EU:C:2015:247.

53 Vid. Case C-193/15 P *Tarif Akhras v Council of the European Union* [2016] ECLI:EU:C:2016:219.

54 Case C-72/15 PJSC, op. cit., note 15. For a comment on Rosneft case, see, Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market

discretionary authority vested in the legislator when making political, economic, and social decisions, which often require intricate assessments (par. 146 and 147). The Court concluded that the fundamental rights at issue—freedom of enterprise and property rights—are not absolute prerogatives. Their exercise may be legitimately restricted by the Union to achieve objectives of general interest (par. 148).[55]

Concerning judicial control over the observance of the principle of proportionality, the Court in the Hawswani case reiterated that, in accordance with jurisprudence, this principle "requires that measures implemented through provisions of EU law should be appropriate for attaining the legitimate objectives pursued by the legislation concerned and do not go beyond what is necessary to achieve them" (par. 99).[56] Furthermore, the Court clarified that it had recognized the European legislator's "broad discretion in areas involving political, economic, and social choices, where complex assessments are required" (par. 100).[57] Consequently, when the time comes, the Council would need to demonstrate that the adoption of restrictive measures is appropriate, as alternative and less coercive measures would not effectively achieve the intended purpose.[58]

Finally, it is relevant to examine the possibility of compensation for damages allegedly suffered as a consequence of the established restrictive measures. In light of the necessary coherence of the judicial protection system established by Union law, the Court is also competent to rule on the damages allegedly suffered due to restrictive measures adopted in CFSP decisions. The primary reason is that the public designation of individuals subject to restrictive measures brings opprobrium and mistrust, which can cause damages and justify the filing of a compensation claim to seek redress. The Court's approach can be observed in three significant cases: Abdulrahim[59], Safa Nicu

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Law Review, Vol. 57, 2017, pp. 1799-1834.

55 *Ibid*., par. 148 "[…] Second, the fundamental rights relied on by Rosneft, namely the freedom to conduct a business and the right to property, are not absolute, and their exercise may be subject to restrictions justified by objectives of public interest pursued by the European Union, provided that such restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the rights guaranteed (see, to that effect, judgments of 14 May 1974, Nold v Commission, 4/73, EU:C:1974:51, paragraph 14; of 30 July 1996, Bosphorus, C84/95, EU:C:1996:312, paragraph 21, and of 16 November 2011, Bank Melli Iran v Council, C548/09 P, EU:C:2011:735, paragraphs 113 and 114)".

56 Case C241/19 P *George Haswani v Council of the European Union & European Commission* [2020] not yet published ECR.

57 *Ibid.*

58 Case C-348/12 *Bank Melli Iran v Council T-390/08* [2009] ECLI:EU:C:2013:77.

59 Case C-239/12 P *Abdulbasit Abdulrahim v Council of the European Union & European Commission* [2013] ECLI:EU:C:2013:331.

Sepahan[60], and Bank Refah Kargaran.[61] The Grand Chamber ruling in Abdulrahim constituted the first, albeit timid and indirect, signal of openness towards recognizing the applicant's right to some form of reparation, at least for non-material damages suffered as a result of the imposition of restrictive measures. [62] In this case, however, such reparation consisted solely of the rehabilitation of the applicant's reputation resulting from the annulment of the act adopted against him, and not from pecuniary compensation.[63] However, it was not until the Safa Nicu Sepahan case that the Court recognized, for the first time, monetary compensation for the damage suffered as a result of being listed under restrictive measures. Thus, not only would the annulment of the restrictive measures constitute a form of reparation for non-material damage, but the individual or entity could also seek pecuniary compensation. To determine the amount of compensation, particular consideration was given to the gravity of the observed violation, its duration, the behaviour of the Council, and the effects of the implication on third parties (par. 52). It is notable that, despite acknowledging the damage, the Court limited the amount to 50,000 euros. This apparent novelty faced an impasse in the Bank Refah Kargaran case. Although nothing prevents the applicant from invoking, in a compensation claim like the one leading to the contested judgment, an illegality consisting of the violation of the right to effective judicial protection, the failure to fulfil the obligation to state reasons could not, by itself, generate the Union's liability (par. 62 and 63). Indeed, the Court continued by clarifying that the obligation to state reasons, established in Article 296 TFEU, constitutes a substantive formal requirement that must be distinguished from the question of the adequacy of the reasoning, as this pertains to the legality of the contested act on the merits. In effect, the reasoning of a decision involves formally expressing the grounds on which that decision is based. If these grounds are unsustainable or flawed, they vitiate the legality of the decision on the merits, but not its reasoning (par. 64).

4. CONCLUSION

The thematic approach of cyber sanctions presents a unique flexibility compared to country-specific measures. By updating existing sanction lists instead of creating new legal frameworks, it streamlines the process and avoids lengthy, veto-prone procedures often seen with specific country designations. This adaptability resonates well with the dynamic nature of cyberspace, where States frequently col-

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60 Case C-45/15 P *Safa Nicu Sepahan Co. v Council of the European Union* [2017] ECLI:EU:C:2017:402.

61 Case C-134/19 P *Bank Refah Kargaran v Council of the European Union* [2020] ECLI:EU:C:2020:793.

62 Vid. Case T-328/14 *Jannatian v Council* [2016] EU:T:2016:86, par. 62–63.

63 Messina, M., *The European Union's non contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?*, Maastricht Journal of European and Comparative Law, Vol. 25, No. 5, 2018, p. 643.

laborate with non-state actors to further their strategic goals[64]. However, amidst this flexibility lies a potential challenge: the legislative framework's ambiguity. Such ambiguity could lead to judicial review and possibly annulment, jeopardizing the legitimacy and effectiveness of the sanctions. This raises questions about the stagnant sanction list, unchanged since 2020, and whether it reflects a broader model fatigue.

The infrequent updates to the list raise concerns about the framework's ability to address evolving cyber threats adequately. With technology advancing rapidly and cyber threats constantly evolving, a static list may fall short in effectively combating emerging challenges. Moreover, the lack of updates may signal a failure to adapt to shifting geopolitical dynamics and emerging cyber threats. Additionally, the inherent ambiguity in the legislative framework poses implementation and enforcement challenges. Unclear criteria for inclusion on the sanction list and designation processes may lead to inconsistencies and errors, undermining the sanctions' legitimacy and effectiveness in deterring malicious cyber activities.

The effectiveness of judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union requires that, when examining the legality of the reasons underlying the decision to include a person's name on the list of those subject to restrictive measures, the Union judge must ensure that such a decision, which constitutes an individual act for that person, is based on sufficiently solid factual grounds. This involves verifying the facts alleged in the statement of reasons underpinning the contested acts to determine whether such reasons, or at least one of them deemed sufficient on its own, are well-founded.

In assessing the importance of the interests at stake, which forms part of the proportionality review of the discussed restrictive measures, the context in which these measures are integrated must be taken into account. This assessment should be carried out by examining the evidence, not in isolation, but within the context in which it is situated. Given the difficulty for the Council to provide evidence due to complex situations, it meets its burden of proof if it presents to the Union judge a set of sufficiently concrete, precise, and consistent indications that establish a sufficient link between the person subject to a restrictive measure and the situation addressed by the measure. Moreover, provided that the evidence has been obtained regularly and that the general principles of law and procedural rules applicable to the burden and presentation of proof have been observed, it is for the General Court alone to assess the value to be attributed to the elements presented. Furthermore, Article 47 of the Charter of Fundamental Rights of the European

[64] Miadzvetskaya, Y., *op. cit.,* note 31, p. 4.

Union, which reaffirms the principle of effective judicial protection, stipulates in its first paragraph that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal, under the conditions set out in that article. The very existence of effective judicial review to ensure compliance with Union law is inherent to the existence of the rule of law.

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Review article

ARTIFICIAL INTELLIGENCE IN CYBERSECURITY: EXAMINING LIABILITY, CRIME DYNAMICS, AND PREVENTIVE STRATEGIES

Herke Csongor, PhD, Full Professor
University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1., Hungary
herke.csongor@ajk.pte.hu

Dávid Tóth, PhD, Assistant Professor
University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1., Hungary
toth.david@ajk.pte.hu

ABSTRACT

This research comprehensively explores the interplay between artificial intelligence (AI) crime and cybersecurity. The study aims to perform a criminological analysis to understand AI's impacts on cybersecurity, highlighting its benefits and potential risks.

A significant aspect of this research is investigating liability issues associated with AI's deployment. These concerns are not limited to specific applications, such as self-driving vehicles, but extend across various AI-utilizing sectors. AI's capability to autonomously make decisions, sometimes with severe implications for individuals, poses the critical question of responsibility. When AI-driven decisions lead to adverse outcomes, the dilemma arises: who should be held accountable - the developers, the users, or the AI itself?

Another vital research question examines how AI influences cybercrime. This study scrutinises AI's role in transforming cybercrime's nature and the new security risks it introduces. It questions the adequacy of current criminal laws in addressing novel crime forms emerging from AI advancements and explores how these laws might need to evolve. Moreover, the research investigates AI's role in amplifying or simplifying traditional crimes, such as through the creation of phishing programs or the use of DeepFake in identity theft.

The impact of AI on digital evidence forms another critical area of investigation. AI algorithms, capable of efficiently analysing vast data sets, can significantly aid in crime detection and perpetrator identification. However, this advancement also raises concerns about the

authenticity of digital evidence. Technologies like deepfake, capable of producing convincing fake images and videos, present a formidable challenge in distinguishing real from fabricated evidence, especially in legal contexts.

Lastly, the research delves into AI's potential in crime prevention. It assesses how AI-driven predictive models can identify likely crime hotspots and timings, enabling more effective resource allocation by police and security services. The study also explores advancements in AI's facial and object recognition technologies, highlighting their potential in criminal identification.

In summary, this research offers a detailed examination of AI's multifaceted impact on cybersecurity, liability issues, cybercrime, digital evidence, and crime prevention, presenting a nuanced understanding of AI's challenges and opportunities in law enforcement and legal accountability.

***Keywords**: Artificial Intelligence, Cybersecurity, Cybercrime and Digital Evidence, Crime Prevention and Detection, Liability and Accountability*

1. INTRODUCTION

The rapid development of information technology has manifested as a Janus-faced phenomenon. On one hand, it has significantly eased people's daily lives by introducing efficiencies and conveniences previously unimaginable. On the other hand, it has also provided criminals with new avenues to commit offenses, thus ushering in unprecedented challenges for states and their legislative efforts in combating cybercrime. This dichotomy lies at the heart of our research, which seeks to explore the nuanced interplay between artificial intelligence (AI), cybercrime, and cybersecurity.

The COVID-19 pandemic has highlighted our reliance on digital communication as never before. In our collective effort to maintain social distancing, digital platforms have become indispensable, enabling us to continue our professional and personal lives with some semblance of normalcy. However, this increased dependence on digital technology has also amplified vulnerabilities, offering cybercriminals enhanced opportunities to exploit these systems, thereby elevating the risks associated with cybersecurity. Just as with the emergence of smartphones[1], the development of artificial intelligence raises many questions. In our opinion, the rise and proliferation of artificial intelligence present various challenges and dilemmas, necessitating examination through both a criminal law and criminology lens. Our study is designed to address the following key areas:

- criminal law questions arise from using artificial intelligence, such as autonomous vehicles causing accidents.

[1] Andrea, K.; László, K.; Dávid, T., *Digital Dangers of Smartphones*, Journal of Eastern-European Criminal Law, Vol. 7, No. 1, 2020, pp. 36-49.

- The impact of artificial intelligence on crime, with a specific focus on cybercrime, including the emergence of new forms of criminal activities or methods of perpetration.
- An examination of how the gradual spread of artificial intelligence, for instance, through technologies like deepfake, could transform the landscape of digital evidence.
- Lastly, the potential roles of artificial intelligence in crime prevention and detection, enhancing law enforcement capabilities.

Our research systematically examines existing scholarly articles using a comprehensive literature review as our primary methodology.

2. LIABILITY QUESTIONS WITH THE USE OF AI

Artificial Intelligence can make decisions, sometimes autonomously, with severe implications for individuals, which poses the critical question of responsibility. When AI-driven decisions lead to adverse outcomes, the dilemma arises: who should be held accountable?

We can illustrate the issue with self-driving cars. Autonomous vehicle development traces back to the 1920s, with significant advancements like Japan's first semi-automatic vehicle in 1977 and DARPA's influential foundation in 1984 in the U.S. Nevada led state authorization in the U.S., followed by Columbia and California, which permitted autonomous vehicles on public roads by 2012, with evolving regulations to accommodate fully driverless technology. The classification of these vehicles ranges from Level 0 (no automation) to Level 5 (fully autonomous) according to the SAE J3016 standard. By 2020, the National Highway and Transportation Safety Administration (NHTSA) had issued guidelines focusing on higher automation levels to promote safety and innovation. The development of autonomous vehicles is also driven by major companies like Tesla and Mercedes, indicating a shift towards broader acceptance and integration of this technology in society.

In cases involving fully autonomous vehicles, determining who to hold accountable for accidents or crimes caused by the vehicle can pose a challenge:

- The first possible candidate is the manufacturer. The manufacturer isn't automatically responsible for production once the vehicle is approved; manufacturing isn't a crime without the proper permits. However, the manufacturer is liable if it can be proven that the vehicle was programmed to commit a deliberate crime, if they could have foreseen and prevented the accident, or if the accident can be traced back to a programming or manufacturing flaw.

- Another option might be the programmer**.** Programming errors also raise questions about the programmer's responsibility, whether the vehicle was programmed recklessly or deliberately in a way that directly causes an accident (e.g., misinterpreting right-of-way rules). However, modern autonomous vehicles are often programmed with "deep learning," continuously updating their decision-making in various situations based on new data, making it increasingly difficult to attribute poor decisions directly to the programmer.
- The third option can be the owner. The owner merely purchases the autonomous vehicle without influencing its autonomous driving system. In fully autonomous vehicles, the operator becomes merely a passenger, unable to affect the vehicle's operation (except possibly to stop it, which rarely helps in immediate situations). This does not preclude the commission of deliberate crimes using the vehicle (e.g., drug trafficking, terrorist attacks, human trafficking).
- Another candidate can be the user: Like the operator, in fully autonomous vehicles, the user is not a driver but a passenger. As automation increases (starting from Level 3), the "driver's" role becomes mere observation, without the need for active intervention over long periods (similar to autopilots used in airplanes and ocean liners). Since responsibility typically falls on those who can influence events, determining liability always requires considering the circumstances of each case.
- Lastly, we have the concept of the vehicle as a "digital person" (like the criminal liability of legal persons) that might arise in accidents involving fully autonomous vehicles. However, fully autonomous vehicles are unlikely to "understand" norms as commands for the foreseeable future since they operate solely based on pre-installed programming without independently interpreting or understanding legal norms and acting accordingly.

Determining who is liable for accidents caused by fully autonomous vehicles is not straightforward. The potential parties (the user, the manufacturer, the programmer, the owner/operator, and the digital person) can all be held accountable, individually or collectively, and responsibility must be determined based on the unique circumstances of each case.[2]

Csitei also acknowledges the complex issue of deciding who can be liable for accidents caused by self-driving cars. In his study, he emphasizes that as autonomous

[2] Herke, Cs., *A kiberbűnözés és a teljesen önvezető járművek*, in: Barabás, A. T.; Christián, L. (eds.), Ünnepi tanulmányok a 75 éves Németh Zsolt tiszteletére: Navigare necesse est, Ludovika Egyetemi Kiadó, Budapest, 2021, pp. 211-216.

vehicles transcend the traditional notion of a vehicle driver, the concept of culpability may lose meaning in many cases of traffic offenses, suggesting a shift in how liability is considered. He also points out that autonomous vehicles are not fully autonomous from human oversight, as humans define their development and operational parameters. Therefore, aspects of human conduct related to autonomous vehicles' design, development, and operational decisions could be considered for liability. He elaborates on holding legal entities accountable under certain conditions. For example, if it can be proven that the accident resulted from a defect in the vehicle's design or manufacturing process or if the software did not operate as intended, legal entities associated with these aspects might face liability.[3] However, we have to mention that legal persons under Hungarian criminal law cannot be held liable for crimes. They can be only sanctioned by measures and not punishments and only if the crime was committed by the entity's officials, employees, or agents within the entity's operational activities, with the intention or result of obtaining a benefit for the entity. In the case of self-driving cars, legal persons cannot be held liable for such accidents unless there is a statutory modification.[4]

Joon differentiates the theoretical liability conditions according to the levels. For Level 4 autonomous vehicles, which need some driver input, Joon indicates that drivers are still responsible under traffic laws when using the autonomous feature. If an accident happens because they don't follow these laws, they could be held criminally accountable. However, if the car is usually in autonomous mode and only asks for driver help after giving an alert, drivers might not be blamed for accidents before the alert. If an accident occurs because they didn't take over manually after an alert, they could face charges for criminal negligence due to their failure to act. For Level 5 autonomous vehicles, which operate without any need for driver input, it is unreasonable to expect drivers to anticipate or prevent accidents, making it impractical to assign them criminal responsibility. In such cases, the liability for accidents shifts to the manufacturers, who are seen as the "drivers" of these fully autonomous vehicles. Although there is a notion of assigning criminal liability to the artificial intelligence or autonomous driving system, Joon's study ultimately points towards corporate manufacturers as the likely bearers of responsibility for any accidents involving fully autonomous vehicles.[5] Unfortunately, such a case has already occurred. In 2018, in the state of Arizona, an Uber

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3 Csitei, B., *Self-Driving Cars and Criminal Liability,* Debreceni Jogi Műhely, 17th Vol., No. 3-4, National University of Public Service, Faculty of Public Governance and International Studies, Department of Civilistics, 30 December 2020, pp. 34-38. [DOI 10.24169/DJM/2020/3-4/4.].

4 Tóth, D., *The Theories and Regulation of Criminal Liability of Legal Persons in Hungary*, Journal of Eastern-European Criminal Law, Vol. 6, No. 1, 2019, pp. 178-189.

5 Joon, K., *Criminal Liability of Traffic Accidents Involving Autonomous Vehicles*, Central Law Review, Vol. 19, No. 4, 2017, pp. 47-82. [https://doi.org/10.21759/caulaw.2017.19.4.47].

self-driving car hit a pedestrian, which resulted in her death due to the car's failure to identify and respond to her presence correctly. However, the car was not fully autonomous and had a safety driver who was charged with negligence. Uber faced no criminal liability because the company reached an undisclosed settlement with the victim's family.[6]

Some authors only mention civil law liability in these cases. Lohmann recommends a model where the vehicle holder remains strictly liable, ensuring the victim's compensation. Under strict liability, as vehicles advance towards full automation, the incidence of accidents attributed to human error is expected to decrease. At the same time, those caused by system malfunctions or software glitches may rise. In scenarios where such malfunctions lead to accidents, manufacturers might face liability for producing a defective product by product liability legislation. The advent of self-driving cars suggests a shift towards more accidents being linked to product defects rather than errors made by drivers, prompting a more thorough examination of the responsibilities borne by manufacturers.[7]

3. THE REGULATION OF AI IN THE EUROPEAN UNION

Manea and colleagues investigated which fundamental rights might be violated using AI. One primary concern is the right to non-discrimination. Suppose an AI system is trained on data that includes biased decisions from the past. In that case, it can perpetuate and even amplify these biases, undermining the principle of equality before the law. Another significant issue is the right to privacy and personal data protection. AI systems often collect and analyze large amounts of data, which can infringe on individuals' privacy rights. The right to freedom of expression is also at risk, as algorithms can affect how information is accessed and distributed. Finally, the right to a fair trial is a critical concern. If AI-based decision-making systems are used in judicial proceedings, they can distort judgments and introduce biases, potentially compromising the justice system's fairness.[8]

These types of concerns also appeared in the bodies of the European Union. Among the institutions of the EU, the European Parliament has dealt with the

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6 Neuman, S., *Uber Reaches Settlement With Family Of Arizona Woman Killed By Driverless Car*, THE TWO-WAY, [https://www.npr.org/sections/thetwo-way/2018/03/29/597850303/uber-reaches-settlement-with-family-of-arizona-woman-killed-by-driverless-car], Accessed 29 March 2024.

7 Lohmann, M. F., *Liability Issues Concerning Self-Driving Vehicles*, European Journal of Risk Regulation, Vol. 7, No. 2, 2016, pp. 336-340, [doi: 10.1017/S1867299X00005754].

8 Manea, T.; Ivan, D. L., *AI Use in Criminal Matters as Permitted under EU Law and as Needed to Safeguard the Essence of Fundamental Right*s, International Journal of Law and Cyber Warfare, Vol. 1, No. 1, 2022, pp. 18-32.

regulation of the use of artificial intelligence in criminal law cases. Several factors prompted the Parliament to investigate this area. Similarly to the findings above, the European Parliament found that AI systems used in law enforcement can perpetuate and amplify biases and discrimination, mainly based on race or ethnicity. Concerns were also raised about the use of AI in mass surveillance and predictive policing, as these technologies are considered unreliable in accurately predicting individual actions, potentially leading to unjust police actions. Due to these issues, the European Parliament adopted a resolution[9] with the following key points:

- The resolution opposes mass surveillance, explicitly calling for a ban on the processing of biometric data, such as facial images, for law enforcement purposes that lead to mass surveillance. It also recommends halting funding for research and development programs that could further this technology.
- It opposes the use of AI in predictive policing due to its potential for discriminatory applications.
- Human oversight is necessary for decisions with legal implications to ensure accountability and fairness. The resolution states that AI-generated results should not be used to propose judicial decisions.
- Transparency is emphasized regarding which bodies use AI, how, and for what purposes.
- The guidelines aim to ensure that AI use in criminal matters respects fundamental human rights, promotes transparency, and prevents discriminatory practices.

However, this resolution is not legally binding and does not impose obligations on member states. Despite this, the adoption of the resolution is positive, as the applications above could violate people's fundamental rights in criminal proceedings, such as the presumption of innocence. On the other hand, we disagree with the stance on halting research and development, as ethically conducted research could advance law enforcement in the future. Additionally, the transparency criteria are too general in their current form.

Future legislation will be required to address liability questions with legal certainty. The European Union actively explores new AI liability frameworks that could serve as models for global standards. All member states have ratified the so-called AI Act draft[10], confirming political consensus. This draft, first presented by the

[9] European Parliament resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)).

[10] Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts

European Commission on April 21, 2021, as the Artificial Intelligence (AI) Act, aims to regulate AI use across the European Union comprehensively. The Council of the EU further solidified its stance by adopting a common position known as the 'general approach' on December 6, 2022.[11] The AI Act emphasizes the critical need for ex-ante testing, risk management, and human oversight to prevent violations of fundamental rights, particularly in crucial areas like law enforcement and the judiciary. The Act recognizes both the potential benefits and significant risks of AI in law enforcement, underscoring the EU's cautious approach toward its usage to safeguard fundamental rights.[12]

The draft does not explicitly detail liability provisions related to AI; the regulatory framework emphasizes accountability for providers and deployers of AI systems, especially those classified as high-risk. For example, they are obliged to undergo rigorous assessment and continuous monitoring to prevent or mitigate potential harm associated with their use. The proposal includes a principle called responsibility for harm or damage. The idea behind this principle is that if harm or damage occurs due to a provider's or deployers' failure to comply with regulatory standards for AI systems, they may be held legally liable. Damage can manifest in many ways, like personal injury, financial loss, and breach of privacy rights, and the draft acknowledges these outcomes and seeks to hold providers and deployers accountable for both anticipated and unforeseen consequences. The proposal has a holistic approach, stating that harm or damage is shared across the entire lifecycle of an AI system, from design and development to deployment and end-of-life. This ensures that liability considerations are included at every stage.[13]

Should the proposed regulation be accepted and implemented, it might result in a scenario where liability is distributed among multiple parties if self-driving vehicles are involved in accidents. Suppose an investigation determines that the cause of the accident is linked to fundamental defects in the AI system's design, development, or deployment phases. In that case, the AI system's provider might face legal liability. This encompasses situations where the AI was insufficiently trained to navigate road conditions or did not meet established safety and performance

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[https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf], Accessed 29 March 2024.

11 [https://artificialintelligenceact.eu/developments/], Accessed 29 March 2024.

12 Roksandić, S.; Protrka, N.; Engelhart, M., *Trustworthy Artificial Intelligence and its use by Law Enforcement Authorities: Where Do We Stand?* in: „45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO)", 2022, p. 1229.

13 *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts* [https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf], Accessed 29 March 2024.

norms. Moreover, if the deployer (which could be the vehicle owner or a company providing autonomous vehicle services) failed to perform regular maintenance, update the software, or operate the vehicle under conditions for which it was not intended (for example, driving in extreme weather conditions that exceeded the AI's capabilities), the deployer could also bear responsibility. But this remains in the field of civil law liability.

4. THE INFLUENCE OF ARTIFICIAL INTELLIGENCE ON CRIME

Artificial intelligence can transform forms of crime as well. Like all new technological solutions, artificial intelligence also provides opportunities for criminals. In this section, we will review what potential forms of crime could become prevalent in the near future.

First, we could mention identity theft and DeepFake technology. The latter utilizes AI, specifically deep learning algorithms, to alter videos or create audio recordings that convincingly mimic a person's appearance or voice. This technology can fabricate scenarios or statements, creating the illusion of never-occurring events. By training on extensive datasets of an individual's visual and auditory information, deepfake generates highly realistic but entirely fictitious content. This capability introduces unprecedented risks in identity theft, as evidenced by a notable incident in 2019. A UK-based company was defrauded $243,000 through a scam involving an AI-generated voice impersonating the CEO, showcasing the potent combination of deepfake technology and social engineering tactics.[14]

Morphing represents another facet of AI-enabled crime, involving the fusion of multiple images to create a composite that retains characteristics of the original inputs. This process, comprising warping and cross-dissolving phases, manipulates digital identities by blending faces into a singular, indistinguishable image. Such techniques can be exploited to bypass security measures or create fraudulent identification documents, further complicating the challenges of digital identity verification.[15] In Hungary, identity theft is not a separate crime, but the lawmaker should consider an independent statutory provision for this delict.[16]

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14 *Unusual CEO Fraud via Deepfake Audio Steals US$243,000 From UK Company*, Trend Micro, [https://www.trendmicro.com/vinfo/us/security/news/cyber-attacks/unusual-ceo-fraud-via-deepfake-audio-steals-us-243-000-from-u-k-company], Accessed 5 September 2023.

15 Agarwala, A. Nalini R. Manipulating, *Faces for Identity Theft via Morphing and Deepfake: Digital Privacy,* in: "Deep Learning", 2023, Vol. 48, p. 223.

16 Tóth, D., *The Criminal Law Protection of Personal Data in Hungary,* in: Ćeranić, D.; Ivanović, S.; Lale, R.; Aličić, S. (eds.), Collection of Papers "Law Between Creation and Interpretation", Vol. 3, Faculty

Using artificial intelligence, cybercriminals can more easily and quickly analyze illegally stolen personal data, causing more significant harm in the process. Artificial intelligence software can be utilized for malicious purposes, including creating malware.[17] One example is WormGPT, a generative AI tool based on the GPTJ language model developed for malicious purposes, including phishing and Business Email Compromise (BEC) attacks. It is designed to generate highly persuasive and strategically cunning emails for cybercrime, explicitly trained on malware-related data. WormGPT represents an advanced capability for cybercriminals, lowering the barrier to executing sophisticated attacks even for those with limited technical skills. Consequently, users become even more vulnerable to the dangers of cybercrime.[18]

Sibai created a classification of AI crimes primarily based on whether they involve human intervention (intentional or unintentional acts) or crimes committed autonomously by AI without human involvement. According to the study, we can differentiate between the following delicts:

- crimes involving human participation, which are further divisible into additional subcategories:
    - purposeful actions, wherein the actor possesses both the objective and the determination to commit an offense. This encompasses scenarios where the offender deliberately formulates and executes the criminal act.
    - Inadvertent actions, representing offenses arising from carelessness or the involvement of a third entity. This includes instances of oversight, like inadequate system design or examination, and situations where an external party manipulates the AI, leading to criminal activity.
- Crimes executed solely through machine intervention, where AI autonomously perpetrates an offense without human involvement. Here, we can see scenarios where artificial intelligence evolves to a level capable of autonomously committing crimes, absent of human intention.[19]

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of Law, University of East Sarajevo, East Sarajevo, Bosnia-Herzegovina, 2023, pp. 233-246.

17 Allan, K., *Cybercriminals are creating a darker side to AI*, Cyber Magazine, [https://cybermagazine.com/articles/cybercriminals-are-creating-a-darker-side-to-ai], Accessed 24 January 2024.

18 Kelley, D., *WormGPT – The Generative AI Tool Cybercriminals Are Using to Launch Business Email Compromise Attacks*, SlashNext, [https://slashnext.com/blog/wormgpt-the-generative-ai-tool-cybercriminals-are-using-to-launch-business-email-compromise-attacks/], Accessed 13 January 2024.

19 Sibai, F. N., *AI Crimes: A Classification*, 2020 International Conference on Cyber Security and Protection of Digital Services (Cyber Security), IEEE, 2020. pp. 5-8.

Caldwell and others differentiate based on the security risk level.

- The first category for AI-enabled crime is when the threat level is high. This includes the previously mentioned crimes related to Deepfakes. Disrupting AI-controlled systems represents another high-level threat, targeting critical infrastructures such as power grids and transportation networks, posing risks to societal stability. AI-authored Fake News also falls into this category, using AI to fabricate news content that can manipulate public opinion and cause social unrest.
- The second is the medium threat level. This features threats like autonomous attack drones, which could shift warfare and security dynamics, and learning-based cyber-attacks, where AI algorithms adapt to bypass security measures.
- Lastly, the third category is the low threat level. Here, they mention, for example, bias exploitation, manipulating AI's decision-making process, and AI-assisted stalking, enhancing the capabilities of stalkers through data aggregation and analysis.[20]

Overall, artificial intelligence significantly transforms the crime landscape, enabling new methods for committing identity theft and fraud and creating sophisticated cyber-attacks through technologies like Deepfake and AI morphing.

5. ARTIFICIAL INTELLIGENCE AND DIGITAL EVIDENCE

In recent decades, digital evidence has been increasingly used as proof in criminal proceedings. In this context, artificial intelligence also creates new challenges and opportunities during the criminal process. On the one hand, artificial intelligence can assist in the identification, for example, through biometric data or by converting audio material into written form. From this perspective, artificial intelligence can speed up and make the operation of judicial organs more efficient. On the other hand, using digital evidence generated by artificial intelligence can pose difficulties. The emergence of Deepfake videos or audio materials and their evaluation may necessitate the involvement of forensic experts. However, involving experts will not replace the legal assessment of cases and, therefore, may require ongoing training for judges, prosecutors, and the police to understand the admissibility of digital evidence.

The research shows that **t**he correlation between Artificial Intelligence and digital evidence manifests in several transformative ways, enhancing cybersecurity

[20] Caldwell, M.; Andrews, J. T.; Tanay, T.; Griffin, L. D., *AI-Enabled Future Crime*, Crime Science, Vol. 9, No. 1, 2020, pp. 6-12.

threats' identification, analysis, and management. Firstly, the ability of AI to rapidly analyze extensive datasets is fundamental in identifying cybersecurity threats such as malware, cyber-attacks, and phishing attempts, thereby facilitating the collection of digital evidence. This swift examination is critical for detecting threats that may produce digital proof. Furthermore, AI-driven systems excel in continuous learning, analyzing past incidents to refine protective strategies. This ongoing adaptation is crucial for collecting precise and efficient digital evidence against evolving cybersecurity threats. For example, in the event of a phishing attack, AI capabilities can quickly recognize and neutralize the threat while simultaneously collecting detailed evidence about its origin and methodology. In addition, the complex data analysis afforded by AI surpasses human analytical capabilities, particularly in identifying subtle anomalies and patterns that may indicate security breaches. This enhanced detection capability is critical for uncovering digital evidence in scenarios where it may be obscured or sophisticatedly disguised. Finally, AI significantly contributes to monitoring network security and analyzing traffic to detect potential threats. By scrutinizing network behavior, AI technologies are adept at identifying unusual activities and compiling digital evidence, elucidating the attack's nature, source, and intentions.[21] The synergy between AI and digital evidence lies in AI's superior analytical and reactive strengths. Through its ability to detect threats, automate incident response, learn from past incidents, and assist in evidence collection and analysis, AI significantly bolsters cybersecurity defenses and the efficacy of digital evidence in safeguarding against cyber threats.[22]

A study from Blount examines the application of artificial intelligence in predictive policing and its effect on the justice system. She emphasizes the critical role that artificial intelligence algorithms can play in these activities while acknowledging the challenges they introduce, especially regarding transparency and fairness in proceedings. Blount also draws attention to the reliability and objectivity of digital evidence generated by artificial intelligence, noting that these qualities significantly depend on the quality and integrity of the data used. A problem arises because artificial intelligence relies on historical data, which can lead to substantial distortions and biases in predictive policing operations. This may misdirect the operations of judicial bodies and infringe upon the principles of fair procedure. Concerns about the presumption of innocence are also raised, as individuals or locations deemed high risk based on digital evidence might be subjected to intensified surveillance, potentially leading to biases against them. In summary, although the use of artificial intelligence in crime prevention offers potential benefits, the

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21 Bagó, P., *Cyber Security and Artificial Intelligence*, Economy and Finance, Vol. 10, Iss. 2, June 2023, pp. 195-211. [doi: 10.33908/EF.2023.2.5.]

22 *Ibid.*

implications of its use in the production and utilization of digital evidence require a thorough examination of ethical, legal, and procedural safeguards to ensure the fairness and integrity of the criminal justice system. The relationship between artificial intelligence and digital evidence underscores the need for transparency, accountability, and fair access to evidence to uphold the norms of fair procedure.[23]

In their research, Constantini and colleagues explore using artificial intelligence to enhance the management and analysis of digital evidence in criminal investigations and forensic science. They argue that AI can significantly streamline examining digital evidence, which is traditionally labor-intensive and intricate. AI, through tools like Answer Set Programming (ASP), can take the massive amounts of data involved in digital evidence and process it quickly and efficiently. This means investigators can form hypotheses or theories about a case faster and more accurately. In simpler terms, AI can help sift through digital clues much faster than humans, helping speed up investigations and make them more effective.[24]

6. CRIME PREVENTION

We see numerous opportunities and challenges when examining the interplay between artificial intelligence and crime prevention. AI-based technologies can enhance societal surveillance by filtering out criminals and assisting in the reintegration of convicted individuals after their release, further reducing the rate of recidivism. In the future, AI-based probation officers could aid convicts in reintegration, offering more extensive monitoring and providing constant advice after release. The National Institute of Justice in the United States has already funded projects exploring AI's potential benefits in these areas to introduce reforms in the future.[25]

Delving deeper into the practical applications of AI, Raaijmakers' research highlights[26] its transformative potential concerning crime prevention. The author discusses how AI technology can be broadly applied in various areas, including creat-

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23 Blount, K., *Seeking Compatibility in Preventing Crime with Artificial Intelligence and Ensuring a Fair Trial*, Masaryk University Journal of Law and Technology, Vol. 15, No. 1, 2021, pp. 25-51, [https://doi.org/10.5817/MUJLT2021-1-2].

24 Costantini, S.; De Gasperis, G.; Olivieri, R., *Digital Forensics and Investigations Meet Artificial Intelligence*, Annals of Mathematics and Artificial Intelligence, Vol. 86, 2019, pp. 193-229, [https://doi.org/10.1007/s10472-019-09632-y].

25 Martin, E.; Moore, A., *Tapping Into Artificial Intelligence: Advanced Technology to Prevent Crime and Support Reentry*, in: Corrections Today, May/June 2020, pp. 28-32, National Institute of Justice, US Department of Justice, Office of Justice Programs, United States of America.

26 Raaijmakers, S., *Artificial Intelligence for Law Enforcement: Challenges and Opportunities*, IEEE Security & Privacy, Vol. 17, No. 5, 2019, pp. 74-77, [https://doi.org/10.1109/MSEC.2019.2925649].

ing suspicious profiles, traffic pattern analysis, investigation of financial flows on the dark web, detection of child pornography, and identification of anomalies in surveillance recordings. Within this context, AI can provide substantial assistance to law enforcement agencies in their investigative activities and in enhancing the efficiency of digital evidence management, ultimately contributing to the success of investigations.

Additionally, we can highlight the capabilities of artificial intelligence in recognition technologies, which can also assist authorities. For instance, ShotSpotter uses AI to detect gunfire in real time through sound data recognition. This technology is already operational in over 90 cities, significantly enhancing the police's response time to gun-related crimes. Furthermore, AI can be used to improve security camera systems. These cameras do not merely record video but can be enhanced with various techniques for facial recognition and license plate reading. By applying AI, identifying suspects becomes more accessible, which in turn can increase public safety. AI also offers support to authorities in making placement decisions. In this context, tools like Hart (Harm Assessment Risk Tool) assess the risks associated with suspects and those on probation. With risk assessment software, decisions regarding arrests and conditional releases can be made more efficiently.[27]

Roksandic and colleagues also explored the role of artificial intelligence in law enforcement and criminal identification. They noted AI's capability to process large databases more efficiently, assisting in various law enforcement activities such as penalty enforcement, assessing prisoner escape risks, or preventing terrorist attacks. However, they also highlighted concerns about AI's use potentially infringing fundamental human rights. AI systems can create the illusion of absolute precision in predicting events, potentially leading to discriminatory decisions based on gender or age in investigations and detentions. The study mentions the development of algorithms by the University of Houston, which are used to predict suspicious and criminal behavior through camera networks. These algorithms analyze clothing, movement, and skeletal structure to identify persons of interest, helping prevent security threats more effectively. The collaboration between the Cologne Prosecutor's Office and Microsoft is another honorable example. Together with the Ministry of Justice of North Rhine-Westphalia and Microsoft Germany, they developed a hybrid cloud-based system that utilizes AI algorithms to detect and categorize online child pornography while anonymizing the image files. This collaboration led to faster interventions and significantly reduced the psychological stress on the

[27] Faggella, D., *AI for Crime Prevention and Detection – 5 Current Applications*, Emerj, [https://emerj.com/ai-sector-overviews/ai-crime-prevention-5-current-applications/], Accessed 2 February 2024.

personnel involved, demonstrating a practical application of AI in safeguarding public security while managing sensitive data.[28]

The integration of artificial intelligence into crime prevention efforts brings its own set of challenges alongside its benefits. A primary concern is the potential for AI systems to perpetuate biases, mainly if they depend heavily on historical data. Such biases could lead to unfair profiling of individuals as potential offenders based on superficial characteristics, undermining the presumption of innocence—a cornerstone of the criminal justice system.

Raaijmakers raises essential considerations about the transparency and accountability of AI technologies in legal settings. He argues that for AI-generated evidence to be deemed valid in court, there must be clear documentation and comprehension of the processes, models, and algorithms that underpin these technologies. This transparency is crucial for establishing a legal framework that ensures these innovations do not infringe upon the principles of justice. Furthermore, Raaijmakers emphasizes the importance of continuous professional development for those in law enforcement. Adequate training and the necessary technological infrastructure are essential for law enforcement personnel to effectively utilize AI tools, ensuring they are both efficient and ethically deployed.[29]

7. SUMMARY AND CONCLUSIONS

To encapsulate, AI represents a dual-faced phenomenon within the modern digital landscape, marked by its potential to enrich and complicate public safety and cybersecurity aspects. Our comprehensive review sheds light on this intricate interplay, drawing attention to AI's multifaceted implications for societal frameworks.

The evolution of autonomous vehicles is a prime example of the legal and ethical dilemmas accompanying AI's integration into everyday life. The question of accountability — whether it should be attributed to manufacturers, programmers, or the AI systems themselves — highlights the need for dynamic legal frameworks capable of navigating the complexities introduced by technological progress.

Moreover, AI's role in generating and analyzing digital evidence shows a significant shift in the landscape of criminal investigations. While AI promises to enhance the efficiency and precision of such inquiries, AI-generated evidence's integrity and legal validity demand thorough examination to uphold justice.

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[28] Roksandić, S. *et. al. op. cit.*, note 12, p. 1227.

[29] Raaijmakers, S. *op. cit.*, note 26, pp. 74-77.

In the realm of crime prevention, from predictive policing to the deployment of advanced public safety solutions like gunfire detection systems, AI's potential is profoundly evident. However, this potential is moderated by the ethical issues it raises, particularly regarding the risk of perpetuating biases and violating privacy rights. These concerns highlight the necessity of maintaining a reasonable balance between innovation and ethical responsibility.

From our analysis, several key conclusions emerge: Firstly, the advent of AI requires ongoing adaptation within legal and regulatory frameworks to adequately address the new dimensions of accountability and evidence it introduces. Secondly, applying AI in crime prevention and law enforcement demands a thoughtful approach, ensuring that technological advancements do not overshadow fundamental ethical standards and human rights. Hence, a comprehensive legal framework is essential to avoid loopholes in the legal system. The European Union has already set a precedent with the General Data Protection Regulation. The future implementation of the AI Act will mark a significant regional step forward. While the EU AI Act is a commendable example of regulating AI within a regional framework, it's also crucial to highlight the need for a coordinated global effort. For instance, the United Nations could establish comprehensive guidelines that address critical issues such as liability questions related to AI and the use of AI in surveillance for crime prevention while protecting human rights. These guidelines could then be adopted as part of an international convention, ensuring a worldwide standardized approach to AI governance. This would help harmonize regulations, promote ethical AI use, and protect fundamental rights globally. Additionally, the effective integration of AI in surveillance and crime prevention should include extensive training programs for judicial personnel. Such training would ensure that law enforcement and judicial officers are well-prepared to engage with AI-driven tools and data, enabling them to make informed decisions and uphold justice while respecting human rights. This comprehensive approach would bolster the capacity of judicial systems to utilize AI ethically and efficiently.

In conclusion, the future of AI in societal security and justice relies on cooperation among technologists, legal experts, and policymakers. They need to develop a regulatory framework that maximizes AI's benefits for public safety while addressing potential issues. Working together, they can enhance public safety and the legal system while carefully managing ethical challenges.

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Review article

THE INTERSECTION BETWEEN ARTIFICIAL INTELLIGENCE AND SUSTAINABILITY: CHALLENGES AND OPPORTUNITIES*

Ana Pošćić, PhD, Full Professor
University of Rijeka, Faculty of Law
Head of the Jean Monnet Inter - University Centre of Excellence Opatija
ana.poscic@pravri.uniri.hr

ABSTRACT

The development of the digital revolution facilitates innovative models that generate new markets and business opportunities. The reappearance of artificial intelligence (AI) has created further potentials and types of market participation. AI is understood as a cutting-edge technology and a key driver of the transition of our economy into the digital economy.

It is important to recognize and constantly bear in mind that artificial intelligence systems provide certain benefits but are associated with certain risks and potential negative effects. The European Commission, in its Ethical Guidelines for Trustworthy Artificial Intelligence (2019), emphasizes ethical principles and associated values that must be respected in the development, introduction, and use of artificial intelligence systems: respect for human autonomy, prevention of harm, fairness, and explainability.

The question arises as to whether the emerging fundamental ethical principles and regulatory policies concerning AI systems require certain adaptations when it comes to the application of AI technology in connection with the sustainable development goals. The development of artificial intelligence systems compatible with the goals of sustainable development, as defined in the 1987 report of the UN Brundtland Commission as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", is encouraged. Sustainability or sustainable development is defined in the literature as a concept based on three pillars - encompassing social, economic, and environmental aspects. The European Commission highlights that sustainable development is a fundamental principle of the Union Treaty and a priority goal of Union policies, along with digitization and a robust single market.

In recent years, doctrine has sought to bridge the gap between the two disciplines by introducing the term "Sustainable AI". The aim of the paper is to understand the development of AI that is

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compatible with sustainable goals. To understand this, it is necessary to comprehend the basic concepts of artificial intelligence systems and explore the sociological, ecological, and economic implications of these systems, all with the aim of finding ways to achieve the goals of sustainable development and the sustainability of AI systems themselves. These are closely tied to adhering to the highest ethical principles with the responsible use of artificial intelligence systems.

***Keywords**: EU, artificial intelligence, sustainability*

1. INTRODUCTION

The development of the digital revolution facilitates innovation models that generate new markets and business opportunities. The reappearance of artificial intelligence (AI) has created further potentials and types of market participation. AI is understood as a cutting-edge technology and a key driver of the transition of our economy into the digital economy. It is part of the fourth industrial revolution, which is "characterized by a range of new technologies that are fusing the physical, digital, and biological worlds, impacting all disciplines, economies, and industries, and even challenging ideas about what it means to be human".[1]

AI, as one of the key technologies, has already become part of our everyday life, from the traffic sector, climate sector, energy, agriculture, as well as financial markets and the data-driven economy.[2] Although AI systems provide benefits, certain risks and potential negative effects might arise. It is necessary to understand and analyze possible negative consequences of enabling AI systems.

The unprecedented growth of new technologies poses difficulties in understanding their impact on the future of society. While some risks are apparent at the outset, some of them may occur in the future. Especially true with societal and ethical risks, some of them concern data protection, privacy matters, opacity, bias, and unforeseeability, but also manipulation, hate speech, and fake news.[3] It is necessary to consider the ethical and human goals of new technologies together with the environmental and economic costs of training such models.

The pace at which AI develops is so fast that it is almost impossible to govern AI systems. Understanding complex systems will help us in predicting and avoiding

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1 Schwalb, K., *The Fourth Industrial Revolution*, World Economic Forum, Cologny/Geneva, 2016, p. 1.

2 European Commission (2018a) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe, 25. 4. 2018 COM(2018) 237 final (European Commission (2018a)).

3 Hacker, P., *Sustainable AI Regulation,* (June 1, 2023), [https://ssrn.com/abstract=4467684 or http://dx.doi.org/10.2139/ssrn.4467684], Accessed 20 February 2024, p. 3.

possible failures of AI systems.[4] Ethics, efficiency of systems as well as sustainability issues are crucial in the assessment of AI systems.[5]

These topics are at the heart of the European Union. The European Union aims to be a leader in this sector, so it published a Communication on Artificial Intelligence for Europe[6] in 2018, along with the accompanying document on Liability for Emerging Digital Technologies.[7] The Commission believes that the way we approach AI will define the world we live in.[8] The development of AI systems with humans in the loop must benefit people and society. Basically, the idea is to try to understand complex interactions and technology underpinning it, so the possible risks to the whole society can be diminished. If we want to offer possible solutions it is necessary to understand the basic structure of the system. The problem with new technology is that the technological revolution is moving so fast and it is usually quite ahead of the legislator. The regulation is needed, but with a caveat that any regime adopted must be in line with new developments. So, the emerging fundamental ethical principles and regulatory policies concerning AI systems require certain adaptations when it comes to the application of AI technology to sustainability issues.

On the one side we have the fast and unprecedented development of AI systems along with certain risks and on the other side the necessity to incorporate sustainable development goals encompassing social, economic, and environmental aspects. The AI system can be seen as an enabler, as well as impediment of the sustainable development goals.

In recent years, doctrine has sought to bridge the gap between the two disciplines by introducing the term "Sustainable AI". The aim of the paper is to understand the development of AI that is compatible with sustainable goals. To understand this, it is necessary to comprehend the basic concepts of AI systems and explore the sociological, ecological, and economic implications of these systems, all with the aim of finding ways to achieve the goals of sustainable development and the

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4 Wilson, C.; van der Velden, M., *Sustainable AI: An integrated model to guide public sector decision-making*, Technolgy in Society, Vol. 68, 2022, p. 1.

5 Vinuesa, R. *et al., The role of artificial intelligence in achieving the Sustainable Development Goals*, Nature Communications, Vol. 11, 2020, p. 5.

6 European Commission (2) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe, 25. 4. 2018 COM(2018) 237 final, (European Commission (2018a)).

7 European Commission (2018b) Commission Staff Working Document, Liability for emerging digital technologies, 25. 4. 2018 SWD(2018) 137 final.

8 European Commission (2018a), *op. cit.,* note 6, para 1.

sustainability of AI systems themselves. It means respecting highest ethical principles and the responsible use of AI systems.

2. THE NOTION OF AI

AI encompasses variety of different technologies and sub-areas. The diversity of areas presents a definition challenge that has implications for doctrine and regulation.[9] AI is usually explained as a collection of technologies that combine data, algorithms, and computing power.[10] There are various definitions proposed in doctrine, ranging from simple definitions of AI as "intelligent machines" or at least "machines acting in ways that seem intelligent" to more complex and comprehensive ones, referring to AI as "an umbrella term embracing computer (machine) vision, natural language processing, virtual assistants and bots, robotic process automation, machine learning (including most advanced techniques like deep learning) and cognitive processes in organizations".[11] In the sea of so many proposed definitions, the one suggested by the Policy Department for Economic, Scientific, and Quality of Life Policies best explains the complex notion of AI as a "branch of science and as such it can be defined as a set of computational technologies that are inspired by the ways people use their nervous systems and bodies to sense, learn, reason, and take action".[12] It is wide, easy to understand, and flexible enough to adjust to rapid technological developments.

Russel and Norvig in their seminal textbook organize different definitions of AI along four different axes, depending on the approach taken, i.e. whether the accent is on thinking humanly, acting humanly, thinking rationally or acting rationally.[13] The European Commission underlines that "AI refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goal".[14] It is actually a collection of technologies that combine data, algorithms and computing power.[15] AI

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9 Mazzucato, M. *et al., Governing artificial intelligence in the public interest*, UCL Institute for Innovation and Public Purpose, Working Paper Series (IIPP WP 2022-12), [https://www.ucl.ac.uk/bartlett/public-purpose/wp2022-12.], Accessed 2 February 2024, p. 2.

10 European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, Brussels, 19. 2. 2020, p. 2 (White Paper).

11 European Parliament (2019a) State of the art and future of artificial intelligence, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631051/IPOL_BRI(2019)631051_EN.pdf], Accessed: February 29, 2024.

12 *Loc. Cit.*

13 Russel, S. J.; Norvig, P.: *Artificial Intelligence: A Modern Approach*, 4th Ed., Pearson, 2022, p. 19-22.

14 European Commission (2018a), *op. cit.*, note 6, p.1

15 White paper, *op.cit.,* note 10, p. 2

can be purely software based or can be embedded in hardware devices.[16] The proposed AI act[17] opted for a definition that encompasses previous mentioned models as "a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, 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 virtual environments" (art. 3).

The definitions evolve over time and depend on the level of technological advancement, so the temporal element is crucial. Finding an appropriate definition is necessary in order to understand legal, social and ethical implications associated with AI. In order to effectively govern the technology, there is a need of uniformly accepted definition.[18] Since AI-based solutions may be applied and used in very different economic and societal sectors, only an interdisciplinary approach may offer acceptable results.

3. THE ROLE OF AI IN ACHIEVING SUSTAINABILITY DEVELOPMENT GOALS

Sustainability, as AI, is a term that everyone knows something about it but without uniform definition. Nearly, every discourse on sustainability issues begins with the landmark Brundtland Report from 1987, which defined sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[19] The nexus of technological advancements and economic growth holds the potential to promote sustainable development as a global benchmark and standard for all policy areas.

In the realm of doctrine, sustainability is perceived as a concept, a goal, a policy objective, a guideline, an ideal, a meta-principle, a weak norm of international law, a concept or principle of customary law, depending on the author's perspective.[20]

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16 European Commission (2018a), *op.cit.,* note 6

17 In this paper we refer to the European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), (AI Act).

18 Mazzucato, M., *et all., op. cit.*, note 9, p. 2.

19 Brundtland Report (1987) Report of the World Commission on Environment and Development, Our Common Future, [https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf], Accessed 1 June 2023, p. 16.

20 Verschuuren, J., *The growing significance of the principle of sustainable development as a legal norm,* in: Fisher, D. (ed.), Research Handbook on Fundamental Concepts of Environmental Law, Cheltenham, UK –Northhampton, MA, USA, Edward Elgar Publishing, p. 276.

Over the years, it has become evident that sustainable development extends beyond environmental protection; it is inseparably linked with a sustainable economy. Promoting sustained, inclusive, and sustainable economic growth, with decent work for all, stands as one of the UN Sustainable Development Goals.[21] This framework lists 17 sustainable development goals with 169 targets, all interlinked and interdependent. The concept is also known as "3D Sustainability" which attempts to translate environmental, social, and economic capital and (carrying) capacity realities into practically applicable new sustainable regulation and governance solutions.[22] All three pillars must be developed to achieve sustainability principles. The economic principle refers to guaranteeing sustainable and feasible economic growth, which can be achieved by responsible resource management using renewable energy and promoting fair trade practices. The social aspect focuses on improving the quality of life, with an emphasis on human rights, gender equality, and access to services. The environmental pillar promotes the preservation of natural resources with their responsible usage.[23]

However, misunderstandings and overuse of the term pose difficulties in its definition. According to Montini, there is an incorrect replacement of the term sustainability with the term sustainable development, resulting in a greater focus on economic development that can later achieve social and environmental goals.[24]

In recent decades, the European Union has steadily progressed its efforts towards achieving sustainable, fair, and inclusive growth by creating and adopting political, legal, and financial preconditions fit for this purpose. The Sustainable Development Goals are proclaimed to be "at the heart of EU's policymaking and action"[25], and the transformation to a sustainable economy is the EU's key political priority,

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21 United Nations (2015) Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [A/RES/70/1 https://sdgs.un-.org/2030agenda], Accessed 29 February 2024.

22 Mauerhofer, V., *Sustainable Development Law in (Only) One World: Challenges and Perspectives for Governance and Governments*, in: Mauerhofer, V.; Rupo, D.; Tarquino, L. (eds.), Sustainability and Law, General and Specific Aspects, Springer, Cham, 2020, p. 17.

23 Medeot, T., *Artificial Intelligence and Sustainability: How AI can improve sustainable decision – making in modern organizations*, International Journal for Regional Development, Vol. IV, 2023, p. 133.

24 Montini., M., *Designing Law for Sustainability*, in: Mauerhofer, V.; Rupo, D.; Tarquino, L. (eds.), Sustainability and Law, General and Specific Aspects, Springer, Cham, 2020, p. 17.

25 European Commission (2019a) Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Sustainable Growth Strategy 2020, COM(2019) 650 final, Brussels, 17. 12. 2019, p. 2, (European Commission (2019a)), p .2.

as it is "essential for the wellbeing of our society and our planet"[26], and for the development of "an innovative and sustainable society".[27]

Sustainability is part of the EU's constitutional legal framework (art. 3 Treaty on European Union (TEU)[28]; art. 21 TEU and art. 11 Treaty on the Functioning of the European Union (TFEU)[29]). When it comes to the specific legal basis in primary law for the Union's environmental policy (art. 191 TFEU), there is no explicit mentioning of sustainable development among the objectives or among the principles upon which this policy is based. On the other hand, seeking to promote "balanced and sustainable development" as a continued task of the EU is mentioned in the preamble of the Charter of Fundamental Rights of the EU[30], and its art. 37 on environmental protection explicitly refers to the "principle of sustainable development", requiring that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Although mentioned in EU primary law, sustainable development is not defined in EU primary law. Despite this, TFEU codifies principles through which sustainability is achieved. One example is the principle of integration from art. 11 TFEU. This is a horizontal clause that requires the integration of environmental protection requirements into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. It supports the integration and translation of sustainable development into more concrete commitments.[31]

Sustainable development takes into account environmental concerns but also digital transformation, innovation, the use of new technologies, as well as social concerns. It is not a goal in itself but rather a process, whereas sustainability is an objective. If we change our point of view, we can ask ourselves, how can AI and new technologies help in achieving sustainability development goals?

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26 *Ibid.*, p. 1 .

27 Ecco-Innovation Observatory (2020) EIO Biennial Report 2020: Eco-Innovation and Digitalisation, Case studies, environmental and policy lessons from EU Member States for the EU Green Deal and the Circular Economy, [https://ec.europa.eu/environment/ecoap/sites/default/files/eio5_eco-innovation_and_digitalisation_nov2020.pdf], Accessed 15 January 2024, p. 6, (Ecco-Innovation Observatory).

28 Treaty on European Union, (consolidated version 2016), OJ C 202, 7. 6. 2016.

29 Treaty on the Functioning of the European Union (consolidated version 2016), OJ C 202, 7. 6. 2016.

30 Charter of Fundamental Rights of the EU, OJ C 202, 7. 6. 2016.

31 Nowag, J., *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press, Oxford, 2016, p.1.

Sustainability issues must be at the heart of digital transformation. "Green" and "digital" or "twin" transitions are key enablers of the transformation towards a sustainable economy or competitive sustainability, as Europe's new growth paradigm. All EU actions and policies have to contribute to the European Green Deal. It is a document promoting the transformation of the EU "into a fair and prosperous society, with a modern, resource-efficient and competitive economy".[32]

Digital technologies are critical enablers for achieving sustainability goals[33]. The Commission will explore measures to ensure that digital technologies such as AI can accelerate and maximize the impact of policies to deal with climate change and the protection of the environment.[34] Since 2020, sustainability is integrated into the European Semester process, thus making it an economic and employment policy priority for the EU.[35]

The transformative power of AI systems will contribute to the accomplishment of the green transition. Sustainability must be the core point of departure for the development not only of AI technologies but also a digitalized society in general. The idea is to develop environmentally sound technologies. Building on the ideas developed in the previous sustainable development strategies, European Commission sets out a long-term strategy for a sustainable Europe. Initiatives su ch as the New Circular Economy Action Plan[36] the Biodiversity Strategy for 2030[37] and the

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32 European Commission (2019b) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final, Brussels, 11. 12. 2019, p. 1, (Green Deal).

33 *Ibid.*, p. 9.

34 *Loc. Cit.*

35 European Commission (2019a) Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Sustainable Growth Strategy 2020, COM(2019) 650 final, Brussels, 17. 12. 2019, European Commission (2021a) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building an economy that works for people: an action plan for the social economy, Luxembourg: Publications Office of the European Union, p. 3.

36 European Commission (2020c) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan for a cleaner and more competitive Europe, COM(2020) 98 final, Brussels, 11. 3. 2020.

37 European Commission (2020d) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM(2020) 380 final, Brussels, 20. 5. 2020.

Zero Pollution Action Plan [38]together with other policy instruments create an intricate network of measures and targets in different fields to achieve this overarching common objective. The main focus is on the potential of AI systems and the role they might play in the transformation towards sustainable society. The Ecco-Innovation Observatory stresses strong links from digitalisation and a transformation towards an innovative and sustainable society in order to create preconditions and a framework for a "…sustainable and smart future".[39] The concept of sustainability has evolved from the idea of reducing environmental footprint to placing an accent on innovation and the overall impact. Sustainability is, and should be, simply "how […] business is done".[40]

The main dilemma is how new technologies, together with AI systems, contribute to the socio-ecological transformation of the economy. The uptake of innovative digital solutions can assist in achieving sustainability objectives in various sectors of the economy. There is a need to develop and shape AI capabilities together with technologies towards a sustainable, equitable, and green digital economy.[41] Besides the positive influence of AI systems in the development of sustainability goals, we must not forget that there are potential pitfalls of the digital transformation on sustainability, such as health and ecological impacts as well as adverse economic and social effects.[42]

The application of AI systems will produce novel forms of interaction between humans, machines, and the environment ecosystem. AI systems have at least three advantages that can help in achieving sustainability goals: automation of time-consuming tasks that allows humans to focus on complex tasks, shortening the process in analyzing massive amounts of data, and the possibility to solve complex problems.[43] The intersection of these elements can help in achieving the digitalised and transformative society.

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38 European Commission (2021d) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Pathway to a Healthy Planet for All, EU Action Plan: "Towards Zero Pollution for Air, Water and Soil", Brussels, COM(2021) 400 final, 12. 5. 2021.

39 European Commission (2020g) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789 final, Brussels, 9. 12. 2020, p. 2.

40 Chouinard, Y.; Ellison, J.; Ridgeway, R., *The Sustainable Economy*, Harvard Business Review, October 2011, [https://hbr.org/2011/10/the-sustainable-economy], Accessed 1 June 2022.

41 Mazzucato, M. *et al., op. cit.*, note 9, p. 1.

42 Ecco-Innovation Observatory, p. 7-8.

43 Nishant, R.; Kennedy, M.; Corbett, J., *Artificial Intelligence for sustainability: Challenges, opportunities, and research agenda*, International Journal of Information Management, Vol. 53, 2020, p. 2.

AI systems can help in achieving some sustainable development goals but also impede some.[44] There is an urgent need to set policies and regulation to open potential of AI systems to every sector with particular focus in achieving sustainability development goals.[45] Moreover it is necessary to think of sustainable deployment of AI systems as well.[46] The later will be further discussed.

There is a growing need to understand AI for sustainability. But how can it be defined? What does it consist of? Sustainability must be at the central point of departure for the development of not only AI technologies but a digitalised society in general. A more holistic approach is needed. Interdisciplinary research is essential to gain a greater understanding of how to develop sustainable AI.

It is obvious that there are numerous positive effects that AI systems bring to our society (for example, mitigating global warning and climate change) but also we must not forget negative effects on society. Wynsberghe distinguishes three waves of AI ethics: the first is the study of ethical and social effects that influence developers and users of AI systems, the second one is more focused on practical questions in terms of explainability of AI systems and the last one analyses environmental aspects of the impact of AI systems.[47] The idea is to put sustainability at the core of AI systems. As Mazzuacato and authors rightly point out, machine learning as a subfield of AI can accelerate the achievement of sustainable development goals. They offer example of smart electric grids and use of AI in healthcare.[48]

It is obvious that AI can be enabler of sustainable development goals, but it is necessary to analyse precisely the techniques in doing so. One study shows that AI may act as facilitator of 134 targets but also inhibitor of another 59 targets.[49] For example, AI can improve societal outcome like no poverty, quality education, clean water and sanitation, clean energy, sustainable cities, identify areas of poverty by satellite images but also negative effects can be perceived from different cultural values and wealth. AI is trained by the data that is harvested in countries in which it is developed. In the situation where the ethical and human rights are less developed, it may enhance bias outcomes. Cryptocurrency applications are using as much electricity as the total national electrical demand of some countries. Green growth of ICT technology is our future. AI can have a positive impact on

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44 Vinuesa, R. *et al., op. cit.,* note. 5, p. 1.

45 *Ibid*, p. 6.

46 Wynsberghe, A., *Sustainable AI: AI for sustainability and the sustainability of AI*, AI and Ethics, Vol. 1, 2021, p. 213.

47 *Loc. Cit.*

48 Mazzucato, M. *et al., op. cit.*, note 9, p. 2.

49 Vinuesa, R. *et al., op. cit.,* note. 5, p. 2.

achieving economic outcomes. The study has identified benefits from AI on 42 targets while negatives have been found in 20 targets. Increased productivity is one of the main advantages but, on the other side, it raises inequalities. It deepens the so-called economic gap. Technology rewards the educated as more jobs with sophisticated skills will be needed. Benefits of using AI systems in the field of environment were identified in 25 targets. One relates to the ability to analyze a huge amount of data in a short time that can direct actions aimed to preserve the environment. It can support low-carbon energy systems to improve renewable energy and energy efficiency. Marine pollution is one of the possible areas of benefit. AI safety research is needed. The investigation shows that many AI applications are biased towards sustainable development issues and are relevant to those nations where AI researchers work and develop systems.[50]

According to the Commission, there is a need for continuous work in the area of effective application and enforcement of existing EU and national legislation. The limitations in the scope of the existing EU legislation should also be tackled. Good regulatory response is needed. AI systems have been at the forefront of the political agenda in the EU in the last few years. In 2017, the European Council called on the Commission to develop a European approach to AI. In 2018, the Commission published a Communication with the aim "to boost the EU's technological and industrial capacity, prepare for socio-economic changes and ensure an appropriate ethical and legal framework".[51] It has often stressed that possible regulatory proposals must take into consideration the fact that any misplaced regulation has the potential to stifle innovation in every sector, especially the AI sector.

In the last few years in the EU, we have witnessed legal initiatives concerning AI. The picture in the EU was fragmented. The discussion centred on whether any regulation is needed at all. In other words, do we have to regulate AI systems or not? The Commission started its path toward regulation form the White paper on artificial intelligence that stressed the need to maintain scientific discovery, preserve the EU's technological leadership while improving the lives of its citizens and the development of AI based on European values. The White paper calls for a European approach that will diminish national fragmentation of rules and develop an ecosystem of trust and excellence.[52] The Commission also stressed the need to assess the environmental impact of AI throughout its lifecycle and its supply chain. In order to enhance trust, the Commission issued the Ethics Guide-

50 *Ibid.*, p. 6.

51 European Commission, *op.cit.*, note 6, 2018a.

52 White paper, *op.cit.,* note 10, p. 1-3.

lines for Trustworthy AI in 2019.[53] The accent is on the trust in the development, deployment, and the use of AI systems as an essential part of every regulation aimed at establishing lawful, ethical, and robust AI systems. It is one of the clearest demonstrations of the EU's ambition to become a leader in ethical AI. The Guidelines cover different chapters that are focused on AI compliance with fundamental rights, technical and non-technical methods to implement trustworthy AI together with assessment lists and case studies. EU values and fundamental rights are at the forefront of AI, as AI systems should not be an aim in themselves, but rather a tool to increase human wellbeing. Guidelines set ethical principles that practitioners should always adhere to: respect of human autonomy, prevention of harm, fairness, explicability, accountability, and traceability. They point out that AI systems can facilitate the achievement of the UN's Sustainable Development Goals, such as promoting gender balance and tackling climate change, rationalizing our use of natural resources, enhancing our health, mobility, and production processes, and supporting how we monitor progress against sustainability and social cohesion indicators.[54]

AI applications that address sustainable development goals should carefully take into consideration ethical principles. According to Guidelines, "AI systems promise to help tackling some of the most pressing societal concerns, yet it must be ensured that this occurs in the most environmentally friendly way possible. The system's development, deployment and use process, as well as its entire supply chain, should be assessed in this regard, e.g. via a critical examination of the resource usage and energy consumption during training, opting for less harmful choices".[55]

Developing responsible AI, with a human-centric approach, is the ultimate objective and a bottom line of all policy and regulatory initiatives in this area. Disruptive technologies, such as AI, require timely and appropriate regulatory response. The result of the ongoing legislative process for the adoption of the Artificial Intelligence Act will show whether the EU will succeed in finding the right balance between the interest of establishing and preserving the EU's technological leadership, on the one hand, and the protection of Union values, fundamental rights, and principles to the benefit of its citizens, on the other. The proposed solution from the AI Act has caused both excitement and criticism in the legal doctrine and industry. It contains a uniform set of horizontal rules for the development, marketing, and use of AI systems in conformity with the Union values, applying

[53] Independent High-Level Expert Group on Artificial Intelligence (HLEG): Ethics Guidelines for Trustworthy AI, [https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai], Accessed 17 January 2024 (Ethics Guidelines).

[54] *Ibid.*, p. 4 .

[55] *Ibid.*, p. 19.

the proportionate risk-based approach. The aim is to avoid regulatory friction and fragmentation, and to create a well-functioning internal market for AI systems and technologies. One of the proposed solutions that try to incorporate the innovative or experimental approach to law-making, is the introduction of AI regulatory sandboxes. This is a novel regulatory regime and a policy instrument, aimed at fostering innovation by allowing the development and testing of AI systems under strict regulatory oversight before these systems are placed on the market (art. 57-63). AI regulatory sandboxes can be used to measure the achievement of sustainable development goals.

To ensure that AI systems lead to socially and environmentally beneficial outcomes, Member States are encouraged to support and promote research and development of AI solutions in support of socially and environmentally beneficial outcomes, but without precise instructions on how to achieve them. It is a pity that the legislator focused more on transparency obligations of the developer and deployer of AI systems, thus ignoring sustainability issues.

4. MOVING FROM AI FOR SUSTAINABILITY TO SUSTAINABLE AI

There has been much discussion on how to steer AI and new technologies towards achieving economic, social, and environmental targets. However, there's a lack of analysis on the deployment, training, and implementation of sustainable AI.[56] Both aspects are interconnected and mutually enforceable, and need further clarification.

The financial and environmental costs of developing AI systems are substantial. For instance, by 2027, the total energy consumption of AI is projected to match the energy demand of countries such as the Netherlands or Argentina.[57] Developing and promoting sustainable AI systems should also be considered and made transparent to AI deployers, users, as well as policy makers. Sustainable AI is hidden part of the development process.

To grasp any concept, first must be defined. However, there is a scarcity of literature and consistency in defining the term "sustainable AI". Most definitions portray it as "development, implementation, and utilization of AI in a manner that minimizes negative social, ecological, and economic impacts of the applied algorithms", "an approach where the positive and negative impacts of AI on people

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[56] Kindylidi, I.; Cabral, T. S., *Sustainability of AI: The Case of Provision of Information to Consumers*, Sustainability, Vol. 13, 2021, p. 1.

[57] Hacker, P., *op. cit.*, note 3, p. 3.

and society are as important as the commercial benefits or efficiency gains" or as a "movement to foster change in the entire lifecycle of AI products". Additionally, it is described as "change that is not harmful but beneficial for human life".[58]

The definition put forth by Wynsberghe appears to be the most persuasive. She characterizes sustainable AI as an umbrella term encompassing AI for sustainability and the sustainability of AI. It is a "field of research that applies to the technology of AI (the hardware powering AI, the methods to train AI, and the actual processing of data by AI) and the application of AI while addressing issues of AI sustainability and/or sustainable development".[59]

The development and use of AI systems must align with social, economic, and environmental pillars. However, there is a noticeable lack of studies on the sustainable use of AI systems. AI training consumes substantial energy and water resources. For instance, one investigation revealed that a conversation with ChatGPT consisting of 20-50 questions can evaporate the contents of a 500ml bottle of water![60] Moreover, according to another survey, Google's AlphaGO Zero generated 96 tonnes of CO2 over 40 days of research training, equivalent to 1000h of air travel or a carbon footprint of 23 American homes.[61] Additionally, computer and data centres' reliance on minerals for their batteries leads to carbon emissions. Electronic waste should not be overlooked, too. These situations are not merely abstract, but result in concrete emissions. Thus, the sustainability of developing and using AI models warrants examination and must be integrated into the regulation and implementation of AI systems.

The European Parliament has advocated for more stringent provisions regarding sustainability requirements. However, during negotiations on the adoption of the AI Act, it advocated for more environmental issues to be included, albeit everything remained within the realm of soft law rules. Consequently, the AI Act encourages providers and deployers of AI systems to adhere to additional guidelines on the trustworthiness of AI systems. The code of conduct should encompass specific questions assessing and minimizing the impact of AI systems on environmental sustainability, such as energy-efficient programming and techniques for efficient design, training, and use of AI (art. 95). It is noteworthy that these are voluntary codes of conduct that should be founded on clear objectives and indicators to measure their attainment. Nonetheless, the newly established AI Office has a task of encouraging and facilitating the drafting of codes of conduct intended to

58 Wilson, C., van der Velden, M., *op. cit.*, note 4, p. 4.

59 *Loc. Cit.*

60 Hacker, P., *op. cit.*, note 3, p. 5.

61 Wynsberghe, A., *op. cit.*, note 45, p. 214.

foster the voluntary application of AI systems other than high-risk AI systems.[62] As Hacker suggests, their value lies in gathering knowledge and expertise from various sectors of AI systems, enabling customized solutions and flexibility.[63]

It is crucial the switch from ethical inquiries to the practical application of AI systems with a focus on promoting environmental well-being.[64]

Achieving sustainability development goals entails risks and costs. Thus, it is essential to define parameters for measuring the sustainability of developing and using AI models.[65] Another potential concern stems from tuning the AI systems to be up to date and efficient. IT experts point these costs will be much higher than the development of systems. Collecting data entails large costs as MIT in a report said that the cloud has a larger footprint then entire airline industry. A single data center might consume the amount of electricity equivalent to 50 000 homes.[66] Environmental costs must be taken into account in the development and use of AI systems. They need to be integrated into the systems. The AI Act obliges providers of general-purpose AI systems to provide information on the energy consumption of those models (annex XI). Harmonised standards and standardisation deliverables on AI resource performance, such as the reduction of energy and other resource consumption of high-risk AI systems during their lifecycle, and on the energy-efficient development of general-purpose AI models, shall be developed (art. 40).

The developers of AI systems must uphold the development of AI systems compatible with sustainability goals. Sustainability must be at the core of the activities of every AI system. It is closely linked to the concept of robustness, which will become a key concept in developing and deploying AI systems. As already mentioned, the AI Act overlooked AI sustainability. It stresses that AI benefits a wide array of economic, environmental, and societal benefits across the entire spectrum of industries and social activities (recital 4). The compromise text highlighted that the Act includes a high-level statement that one of the purposes of the AI Act is to ensure a high level of protection of health, safety, and fundamental rights enshrined in the Charter, which includes democracy, rule of law, and environmental protection while boosting innovation and employment and making the Union a

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62 Commission decision of 24. 1. 2024 establishing the European Artificial Intelligence Office, Brussels, 24. 1. 2024 C(2024) 390 final.

63 Hacker, P., *op. cit.*, note 3, p. 21.

64 Wilson, C.; van der Velden, M., *op. cit.*, note 4, p. 2.

65 Wynsberghe, A., *op. cit.*, note 45, p. 214.

66 *The Staggering Ecological Impacts of Computation and the Cloud*, [https://thereader.mitpress.mit.edu/the-staggering-ecological-impacts-of-computation-and-the-cloud/], Accessed 20 February 2024.

leader in the uptake of trustworthy AI (art. 1). So, environmental protection is put on an equal footing with fundamental Union values and has become one of the criteria in the development and deployment of AI systems, but without clear tools on how to protect them. Understanding the technology life cycle is necessary, and certain support should be given to develop sustainable technology development. Kindylidi proposes incentives in the form of tax benefits and funding to undertakings developing sustainable AI.[67]

More should be done to understand how to develop and maintain sustainable AI. Besides promoting AI to achieve sustainable goals, the sustainability of AI addresses problems in measuring the carbon footprint and energy consumption of AI systems. These two systems are interconnected and should be examined together. In this regard, Ethics Guidelines encourage the sustainable and ecological responsibility of AI systems to benefit all human beings, including future generations. They point out that research has to be fostered into AI solutions addressing areas of global concern, such as the Sustainable Development Goals.[68]

Guidelines provide an assessment list as a tool to help AI practitioners to ensure compliance with non-legal standards. Some of the questions from the list ask: Did you establish mechanisms to measure the environmental impact of the AI system's development, deployment, and use (for example the type of energy used by the data centres)? and Did you ensure measures to reduce the environmental impact of your AI system's life cycle?[69] It is a clear example showing that the sustainability of AI is capturing more attention.

AI systems must focus not only on human rights and ethical issues, but also on the necessity to serve the needs of the environment, economy, and society.[70] Wynsberghe suggests that we must be really careful to choose the goals we will follow. One of them definitely is the development of AI systems with sustainable values. She suggests using a "proportionality framework" to assess whether the training of a particular AI is proportionate. The best practices should be encouraged. One proposal is to include AI for climate term.

Tuning a model is more expensive than training a model to begin with.[71] What will happen with old systems that will need continuous adaptation? Undertakings developing AI systems should deploy cost-benefit analysis to reduce energy

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67 Kindylidi, I.; Cabral, T. S., *op. cit.*, note 55, p. 9.

68 Ethics Guidelines, p.19.

69 *Ibid.*, p. 31.

70 Wynsberghe, A., *op. cit.*, note 45, p. 215.

71 *Ibid.*, p. 216.

consumption. Carbon emissions in the digital sector should be reduced. There is massive infrastructure behind AI systems. We cannot think of something happening in clouds or abstract. Exchanging views and best practices among stakeholders is crucial.[72]

Wynsberghe offers two tools to monitor energy consumption and carbon dioxide emissions of AI systems: "Carbontracker" and "Machine Learning Emissions Calculator". Another interesting proposal comes from Hacker that recommends including the sustainability by design concept to incorporate environmental consideration into the design and implementation of AI.[73] The AI Act obliges high-risk systems to establish and implement a risk management system for the whole lifecycle of the system (art. 9). Perhaps, also non-risk systems should be included, as their emission is not related to the level of risk to health, safety, or fundamental rights.[74]

5. CONCLUSION

The paper aims to bridge the gap between AI and sustainability by exploring the concept of "Sustainable AI", which encompasses two pillars: AI for sustainability and sustainable AI. The objective is to understand the development of AI that aligns with sustainable development goals. To achieve this, it is crucial to grasp the fundamental concepts of AI systems and their definition, as well as to examine the potential pathways for realizing the sociological, ecological, and economic implications of these systems, all with the overarching goal of advancing sustainable development objectives. Additionally, the paper seeks to address the challenges associated with developing, deploying, and using AI in a sustainable manner, which is closely intertwined with upholding the highest ethical standards in the responsible utilization of AI systems. The aim is to harness and transform AI systems for beneficial and sustainable purposes.

Sustainable development entails balancing environmental, social, and economic dimensions. As legal philosopher Westerlund stated "unless law is made sustainable, it will protect unsustainable conducts",[75] indicating that the regulatory framework must not overlook the social, economic, and environmental aspects of sustainable development. Therefore, sustainability considerations should be inte-

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72 Kindylidi, I.; Cabral, T. S., *op. cit.*, note 55, p. 10.

73 Hacker, P., *op. cit.*, note 3, p. 22.

74 *Ibid.*, pp. 23–24.

75 Westerlund 2008, p. 54 in: Montini., M., *Designing Law for Sustainability*, in: Mauerhofer, V.; Rupo, D.; Tarquino, L. (eds.), Sustainability and Law, General and Specific Aspects, Springer, Cham, 2020, p. 40.

grated into the development of AI systems alongside accompanying regulations. The regulatory framework should be crafted to promote sustainability, as failure to do so may perpetuate economic unsustainability. The concept of regulation for sustainability can be reframed as AI for sustainability, aiming to encourage activities that do not harm ecosystems.

In addition to offering benefits, AI systems consume significant amounts of water and energy. Sustainable AI must be integrated into the design and monitoring of AI systems throughout their lifecycle. Although the AI Act mentions environmental considerations, sustainability issues should be more concretely integrated with stronger enforcement mechanisms. Encouraging and promoting codes of conduct and best practices will be essential. Furthermore, sharing and collecting necessary information will be crucial for the future, along with the development of interoperability standards. Collaboration among all stakeholders involved in the lifecycle of AI systems will be vital for achieving sustainable AI. Interdisciplinary research analyzing different aspects of sustainability should be encouraged.

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Chapter 7

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Original scientific paper

HUMAN RIGHTS AS A VEHICLE FOR (BETTER) INTERNATIONAL PROTECTION OF THE ELDERLY

Ines Medić, PhD, Full Professor
University in Split, Faculty of Law
Domovinskog rata 8, 21000 Split
ines.medic@pravst.hr

ABSTRACT

Despite the fact that 21st century's society has been defined as an „ageing society", law has not yet responded adequatly to the needs of the „aging" part of that same society. National legislators are often waiting for the „push" from international community and national laws are still quite short with provisions aimed at the specific protection of the elderly. On the international level, apart from general human rights treaties and some soft law provisions on the right of older people, there is still no international convention which recognizes the specific rights of all older persons. There are different public and private international law instruments though, but they are diverse and either too general or too limited.

The Convention on International Protection of Adults (CIPA) and the Convention on the Rights of Persons with Disabilities (CRPD) as the most prominent ones both have their limitations. First and foremost, their personal scope of application is limited in a way that covers only the most vulnerable among the elderly. EU's Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of the adults complements the CIPA, thus it is also limited in its scope.

Having in mind that according to the World Social Report 2023 the shift towards older population is largely irreversible and by 2050 the number of persons aged 65 years or older is expected to be surpassing 1,6 billion, a question arises „is the existing legal framework the best we can offer for the protection of the elderly?". Based on the protection offered to other underprivileged groups, it is obvious that the time has come that not only the vulnerable but all the elderly should be granted internationally recognized charter of rights instead of just general standards scattered throughout different international instruments.

Such charter of rights should establish specific standards related to the rights of elderly, complementary with the existing general standards. It should also include an effective mechanism of enforcement of those rights. This will create a new legal dimension and a new obligation for national and international legislators, leading towards better protection of elderly on national and international level.

Thus, the aim of this article is to establish and explore the current state of play with regard to, particularly, international protection of the elderly, as well as to articulate arguments in favour of the proposed convention on the rights of the elderly.

Keywords: *human rights, international protection, older persons, proposed convention*

1. INTRODUCTION

It is indisputable that the world is facing big demographic shift. According to the World Social Report 2023 the shift towards older population is largely irreversible and by 2050 the number of persons aged 65 years or older is expected to be surpassing 1,6 billion,[1] Although, due to better health and wealth of societies, traditional notions of dependence of the elderly are loosing its significance, effective systems of old-age support are necessary. This is due to the demographic transition to longer lives and smaller families and, consequently, changed composition of kinship structures.[2] According to these projections, by the age of 2095 „the number of living grandparents and great-grandparents will markedly increase and the number of cousins, nieces and nephews, and grandchildren will decline".[3] The larges decline in family size is expected in Latin America and Carribean, more modest in Europe and North America since in those regions family structures are already small. With respect to kin configuration, more „horizontal" families which are dominated by lateral kin (siblings and cousins) will be replaced by more „vertical" families which are dominated by a higher proportion of ascendants and descendants (children and grandparents).[4] Due to increased cross-border mobility there is also a question of availability of kinship support.

All this advocates in favor of the development of robust system of old-age support. Even more so, since older people are often stereotyped as being dependent on others. They are seen as „recipients of charity", rather than as rights holders who can make their own choices.[5] In combination with lack of family ties which could provide support and informal care those individuals are on their own, which is exactly why it is necessary to put the rights and well-being of older persons at the centre of the future legislative efforts.

However, despite the fact that the 21st century's society has been defined as an „ageing society", law has not yet responded adequatly to the needs of the „aging"

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1 World Social report 2023: Leaving No One Behind In An Ageing World, UN, 2023, p. IV.

2 Alburez-Gutierrez, D.; Williams, I.; Caswell, H., *Projections of human kinship for all countries*, Academia Sinica (Taiwan), 2023, [https://doi.org/10.1073/pnas.2315722120]. Accessed 23 March 2024.

3 *Ibid.*

4 *Ibid.*

5 Shahriar Rahman, R., *Older People's Rights*. [https://www.amnesty.org]. Accessed 1 December 2023.

part of that same society. National legislators are often waiting for the „push" from international community and national laws are still quite short with provisions aimed at the specific protection of the elderly. On international level, apart from general human rights treaties and some soft law provisions on the right of older people, there is still no international convention which recognizes the specific rights of all older persons. There are different public and private international law instruments though, but they are diverse and either too general or too limited.

Based on the protection offered to other underprivileged groups, it is obvious that the time has come that not only the vulnerable but all the elderly should be granted internationally recognized charter of rights instead of just general standards scattered throughout different international instruments.

Such charter of rights should establish specific standards related to the rights of elderly, complementary with the existing general standards. It should also include an effective mechanism of enforcement of those rights. This will create a new legal dimension and a new obligation for national and international legislators, leading towards better protection of elderly on national and international level.

In order to set the ground for articulating arguments in favour of the proposed Convention for the protection of older persons, the first part of this article will include an attempt to demarcate the elderly as a target group and to analyze the existing framework for the protection of the elderly and the second part of this article will present an analysis of the proposed Convention's content.

2. DEFINING THE SUBJECT MATTER

2.1. Defining the „Older Age"

Every attempt to define the personal scope of application of any instrument should begin with the definition of the target group. While it goes rather easy with regard to some groups (e.g. children, women, disabled, etc.), when it comes to elderly it becomes a challenging task. It is a direct consequence of the fact that proces of getting old is uniqe in each individual case, depending on living conditions, genetic predisposition and care for one's own health.[6] Thus, it might be said that everyone becomes old at a different time, which makes it difficult to grasp who should be considered to be elderly.

[6] Roksandić, S., *Zdravstvena prava za starije osobe u Republici Hrvatskoj*, Medicus, Vol. 14, No. 2, 2005, p. 313.

Apart from being a biological phenomenon, „older age" is also a social construct which changes in a given contexts and situations. This is particularly true given that people are living longer and healthier lives, changing perceptions and stereotypes about older people in many societies. However, „even the idea of elderly as a socially constructed category may create some difficulties given some individuals' self-perception that they do not belong to that category".[7]

Consequently, there is sometimes a tendency to define „old age" exclusively in non-biological terms (like „young at heart", etc.) but it should be avoided. Although the „context-specific approach" to older age might work in certain cases,[8] it does not help at all in establishing the target group for the protection of the human rights of older persons.

Obviously, people age differently and „the term „elderly" is only a generalization that draws together people of vastly different characteristics".[9] With that in mind, most of the existing legislation favours more neutral term „older people" rather than „elderly", which can stigmatize older people by associating them with frailty and dependence.

Based on that premise, it is not a surprise that there is no universally accepted definition of an „older person". However, it does not mean that there is no definition at all. On the contrary, there are number of definitions – based on the change in the social role of the indiviual (e.g. retirement) or changed abilities of the individual (e.g. psychological or physiological conditions) or the age of the individual (65 in most of the developed countries and 50 to 55 in underdeveloped countries).[10] [11] Despite the fact that „any chronological demarcation of age boundaries may be considered arbitrary and open to dispute on grounds that it poorly represents the biological, physiological, or even psychological dimensions of human experience",[12] most of the countries associate older age with the certain

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7 Mégret, F., *The Human Rights of Older Persons: A Growing Challenge*, Human Rights Law Review, Vol. 11, No. 1., 2011, p. 43.

8 Hughes, M. L.; Touron, D. R., *Aging in Context: Incorporating Everyday Experiences Into the Sudy of Subjective Age*, Front Psichiatry, Vol. 12, 2021, pp. 1-12.

9 Frolik, L. A.; McChristal Barnes, A., *Elder Law: Cases and Materials*, LexisNexis Mathew Bender, 2007, p. 3.

10 See: Kowal, P.; Dowd, J. E., *Definition of an older person, Proposed working definition of an older person in Africa for the MDS Project*, Geneva: World Health Organization, 2001, [https://www.who.int/healthinfo/survey/ageingdefnolder/en], Accessed 3 December 2015.

11 Although, even in most developed countries it may vary also. For example, in Slovakia person may be considered „old" even at about 57 years while in the Netherlands it may take more that 70 years of age. See more in: Charness, N; Czaja, S., *Age and Technology for Work*, in [Schultz, K.; Adams, G. [eds.], Aging and Work in the 21st century, Routlege, 2018.

12 National research Council (US) Panel on a Research Agenda and New Data for an Aging World, Preparing for an Aging World: The Case for Cross-National Research, Washington [DC]: National Academies Press, 2001, [https://www.ncbi.nlm.nih.gov], Accessed 23 March 2024.

age limit, mainly the same one which correlates with the age at which a person becomes eligible for statutory and occupational retirement.[13] Likewise, the United Nations treats anyone above 60 years old as an older person.[14]

It is obvious, that in order to accomodate the objective (age, functional capacity, social involvement and physical and mental health)[15] and subjective (self-defining) factors, the definition of the elderly or „older persons" should include an age treshold and some flexibility „to take into account national and local, as well as functional, variations".[16] In other words, in order to demarcate the target group of the proposed Convention from the rest of the population it is necessary to introduce at least minimal framework for the determination of an „older person".

2.2. Defining the Concerns Associated with „Older Age"

One of the main concernes when it comes to an „older age" is „ageism".[17] Ageism can be explained as systematic stereotyping of people because they are old. Or, as process which „allows the younger generations to see older people as different from themselves, thus they subtly cease to identify with their elders as human beings."[18] In other words, „people cease to be people, cease to be the same people or became people of an indstinct and inferior kind, by virtue of having lived a specified number of years".[19]

According to the World Health Organization (WHO), „Ageism refers to the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) directed towards people on the basis of their age. It can be institutional, interpersonal and self-directed. Also, according to the WHO, „institutional ageism refers to the laws, rules, social norms, policies and practices of institutions that unfairly restrict opportunities and systematically disadvantaged individuals because of their age. Interpersonal ageism arises in interactions between two or more individuals, while self-directed ageism occurs when ageism is internalised

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13 *Ibid*.

14 Mégret, *op. cit*, note 7, p. 43.

15 World Health Organisation, Our Ageing World, [https://www-who.int/ageing/en], Accessed 12 January 2010.

16 Mégret, *op. cit*, note 7, p. 43.

17 In details about ageism: Gutterman, A.S., *Ageism: Where It Comes From and What it Does*, 2022, [https://ssrn.com/abstract=3849022], Accessed 6 July 2023.

18 Bytheway, B., *Ageism*, in: Johnson, M. L. (ed.). The Cambridge Handbook of Age and Ageing, Cambridge Books Online: Cambridge University Press, 2009, p. 338.

19 Johnson, J.; Bytheway, B., *Ageism: Concept and definitions*, in: Johnson, J.; Slater, R. (eds.), Ageing and Later Life, Thousand Oaks: Sage Publications, London, 1993, p. 200.

and turned against oneself."[20] Ageism often intersects and interacts with other forms of stereotypes, prejudice and discrimination, including ableism, sexism and racism. Multiple intersecting forms of bias compound disadvantage and make the effects of ageism on individuals' health and well being even worse.[21]

According to the United Nations Economic Commission for Europe (UNECE) ageism includes „stereotyping, prejudice about and discrimination against people on the basis of their age; which is largely implicit, subconscious and unchallenged in our societies, cuts across the life course and stems from the perception that a person might be too old or too young to be or do something. While ageism can affect people of any chronological age, more attention is usually paid to the higher ages, as older people suffer a great share of ageism and once encountering it, face more serious consequences that younger persons."[22]

Unfortunately, ageism translates in almost all areas of life. To start with, there are economic concernes. Very often, older people face discrimination in employment, whether direct (e.g. mandatory retirement ages or maximum age limits on hiring) or indirect (e.g. when employers make ageist assumptions about an older person's ability to work or learn new skills). Even if they manage to overcome economic concerns, they often face workplace discrimination. According to the data of the Amnesty International Belgium, nearly one in four older people who remained in work felt that they been treated differently after turning 55 years old.[23] When it comes to access to pensions, which are a lifeline to older persons, only 68% of older people globally receive a pension. The numbers drop signifficantly with regard to Africa, Asia and Middle East, where less than 30% of older people receive a pension. In both scenarios, if a pensioner is a women there is also intersection with gender discrimination. Since women are more likely to take breaks from formal work to care for their family or to work in the informal economy, they often receive lower pensions than men. Further on, in times of crises, economic vulnerabilities of „older persons" are heightened since age discrimination is often embedded in humanitarian response, and older people often struggle to access adequate healthcare, food, financial assistance and housing.[24] Last but not least, ageism also has negative health outcomes.[25]

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20 Global report on ageism, Geneva: World Health Organization, 2021, p. XV.

21 *Ibid.*

22 United Nations Economic Commission for Europe, Combating ageism in the world of work (UNECE Policy Brief on Ageing No 21, February 2019), p. 3. Meisner, B., *A Meta-Analysis of Positive and Negative Age Stereotype Priming Effects on Behaviour Among Older Adults*, Journals of Gerontology Series B Psychological Sviences and Social Sciences, Vol. 67, No. 1, 2012, p. 13.

23 Shahriar, *op. cit*, note 5, p. 11-12.

24 *Ibid*.

25 Pascoe, E.A.; Smart Richman, L., *Perceived Discrimination and Health: A Meta-Analytic Review*, Psychological Bulletin, Vol. 135, No. 4, 2009, p. 531-534.

As it is obvious, ageism, irrespective of its ground, has numerous negative outcomes. Combined with vulnerability of „older age" often leads to violation of human rights of older persons. Since discriminatory grounds tend to overlap, „collective, concerted and coordinated global action is required to tacle ageism."[26] On personal level, it will take changing of people's understanding and social behaviours. On the institutional level it will take changing of political determination around age and ageing. Unfortunately, so far ageism has received little attention, as well in research as in policy making.[27]

3. EXISTING AND EXPECTED INTERNATIONAL REGULATION

Despite numerous efforts to frame the elderly issues in terms of human rights, trajectory of the domestic and international protection of the elderly has so far been moving in different direction. National legislators are waiting for the „push" from international community, while international human rights law refering to elderly has so far been based mainly on some scattered provisons of existing international instruments dealing with human rights in general and some private international law instruments dealing with international protection of certain groups of adults. There are also some new legislative initiatives but mainly to complement the Hague Convention on the International Protection of Adults, thus also just indirectly touching upon certain human rights.

3.1. Current State of Play in International Human Rights Arena

3.1.1. From Global ….

Up to this day, there is no comprehensive international instrument on global level „dealing with the specific needs of and required protections of the elderly".[28] There are legal instruments protecting the rights of all people, thus including the elderly, but the treaty tailored specificaly to the needs of elderly is still lacking.

The Universal Declaration of Human Rights (UDHR)[29] makes explicit reference to the rights of the elderly – „Everyone has the right to a standard of living ad-

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[26] Officer, A.; de la Fuente-Núñez, V., *A global campain to combat ageism*, Bulletin of the World Health Organization, No 96, 2018, pp. 295.

[27] *Ibid.*

[28] Miller, J.M., *International Human Rights and the Elderly*, Marquette Edler's Advisor, Vol. 11, No. 2, p. 347. Rodríguez-Pinzón; Martin, C., *The International Human Rights Status of Elderly Persons*, American University International Law Review, Vol. 18, No. 4, pp. 915, 917.

[29] The Universal Declaration of Human Rights, 10 Decembar 1948, General Assembly resolution 217A.

equate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.".[30] Despite its existence, (mainly) due to lack of recognition of ageism and despite numerous subsequent soft law instruments,[31] older persons still remain largely invisible in international human rights law.

In the wake of UDHR, some other international instruments have been enacted that recognize the specific rights of all persons, and equality and non-discrimination. International Convenant on Civil and Political Rights (ICCPR)[32] and International Convenant on Economic, Social and Cultural Rights (ICESCR)[33] both prohibit the discrimination and establish the duty to eradicate it. They ensure that the rights contained within it apply to all people „without distinction of any kind, such as race, colour, seks language, religion, political or other opinion, national or social origin, property, birth or other status". Despite the lack of any explicit mention of the elderly, the ICCPR and the ICESCR have been accepted by the respective Committees[34] to protect the rights of the elderly.[35]

In order to clarify the extent to which the ICESCR applies to elderly, the Committee on Economic, Social and Cultural Rights even adopted General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons.[36] General Comment No. 6 discusses general obligation od States parties towards older people as well as specific provisions of the Covenant that adress the rights of the elderly related to: equal rights of man and women, work, social security, protection of the family, adequate standard of living, physical and mental health and education and culture. It

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30 See Art. 25(1) of the UDHR.

31 Which address the respective issues in a more direct and express manner and include sets of principles, declarations, plans of action, etc. See: Ramachandran, M., *Older Presons and the International Human Rights Framework: Argument for a Specific International Convention*, Journal of the Indian Law Institute, Vol. 56, No. 4, 2014, pp. 536-543. Tang, K.-L.; Lee, J.-J., *Global Social Justice for Older People: The Case for and International Convention on the Rights of Older People*, The British Journal of Social Work, Vol. 36, No. 7, 2006, pp. 1139-1142. Doron I., *From National to International Elder Law*, The Journal of International Aging, Law & Policy, Vol I, 2005, pp. 52-61.

32 International Convenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2220A (XXI).

33 International Convenant on Economic, Social and Cultural Rights, 16 December 1966, A/RES/21/2200.

34 ICCPR by the Human Rights Committee and the IESCR by the Committee on Economic, Social and Cultural Rights. See: Miller, *op. cit*, note 28, p. 350, 352.

35 Miller, *op. cit.*, note 28, p. 350.

36 Committee on Economic, Social and Cultural Rights even adopted General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, [1996], U.N. Doc. E/1996/22 at 20.

provides a legal interpretation of how ICESCR ought to apply to older persons.[37] According to the General comment No. 6, age as a separate discriminatory ground was not included in either of the Covenants since at the time of their enactment „the problem of demographic ageing was not as evident as it is now". Although the Covenants are enforceable legal instruments, „the elderly whose rights are being violated may not have the ability to voice those violations.".[38]

The first UN human rights convention that explicitly affirmed the age as prohibited basis of discrimination was the Convention on the Elimination of All Forms of Discrimination against Women,[39] with regard to their access to old age subsidies. Due to changes in population structures and its implications for human rights, some years later the Committee on the Elimination of Discrimination against Women adopted General recommendation No. 27 on older women and protection of their human rights,[40] „in order to provide guidance concerning State parties' obligations under the Convention with regard to women' rights and the need to ensure that people are able to age with dignity".[41]

Scope of prohibited discrimination bases associated with an (older) age was subsequenly widened by the Convention on the Protection of the Rights of Migrant workers and their Families[42] and further on by the Convention on the Rights of Persons with Disabilities (CRPD).[43]

UN Convention on the Rights of Persons with Disabilities (CRPD) „promotes, protects and ensures the full and equal enjoyment of all human rights and funadmental freedoms by all persons with disabilities, and promotes respect for their inherent dignity".[44] The Convention represents a paradigm shift from a medical

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37 Tonolo, S., *International Human Rights Law and the Protection of the Elderly in Europe*, Medicine, Law & Society, Vol. 11, No. 2, 2018, p. 109.

38 Miller, *op. cit.*, note 28, p. 352.

39 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, Treaty Series 1249 [1979]:13.

40 Committee on the Elimination of Discrimination against Women, General recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27.

41 Huenchuan, S.; Rodríguez-Piñero, L., *Ageing and the protection of human rights: current situation and outlook*, ECLAC – Project Document Collection, United Nations, 2011, pp. 27-29.

42 Convention on the Protection of the Rights of Migrant workers and their Families, 18 December 1990, Treaty Series 2220 [1990]:3.

43 The United Nations Convention on the Rights of Persons with Disabilities, Treaty Series 2515 [2006]:3. Hendriks, A., *UN Convention on the Rights of Persons with Disabilities*, European Journal of Health Law, Vol. 14, No. 3, 2007, pp. 273-298.

44 Art. 1(1) of the CRPD.

model of disability to a human rights model.[45] CRPD, within its personal scope of application, has much to offer to elderly „both in terms of its substantive provisions as well as an example of what can be accomplished through advocacy efforts to codify human rights protections under international law".[46]

Areas covered by the CRPD are: accessibility, personal mobility, health, education, employment, habilitation and rehabilitation, participation in political, social and cultural life, and equality and non-discrimination. Although the CRPD does not single out elderly as a separate category, several of its provisions are of particular relevance to elderly, such as: art. 1 (purpose), art. 3 (general principles), art. 6 (women with disabilities), art. 9 (accessibility) and in particular provision of Art. 12 (equal recognition before the law), which challenges paternalistic policies relating to people who lack „capacity". The CRPD proposes the abolition of guardianship in favour of decision-autonomy and „supportive decision making". There is also art. 19 (living independently and being included in community) which limits the scope of a State's use of institutionalization,[47] as well as arts. 25 and 26 dealing with accessibility of mainstream health services and art. 28, focusing on adequate standard of living and social protection.[48] However, personal scope of application of the CRPD is limited to only certain category of elderly.

3.1.2. … to Regional Level

At the regional level, legislation dealing with human rights is produced by by the Council of Europe and the EU. There are number of more or less binding documents,[49] of which we will mention only the most important ones.

3.1.2.1. Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[50] together with its Protocols is considered regional codifica-

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45 Kanter, A.S., *The United Nations Convention on the Rights of persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, Georgia State University Law Review, 2009, Vol. 25, No. 3, p. 549.

46 *Ibidem*, p. 530.

47 Morrison-Dayan, R., *Protecting the Right to Social Participation of Older persons in Long-term Care under Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*, Human Rights Law Review, Vol. 23, No. 2, 2023, pp. 1-21.

48 Tonolo, *op. cit.,* note 37, p. 112.

49 For more see: Rešetar Čulo, I., *Zaštita prava starijih osoba u Europi: trenutno stanje, nedostatci i izazovi*, Pravni vjesnik, Vol. 30, No. 2, 2014., pp. 127-130.

50 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005.

tion of universal rights, meant to protect ordinary people from abuse by the state by placing on states explicit duty to protect all individuals.[51]

Obviously it's wording is not explicitly directed to the human rights of elderly. The text of the ECHR does not contain any reference to the notion of „older persons". However, case law of the European Court of Human Rights (ECtHR) proves that it can and it has been be used in cases related to elderly as well.[52] According to the ECtHR case law, there have been cases dealing with the right to life,[53] prohibition of torture and inhuman or degrading punishment or treatment,[54] prohibition of slavery and forced labour,[55] right to liberty and security,[56] right to a fair trial,[57] right to no punishment without law,[58] right to respect for private and family life,[59] right to freedom of thought, consience and religion,[60] right to freedom of expression,[61] right

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51 Art. 1 of the ECHR: „The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.".

52 Tymofeyeva, A., *Human Rights of Older Persons in the Case Law of the European Court of Human Rights*, Czech Yearbook of Public & Private International Law (CYIL), Vol. 10, 2019, pp. 266-282.

53 Art. 2 of the ECHR: *Volintiru v. Italy*, application no. 8530/08; *Dodov v. Bulgaria*, application no. 59548/00; *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, application no. 53600/20; *Watts v. the United Kingdom*, application no. 15341/89.

54 Art. 3 of the ECHR: *Larioshina v. Russia*, application no. 56869/00; *Budina v. Russia*, application no. 45603/05; *Chyzhevska v. Sweden*, application no. 60794/11; *Frolova v. Finland*, application no. 47772/11; *Senichishak v. Finland*, application no. 5049/12; *Sawoniuk v. the United Kingdom*, application no. 63716/00; *Papon v. France*, application no. 64666/01; *Farbtuhs v. Latvia*, application no. 4672/02; *Haidn v. Germany*, application no. 6587/04; *Contrada (no. 2) v. Italy*, application no. 7509/08; *Taştan v. Turkey*, application no. 41824/05.

55 Art. 4 of the ECHR: *Floirou v. Romania*, application no. 15303/10; *Meier v. Switzerland*, application no. 10109/14.

56 Art. 5 of the ECHR: *H.M. v. Switzerland*, application no. 39187/98; *Vasileva v. Denmark*, application no. 52792/99.

57 Art. 6 of the ECHR: *Süssmann v. Germany*, application no. 20024/92; *Jablonská v. Poland*, application no. 60225/00; *Farcaş and Others v. Romania*, application no. 30502/02; *X and Y v. Croatia,* application no. 5193/09; *Zavodnik v. Slovenia*, application no. 53723/13.

58 Art. 7. of the ECHR: *Van Anrat v. the Netherlands*, application no. 65389/09; *Glien V. Germany*, application no. 7345/12.

59 Art. 8 of the ECHR: *Gross v. Switzerland*, application no. 67810/10; *McDonald v. the United Kingdom*, application no. 4241/12; *Jivan v. Romania*, application no. 62250/19; *Grant v. the United Kingdom*, application no. 32570/03; *Schlumpf v. Switzerland*, application no. 20002/06; *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, application no. 53600/20; *M.K. v. Luxembourg*, application no. 51746/18; *Calvi and C.G. v. Italy*, application no. 46412/21.

60 Art. 9 of the ECHR: *Pretty v. the United Kingdom*, application no. 2346/02; *Georgini v. Italy*, application no. 20034/11.

61 Art. 10 of the ECHR: *Heinisch v. Germany*, application no. 28274/08; *Tešić v. Serbia*, applications no. 4678/07 and 50591/12.

to marry,[62] right to an effective remedy,[63] right to prohibition of discrimination,[64] right to just satisfaction.[65]

Some of the human rights relevant also for elderly are enshrined in the Protocols to the ECHR (e.g. right to protection of property,[66] voting rights,[67] the right to continuous education of the elderly[68]), but unlike the rights enshrined in the Convention itself, rights cotained in Protocols might not be protected in all 46 states since Protocols are not ratified by all 46 states.

In any of the existing ECtHR cases there is no explicit articulation of the term „elderly" or „older person". However, careful reading of ECtHR's case law clearly shows that what is seen at first sight is not always true. Age in itself does not justify any special status of older persons in the proceedings before the ECtHR. But, in cases which involve older persons[69] ECtHR does take into account their „limitied physical mobility, decreased information processing and problem-solving skills that are often related to declining memory capacity and weakened evaluation skills"[70] or, in other words, their vulnerability. Only cummulation of age and vulnerability (assesed through deteriorated personal faculties) may leed to finding a breach of the ECHR.[71] Thus, the lack of explicit definition should not be seen as the absence of one.

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62 Art. 12 of the ECHR: *Delecolle v. France*, application no. 37646/13.

63 Art. 13 of the ECHR: *Şimşek and Others v. Turkey*, applications no. 35072/97 and 37194/97; *Popov (no. 1) v. Moldova*, application no. 74153/01; *Zavodnik v. Slovenia*, application no. 53723/13

64 Art. 14 of the ECHR and Art 1 of Protocol No 12 to the Convention: *Burden v. the United Kingdom*, application no. 13378/05; *Carson and Others v. the United Kingdom*, application no. 42184/05; *Taipale v. Finland*, application no. 5855/18; *Tulokas v. Finland*, application no. 5854/18.

65 Art. 41 of the ECHR: *Georgel and Georgeta Stoicescu v. Romania*, application no. 9718/03.

66 Art. 1 of Protocol No. 1. to the ECHR: *Klaus and Youri Kiladze v. Georgia*, application no. 7975/06; *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, applications no. 62235/12 and 57725/12; *Mauriello v. Italy*, application no. 14862/07; *Aielli and Others and Arboit and Others v. Italy*, applications no. 27166/18 and 27167/18; *P.C. v. Ireland*, application no. 26922/19; Žegarac *and Others v. Serbia*, application no. 54805/15.

67 Art. 3 of Protocol No. 1 to the ECHR: *Paksas v. Lithuania (GC)*, application no. 34932/04.

68 Mikołajczyk, B.*, Is the ECHR ready for global ageing?*, The International Journal of Human Rights, Vol. 17, No. 4, 2013., p. 518.

69 ECtHR: *Valentin Câmpeanu v. Romania (GC)*, application no. 47848/08 (mentally disabled person), *Khlaifa and Others v. Italy [GC]*, application no. 16483/12 (in the context of the expulsion of the aliens), *Mahamed Jama v. Malta*, application no. 10290/13 (in the context of asylum proceedings), etc.

70 Tymofeyeva, A., *op. cit.*, note 52, p. 279. Seatzu, F., *Reshaping EU old age law in light of the normative standars in international human rights in relation to older persons*, in: Ippolito, F.; Iglesias Sánchez, S. (eds.), Protecting vulnerable groups: the European human rights framework, Hart Publishing, 2017, p. 49.

71 ECtHR: *Farcaş and Others v. Romania*, application no. 30502/05, *Chmil v. Ukraine*, application no. 20806/10, *Tarakhel v. Switzerland (GC)*, application no. 29217/12.

Considering that the ECHR, despite its evolutive interpretation is not the best fit for the overall protection of human rights of older persons, some have suggested creation and adoption of additional protocol to the Convention.[72] Such protocol should contain a catalog of positive obligations of states which would help eliminate obstacles to the realization of human rights of older persons.[73]

Unlike ECHR, European Social Charter (ESC) (as revised in 1996)[74] explicitly mentions the elderly, in art. 23 -„Every elderly person has the right to social protection.". This right is further articulated in art. 4 of the 1998 Additional Protocol to the European Social Charter.[75] One of the main goals of these provision is for the elderly to remain full members of society or, in other words, not to be discriminated because of their age.[76] In order to achieve this goal, State parties are expected to undertake appropriate measures, e.g. „secure adequate resources enabling the elderly to lead a decent life and play an active part in public, social and cultural life; secure provision of information about services and facilities availbale for elderly persons and their opportunities to make use of them", etc.[77]

Problem is, in many States art. 23 of the ESC and art. 4 of the Additional Protocol to the ESC are not accepted, and the possibility of submitting collective complaint exist in only 16 States parties to the ESC.[78]

3.1.2.2. European Union

The Charter of Fundamental Rights of the EU[79] in its art. 25 explicitly states age as the one of prohibited grounds of discrimination – „The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to

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72 Mikołajczyk, *op. cit.*, note 68, pp. 523-524.

73 Roksandić Vidlička, S; Šikoronja, S., *Pravna zaštita starijih osoba, osobito s duševnim smetnjama, iz hrvatske perspektive: Zašto nam je potrebna Konvencija UN-a o pravima starijih osoba*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 38, No. 3., 2017. p. 1112.

74 Council of Europe, European Social Charter (revised), 3 May 1996, ETS No. 163.

75 The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, ETS No. 158.

76 Digest of the case law of the European Committee of Social Rights, European Committee of Social Rights, Council of Europe, 2008, p. 147.

77 Art. 4. of the The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, ETS No. 158.

78 Rešetar Čulo, I., *Zaštita prava starijih osoba u Europi: trenutno stanje, nedostatci i izazovi*, Pravni vjesnik, Vol. 30, No. 2, 2014, p. 127.

79 The Charter of Fundamental Rights of the EU, OJ C 326/391, 26. 10. 2012.

participate in social and cultural life.". According to the Explanations,[80] art. 25 of the Charter is based on art. 23 of the revised ESC as well as on arts. 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers,[81] so it has to be read in line with these provisions. It implies advocating „an inclusive society, the availability of social rights and high quality of life, intergenaretional solidarity, prevention of adverse environmental impacts, interdisciplinary and intersectoral cooperation and financial sustainability".[82] Age is explicitly mentioned also in art. 21 (non-discrimination), among other prohibited discriminatory bases.

3.2. Current State of Play in Private International Law Arena

3.2.1. Hague Convention on the International Protection of Adults

As all private international law conventions, Hague Convention on the International Protection of Adults (CIPA)[83] primarily deals with international jurisdiction, applicable law and recognition and enforcement.[84] In this case, in relation to protection of vulnerable adults in cross-border cases. Convention applies to „persons who have reached the age of 18 years"[85] and to „measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken".[86] This is to ensure that measures taken with respect to the minor will, if needed, continue to remain effective even after his majority.[87]

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80 Explanantions relating to the Charter of Fundamental Rights, OJ C 303/17, 14. 12. 2007. The Charter of Fundamental Rights of the European Union - reading guide, In the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the European Social Charter (revised), [https://rm.coe.int/16802f5eb7]. Accessed 13 January 2024, pp. 43-44.

81 The Community Charter of the Fundamental Social Rights of Workers, 9 December 1989, COM(89) 471 final.

82 Rešetar Čulo, *op. cit.*, note 78, p. 129. Žganec, N.; Rusac, S.; Laklija, M., *Trendovi u skrbi za osobe starije životne dobi u Republici Hrvatskoj i u zemljama Europske unije*, Revija za socijalnu politiku, Vol. 15, No. 2, 2008, p. 181.

83 HCCH, Convention of 13 January 2000 on the International Protection of Adults [https://www.hcch.net/en/instruments/conventions/full-text/?cid=71]. Accessed 21 February 2024.

84 For more see: Drventić, M., *The Protection of Adults in the European Union*, EU and Comparative Law Isses and Challenges Series (ECLIC), Vol. 3, 2019., pp. 803-829. Frimston, R., *The 2000 Adult Protection Convention – sleeping beauty or too complex to implement?*, in: John, T.; Gulati, R.; Köhler, B. (eds.), The Elgar Companion to The Hague Conference on Private International Law, Edward Elgar Publishing, 2020, pp. 226-235. Frimston, R; Ruck Keene, A.; van Overdijk, C.; Ward, A.D., *The International Protection of Adults*, Oxford University Press, 2015. Bumbaca, V., The Hague Convention on the Protection of Adults – Plea for Practice o fan „Adult" Approach, Yearbook of Private International Law, Vol. XXIII, 2021/2022 (Frimston *et al.*), pp. 365-392.

85 CIPA, op. cit., note 6, Art. 2(1).

86 *Ibid.*, Art. 2(2).

87 Lagarde, P., Explanatory Report on the 2000 Hague Protection of Adults Convention [https://www.hcch.net/en/publications-and-studies/details4/?pid=2951&dtid=3]. Accessed 3 January 2024, para 15.

With respect to the personal scope of application, CIPA consciously avoids the use of legal terms, like „adults with incapacity" or „incapacitated adults", since „the legal mechanisms by which interventions are justified in the lives of adults differ widely between jurisdictions".[88] While modern legal systems have moved beyond status-based approach, there are still jurisdictions in which adult can be declared an „inacapax" and reduced to less than a full legal person.[89] Declaration of incapacity is by no means required in order to qualify for CIPA's protection. On the contrary, as explicitly expressed in Explanatory Report „fundamental rights of adults in need of protection were at all times a central concern".[90]

Thus, according to Art. 1(1), CIPA applies to the protection of „adults who, by reason of an impairment or insufficiency of their personal faculties, are not in the position to protect their interests". In other words, „the adults whom the Convention is meant to protect are the physically or mentaly incapacitated, who are suffering from an „insufficiency" of their personal faculties, as well as persons usually elderly, suffering from an impairment of the same faculties, in particular persons suffering from Alzheimer's desease".[91] To trigger the application of the Convention, „insufficiency or an impairment of personal faculties" most be of such extent that the adult is not in a position to protect his or her interests. Required cummulation of this two factual elements excludes from the scope of application any external cause of vulnerability, like adult victims of external violence, or cases of prodigality, only physical disabilities, etc. Some argue that such approach can be considered restrictive since some of these conditions (e.g. physical disability itself) may justify the adoption of a protection measure, especially if the adult agrees.[92]

Obviously, personal scope of application of the Convention is rather narrow. Especially when it comes to elderly, it is focused only on the most vulnerable among the vulnerable, since all elderly should be considered vulnerable due to (more or less visible) inevitable deterioration of their personal capabilities as they grow older. In combination with limited geographical scope as a result of small number of ratifications, and the absence of a supranational court which leads to differing results in interpretation of CIPA's provisions across the contracting states, it can hardly be called too helpfull from the human rights perspective.

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88 Frimston, *op. cit.*, note 84, p. 227.

89 Frimston, *op. cit.*, note 84, p. 227.

90 Lagarde, *op. cit.*, note 87, para 7.

91 *Ibidem*, para. 9.

92 Von Hein, J., Chapter A.4: Adults, protection of, in: Basedow, J; Rühl, G.; Ferrari, F.; de Miguel Asensio, P (eds.), Encyclopedia of Private International Law, Cheltenham: Edward Elgar Publishing, 2017, 298-300.

Although, during negotiations some delegations advocated for the inclusion into CIPA of reference to other international instruments, in particular UN's ICCPR and on ICECSR, the Commission refused based on explanation that the fundamental rights of adults in need of protection were at all times a central concern of the CIPA. [93] However, after the enactment of the CRPD, CIPA has been facing heavy criticism for inclusion of guardianship (as a protective measure) in its provisions. In recent years there has been a complete rethink on autonomy, decision-making and legal capacity of both persons with disabilities and older persons.[94] Thus, critics of the CIPA advocate the interpretation of the CIPA in line with this new trends, i. e. distancing from guardianship in favour of „supported decision making". According to art. 12. of the CRPD, aim is to restore full voice, choice and control to persons with disabilities (and elderly) over their own lives and with support as needed and requested.[95]

3.2.2. A Proposal for Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Measures and Cooperation in Matters Relating to the Protection of Adults

In May 2023, as a response to significant demographic and social changes, European Commission presented A proposal for Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults.[96] The aim was to complement and improve CIPA's provisions on adult's protection and „to ensure dignity, social inclusion and self-determination of the adults concerned, while avoiding the risk of discrimination".[97] However, despite the CRPD being mentioned in the recitals of the Proposal, several binding provisions are not in line with the obligation set by the CRPD – art. 2 (refering to guardianship), art. 3 (no concept of will and preferences of the per-

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93 Lagarde, *op. cit.*, note 87, para 7.

94 Rolland, S.E.; Ruck Keene, A., Study - Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities, 3 June 2021, [https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ohchr.org/Documents/Issues/Disability/Hague-CRPD_Study.docx&ved=2ahUKEwiRx4qJrMaFAxUcgf0HHaguAbsQFnoECA8QAQ&usg=AOvVaw3hQLPA-J5XJAmlfT0zcN3z4], Accessed 13 May 2023.

95 Hagrass, H., *Rights of persons with disabilities*, Report of the Special Rapporteur on the rights of persons with disabilities, Human Rights Council, A/HRC/55/56.

96 Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the portection of adults, COM(2023) 280 final, 2 June 2023.

97 The European Association of Private International Law (EAPIL) – Position paper on an EU-wide protection for vulnerable adults, 22 March 2022, [https://eapil.org/wp-content/uploads/2022/04/Position-Paper-29.03.22.pdf]. Accessed 13 May 2023.

son), art. 13 (no review as to the substance) and art. 21 (placement of the adult).[98] According to the UN experts, private international law has a profoundly important role in giving effect to fundamental human rights. Therefore, it is essential to interpret the CIPA and proposed Regulation in line with current trends, which give absolute priority to human rights of disabled end elderly.

4. PROPOSAL FOR NEW CONVENTION FOR THE ELDERLY

4.1. Why do We Need New Convention?

Ever since it became obvious that the elderly are not adequatly protected by the current legislation, there is an ongoing discussion whether there is a need for a new piece of legislation or it could be cured by better application of the existing legislation. Although the latter claim has some substantive value, it is rather difficult to support it unconditionally.[99] Namely, closer look into existing legislation shows that it treats elderly rather as the passive recepients of charity than holders of rights. It is obviously wrong approach since all human beings are, first and foremost, holders of rights. According to Article I of the UN's Universal Declaration of Human Rights (1948) „all human beings are born free and equal in dignity and rights".

Therefore, almost fifteen years ago the UN established Open-Ended Working Group on Ageing (OEWGA) with the aim to explore the need for a new Convention. Since its formation, OEWGA has held ten working sessions with „worldwide anectdotal evidence documenting the need for increased protection of the rights of older persons"[100] but there hasn't been much momentum afterwards.

Conclusions of the Study published in the Proceedings of the National Academy of Sciences (Taiwan)[101] also support the need for the proposed Convention. Namely, not only the length of life but also the composition of family networks is changing, in a way that by year 2100 the number of living kin for individuals will decline dramatically worldwide (aproximatelly 38% decline). On top of that, „one-child policy" (whether by choice or by law) changes the kin configuration from more „horizontal" to „vertical", meaning that by the time they get descendants (e.g. grandchildren) the ascendants (e.g. grandparents) might be to old and

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98 Uldry, M., *UN experts criticise draft EU law on protection of adults*, [https://www.edf-feph.org/un-experts-criticise-draft-eu-law-on-protection-of-adults/]. Accessed 3 December 2023.

99 Rolland*, op. cit*, note 94.

100 Mock, W.B.T., *Human Rights and Aging*, Generations: Journal of the American Society on Aging, Vol. 43, No. 4, 2019-20, p. 81.

101 Alburez-Gutierrez, *op. cit.*, note 1.

too frail to provide suport and instead become net consumers of informal care. Fewer kinship resources to rely on means that family solidarity – a crucial source of informal care for milions of people around the world – will also decline dramatically over time.

As has already been pointed out, older persons face specific human rights challenges including poverty, age-related discrimination and elder abuse. References to the older persons in current legal regime are sporadic, fragmented and often indirect. Older persons as a distinct group[102] have specific needs and experiences, and their human rights should be reflected and articulated in a focused/holistic international treaty. There is an undeniable need for stronger legal framework at international level, to protect the human rights of older people – both in everyday settings and in emergency settings.

4.2. And the Content … ?

First and foremost, proposed Convention has to be founded on the paradigm shift „from a predominant economic and development perspective to ageing to the imperative of human rights-based approach".[103] Thus, no more treating of older people as simply beneficiaries of specific rights which must be guaranteed. They have to be viewed as subjects of law whose human rights have to be respected and strenghtened.

Based on OEWGA's areas of focus, its key areas of focus should include equality and non-discrimination, violence, neglect and abuse, autonomy and independence, long term and palliative care, education and capacity building, and social security.

Apart from OWEGA, standards of protection for older persons can also be found in other regional initiatives, e.g. African (Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa (2016))[104] and Inter-American (Inter-American Convention on Protecting the Human Rights of Older Persons (2015)).[105]

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[102] Diverse but, nevertheless, minimally definable.

[103] Report of the Independent Expert on the enjoyment of all humn rights by older persons, 8 July 2016, A/HRC/33/44.

[104] [https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons], Accessed 13 May 2023.

[105] [http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf], Accessed 13 May 2023.

Putting it all together, Convention should address: older persons as active rights holders instead of passive beneficiaries; equality and non-discrimation on the basis of age, including intersectional protection agains ageism (older women, older persons deprived of liberty, LGBTI seniors, elderly in a situation of human mobility); independence and autonomy of elderly; health and informed consent of elderly; community participation and integration accessibility; freedom of expression, opinion and access to information; access to food, water, sanitation and housing; social security, safety and access to justice.[106] In short, create age-neutral societies and environments where older adults can actively contribute and thrive"[107]

Last but not least, Convention should certainly envisage establishment of a supervisory authority that would be empowered to carry out systematic supervision over respect for protected rights of the elderly in the State's parties.

5. CONCLUSION

More than 75 years after the adoption of the UHDR, older persons still remain subject to different human right violations. Although there are improvements in health and survival of older population the benefits are not equaly shared. While certan older persons are in excellent health, others suffer multiple ailments or severe disability.[108] Also, some of them are economically active and able to support themselves while others live in powerty. This inequality is further reinforced in extreme situations, such like wars or pandemic, which underlines the need for further strenghtening of the rights of the elderly. According to the World Social Report 2023, „all Governments need to adapt their policies to enable older persons to remain productive and empowered members of society".[109]

As we review the international and regional instruments that have been enacted to enhance (among other things) the rights of elderly people (even as a group),[110] the majority seem to perpetuate the view of older people as in need of protection, not as right-holders. Consequently, older people face discrimination that is not explicitly prohibited by existing laws. There is a need for a legally binding treaty which will promote and protect human rights of older persons worldwide.

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106 See: Human Rights of the elderly and national protection systems in the Americas, Inter-American Commission on Human Rights, 31 December 2022.

107 Ramsey, A., Protecting the Rights of Older Adults: The Time to Act is Now, 2022. [https://www.ncoa.org/article/protecting-the-rights-of-older-adults-the-time-to-act-is-now]. Accessed 13 December 2023.

108 World Social report 2023: Leaving No One Behind In An Ageing World, UN, 2023, p. 6.

109 World Social report 2023: Leaving No One Behind In An Ageing World, UN, 2023, p. 13.

110 E. g. Hague Convention on the International Protection of Adults (2000).

A convention should lay out areas in which older people are most in need of legal protection and the mechanisms. It should also force state parties to take proactive steps to prevent age discrimination and the abuse of older people, and empower older people around the world to better advocate for their rights.

Proposed Convention should not be considered to be a panacea for every problem but the useful tool which will, in most of the cases, decrease structural and systemic inequity and prevent the need for more sectoral acts.

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CONTEXTUALISATION OF PROVISIONAL MEASURES IN CROSS BORDER CASES IN THE WESTERN BALKANS – STRIKING A BALANCE BETWEEN FINALITY AND LEGAL CERTAINTY

Ilija Rumenov, PhD, Associate professor
University Ss Cyril and Methodius – Skopje, Faculty of Law "Iustinianus Primus"- Skopje
Bul. Goce Delcev 9, 1000 Skopje, N. Macedonia
i.rumenov@pf.ukim.edu.mk

Milka Rakocević, PhD, Associate professor
University Ss Cyril and Methodius – Skopje, Faculty of Law "Iustinianus Primus"- Skopje
Bul. Goce Delcev 9, 1000 Skopje, N. Macedonia
m.rakocevic@pf.ukim.edu.mk

ABSTRACT

Provisional measures as legal instruments are intended to be of effect for a limited period conditioned by occurrence of a certain event or passing of a specific period. Therefore, in essence, these measures are not final and for a long time their circulation in cross border cases was disputed. However, their frequent use in practice provides for them to be able to be recognized and enforced from one jurisdiction to another. The importance of these measures in the European Union is acknowledged by the possibility provided in the Brussels I, Brussels Ibis, Brussels IIter, Maintenance and Succession Regulation for their recognition and enforcement. Moreover, some European national acts, such as the Spanish Act on international judicial cooperation in civil matters have provided for their circulation under certain conditions. However, such effect of these measures remains in the "grey" zone for the countries in the Western Balkans. Recent trends in the North Macedonian case-law show certain acceptance of the foreign provisional measures and their recognition and enforcement. This paper is intended to contextualize the provisional measures in cross border cases within the legal doctrine and the jurisprudence of the Western Balkan countries and show the importance of the balance between finality and legal certainty.

Keywords: *provisional measures, recognition and enforcement, foreign decisions, civil and commercial matters, Western Balkan*

1. INTRODUCTION

Legal certainty is one of the most important goals of law. The importance of legal certainty in cross-border cases is increased because these cases are immanently more complex and thus more uncertain. Theoretically, the creditors satisfaction in legal proceedings should be effectuated with the final decision. Still the debtor uses its possibility to deter the creditor to settle its claim. For that purpose, the majority of the legal systems consider the creditors need to obtain interim relief pending final determination of a lawsuit.[1] Because of its complexity, cross border cases have even greater importance to provide the creditor with this interim protection. This is vital, because the diversity of jurisdictions may facilitate strategic movement of assets by opportunistic defendants in order to frustrate the effectiveness of a final judgment and on the other hand, to have certain balance, a possibility has to be given to the debtor (respondent) to articulate its rights, by not exposing it to an irrevocable decision reached within accelerated proceedings with limited opportunity of defense, or by possibility of holding the claimant liable for damages.[2]

In this aspect, legal certainty lingers between these two antipodes. Despite the frequent use of "legal certainty" in law, its understanding differs from regions, continents and legal systems.[3] Moreover, its meaning and understanding is conditioned based on the legal field from which is observed.[4] From macro perspective of the EU, legal certainty can be understood in the following direction:

> "Legal certainty as a general principle of European law requires, above all, that those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly."[5]

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1 Hau, W., *Provisional Measures*, Encyclopedia of Private International Law in: Ruhl, G.; Ferrari, F., de Miguel Asensio, P. A.; Basedow, J. (eds.), Edward Elgar Publishing, 2017, p. 1142.

2 Garcimartín F., Provisional and Protective Measures in the Brussels I Regulation Recast, Yearbook of Private International Law Vol. XVI, 2014/15, p. 58. Spain has taken into consideration these two aspects and introduced a new specific rule on recognition and enforcement of provisional measures in their national legal acts. Article 41(4) of the Law on International Judicial Cooperation in Civil Matters provides that recognition and enforcement of protective and provisional measures is possible when their denial entails a violation of effective judicial protection and provided that they have been adopted after hearing the opposing party.

3 Kruger, T., The Quest for Legal Certainty in International Civil Cases, Collected Courses of The Hague Academy of International Law - Recueil des cours, Volume: 380, p. 294; Maxeiner, James R., Some Realism About Legal Certainty in the Globalization of the Rule of Law, June 13, 2008, Houston Journal of International Law, Vol. 31, No. 1, p. 28.

4 Kruger, T., *op. cit.*, note 3, p. 295.

5 Maxeiner, James R, Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?, 15 Tul. J. Int'l & Comp. L. 541, 2007, p. 549.

Such notion of legal certainty was further developed by the CJEU to the following components: objective legal certainty (rules of law must be clear and precise) and subjective legal certainty (rules of law must be predictable as regard their effects, especially where they have unfavorable consequence for individuals or companies).[6] Objective legal certainty is found in the legal provisions themselves. These legal provisions must be of general application, rational, consistent, transparent, published, clear and accessible.[7] Subjective legal certainty is focused on the end user, the persons involved in legal situations, where these persons based on their legitimate expectation as rational beings could settle their accounts and predict their own situation according to the provisions which they have information about.[8] So, for the persons which are involved in cross border complex situations, legal certainty is particularly important. That's why, the idea that foreign decisions should retain their effects across borders is synonymous with legal certainty.[9] If for example, the creditors decision is deprived of such cross-border effect, then the settlement of the dispute becomes uncertain since the debtor could easily use the divergence of legal systems and shift the assets from one system to another and severally harm the creditor. Such position is even more important regarding provisional measures, since the recognition and enforcement of a final judgment becomes a too-late stage for satisfying the creditor.

The main impediment for recognition and enforcement of a foreign provisional measure in the countries that are not a part of the EU[10] is the finality of these decisions (or the lack of it). Somehow, such position is paradoxal, since finality of the decisions or their *res iudicata* effect should be one of the main pillars upon which legal certainty is build. Finality is centered around the subjective legal certainty, because it tends to help with the predictability of the legal situation, or to maintain a stable legal environment. Such position in context of cross border recognition and enforcement of foreign provisional measures is not correlated with one other goal that provisional measures intend to achieve i.e., enhancing the efficacy of the litigation.[11] Therefore, it is very important to depict the nature of the provisional measures, their cross-border context and importance in order to understand and

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6 CJEU C-282/12 Intelcar v. Fazenda Publica (Portuguese Treasury) par.44

7 Kruger T., *op. cit.*, note 3, p. 298.

8 *Ibid.*, p. 300.

9 *Ibid.,* p. 426.

10 Nishioka K.; Nishitani Y., Japanese Private International Law, Hart Publishing, 2021, p., 208; Станивуковић М., Живковић М., МЕЂУНАРОДНО ПРИВАТНО ПРАВО - ОПШТИ ДЕО, (2023), pp. 451-452; Varadi T. and others, Međunarodno privatno pravo, deseto izdanje, JP „Službeni Glasnik', Beograd, 2008, p. 545.

11 Nathan Park S., Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution, 38 U. Pa. J. Int'l L. 999, 2017, p. 1013.

improve the objective and subjective legal certainty for natural and legal persons that are found in international legal traffic.

2. DEFINITION AND PURPOSE OF PROVISIONAL MEASURES

Provisional measures are considered as relief aimed at creating conditions for the future fulfillment of the creditor's claims based on a decision that will be made or that has already been made regarding the merits of the case. In this regard, provisional measures are means that should eliminate or reduce the possibility of preventing or obstructing the future fulfillment of the creditor's claim, means that are accessory, subsidiary and conservatory in its substance in relation to the main procedure regarding the merits of the case.[12] Furthermore, the aim of the provisional measure can also be temporary regulation of certain legal relations between the parties in a dispute.[13] In that respect, it can be said that the function of the provisional measures is threefold. Provisional measures are considered as: 1) means of time-limited security of the future fulfillment of the claim (conservatory function); 2) means that temporarily settle the claim, partially or completely, before it is determined with an enforcement title (anticipatory function); and 3) means that provisionally regulate the relations between the parties until their final settlement with a final or enforceable title (regulatory function).[14] Provisional measures are usually determined if the existence of the claim appears probable or if it appears probable or there is a risk that without such measure the realization of the claim would be impossible or significantly more difficult, or if the measure is necessary to prevent violence or occurrence of irreparable damage, or if for other important reasons it is necessary to temporarily regulate the disputed relation between the parties.[15]

There are certain qualities that are considered inherent to the provisional measures: 1) they are auxiliary since they aim to the effectiveness of the decision regarding the merits of the case; 2) their nature is provisional, since they are not final and definitive; 3) they are considered temporary since they are granted for a certain period of time; 4) they have variable character due to the fact that they can be modified or finished; and 5) they are regarded as proportional to the objectives of the parties.[16]

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12 Dika, M., Građansko ovršno pravo, Narodne Novine, Zagreb, 2007, p. 847.

13 *Ibid.*, p. 847-848.

14 *Ibid.*, p. 850.

15 *Ibid.*

16 Esplugues C., Provisional Measures in Spanish Civil Procedure, in: Stürner; R.; Kawano, M., (eds.), Comparative Studies on Enforcement and Provisional Measures, Tübingen, Mohr Siebeck, 2011, p. 210.

Generally, provisional measures consist of orders and prohibitions and in that regard they are usually of condemnatory nature, but the possibility that such measures are of constitutive nature in a form of permissions or regulation of relations between the parties is not excluded. They can also have the character of dispositions that directly determine coercive measures that should be applied in order to secure a certain claim or establish a certain legal situation.[17]

Their immediate goal is not the definitive realization of the creditor's claim, but creation of conditions for its future realization. The determination and implementation of provisional measures is carried out in a special procedure for security of claims, which represents a special system of legal protection within the enforcement procedure.[18] The means of coercion that are taken, in its substance, represent certain interferences in the debtor's legal sphere and have a provisory character and they usually remain in force until the preconditions for enforcement are met or as long as the need for provisional protection is needed.[19]

Given that the provisional measure primarily protects the interests of the creditor, but at the same time impinges the rights and interests of the debtor or third parties, the court has to be rather careful regarding their issuance, since the unjustified determination of the provisional measure can have multiple damaging consequences. That is why, the court has the obligation to carefully and responsibly assess the existence of the conditions for issuing a provisional measure, estimate its proper duration and determine the type of measure that is most adequate in the specific case, carefully assessing all the circumstances.

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17 Јаневски А., Зороска Камиловска Т., Граѓанско процесно право, книга трета, извршно право, Скопје 2011, p. 211.

18 According to the ECtHR case-law, proceedings like those concerned with the grant of an provisional measure such as injunctions, were not normally considered to "determine" civil rights and obligations. However, in 2009, the Court departed from its previous case-law and took a new approach. In Micallef v. Malta (Micallef v Malta, Application no. 17056/06, Judgment of October 15, 2009, para 80-86), the Court established that the applicability of Article 6 to provisonal measures will depend on whether certain conditions are fulfilled, since not all interim measures determine such rights and obligations. Firstly, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the ECHR. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinized. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

19 Јаневски А.; Зороска Камиловска Т., *op. cit.*, note 17, p. 183.

3. RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES IN THE EU AND IN THE CONTEMPORARY HCCH INSTRUMENTS

Provisional measures in the EU are able to circulate based on the provisions of the Brussels I[20], Brussels Ibis[21], Brussels IIter[22], Maintenance[23] and Succession Regulation[24] or based on the provisions of the Conventions of the Hague Conference on Private International Law (HCCH Conventions).[25] The principle of circulation in the EU regulation is that these measures are considered to be part of the term "decisions" and thus the same provisions for recognition and enforcement is applied towards them.[26] Moreover, the position of provisional measures in the EU has been clarified based on the jurisprudence of the CJEU.[27] On the basis of Article 27 par.2 of the Brussels Convention[28] (right of defense) the CJEU derived the standpoint that only decisions from an adversarial procedure (even if it may have remained unilateral through default by the defendant) can be recognized and enforced, but not decisions deriving from so-called *ex parte* procedures.[29] Such position is upheld in the Brussels Ibis Regulation in Article 2 (a) where it is expressively stated:

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20 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16 January 2001, pp. 1–23.

21 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20 December 2012, pp. 1–32.

22 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT OJ L 178, 2 July 2019, pp. 1–115.

23 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7, 10 January, 2009, pp. 1–79.

24 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, 27 July 2012, pp. 107–134.

25 For more on this issue see, Pogorelčnik Vogrinc N., Provisional Security of Creditors in Cross-border Civil and Commercial Matters, LEXONOMICA Vol. 12, No. 2, pp. 129–148., December 2020; Pretelli I., *Provisional and Protective Measures in the European Civil Procedure of the Brussels I System, in Brussels Ibis Regulation Changes and Challenges of the Renewed Procedural Scheme*, Lazic, V., Stuij, S. (eds.), T.M.C. Asser Press, The Hague 2017, p. 100; Garcimartín F., *op. cit.,* note 2, p. 58; Poretti P., *Privremene mjere u europskim građanskim parničnim postupcima, Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća* / Rijavec, V. *et al.* (eds.). Split, 2015, pp. 301-330.

26 Hau, W., *op. cit.*, note 1, p. 1446.

27 Case C-125/79; Case C-80/00.

28 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */ OJ L 299, 31.12.1972, pp. 32–42.

29 Hau, W., *op. cit.*, note 1, p. 1446.

> […judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;].

In order to apply the Brussels Ibis Regulation on recognition of provisional measures, it follows from this provision that first, the Court that rendered the provisional measure needs to have jurisdiction based on the provisions of the Regulation, and secondly, the respondent was granted the right to be heard before the measure was issued or that the decision was served upon him before it is enforced. This position is based on the logic that the court that has the substantive jurisdiction is better placed to decide on the interim protection, since it may evaluate not merely the *fumus boni iuris* and the *periculum in mora* but also the merits of the case.[30] What is important in this Regulation is that Recital (33) paves the way for Member States to provide provisions in their legal system in order to recognize and enforce foreign provisional measures.[31]

Other aspect in the EU are the cases where the provisional measures are rendered based on EU law. Namely, the Regulation No.655/2014 provides for a system of establishing a procedure for issuing a European Account Preservation Order.[32]

On the other hand, the situation in the HCCH Conventions is different. In general, the HCCH instruments in context of recognition and enforcement of foreign decisions, lean towards circulation of final judgments. For example, the HCCH 2019 Judgment Convention[33] and the HCCH 2005 Choice of Court Convention[34] are expressively excluding provisional and interim measures from circulation based on these instruments.[35] Such stance relates to measures that either provide a preliminary means of securing assets out of which final judgment

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30 Pretelli I., *op. cit.,* note 25, p. 100, Garcimartín F., *op. cit.*, note 2, p. 58.

31 Recital (33) states "…This should not preclude the recognition and enforcement of such measures under national law.".

32 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters OJ L 189, 27 June 2014, pp. 59–92.

33 HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

34 HCCH Convention of 30 June 2005 on Choice of Court Agreements.

35 See Article 3(1)(b) of the HCCH 2019 Judgments Convention and Article 4(1) of the HCCH 2005 Choice of Court Convention - "An interim measure of protection is not a judgment".

may be satisfied or maintain the *status quo* pending determination of an issue at trial.[36] Moreover, measures relating only to procedural or enforcement aspects are also not covered by these Conventions because these Conventions are only applicable towards "decisions on the merits", so for example order to freeze the defendants assets are excluded from these instruments.[37]

The HCCH Child Protection Convention[38] and the HCCH Adult Protection Convention[39] contain similar but not identical provisions that confer jurisdiction to the Contracting State in whose territory the adult/child is present to take measures of a take urgent measures of a temporary character.[40] For the HCCH 2000 Adult Protection Convention, this jurisdiction relates to the possibility of taking measures of a temporary character for the protection of adults which have a territorial effect limited to the State in question conditioned that such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.[41] In the case of the HCCH 1996 Child Protection Convention this jurisdiction is extended not only towards the children, but also to their property.[42]

HCCH Maintenance Convention[43] contains different approach. It confers power to the Central Authorities 'to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance applica-

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36 Garcimartín F.; Saumier G., Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention), The Hague Conference on Private International Law – HCCH Permanent Bureau, 2020, p. 75 par. 99.

37 Hau, W., *Judgments, Recognition, Enforcement, in The HCCH 2019 Judgments Convention Cornerstones, Prospects*, Outlook, Weller M. *et al.* (eds.) Hart Publishing, 2023, p. 28.

38 HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

39 HCCH Convention of 13 January 2000 on the International Protection of Adults.

40 See Article 12 of the HCCH 1996 Child Protection Convention and Article 11 of the HCCH 2000 Adult Protection Convention.

41 Article 11 of the HCCH 2000 Adult Protection Convention.

42 Article 12 of the HCCH 1996 Child Protection Convention. For more on the difference between Article 11 of the 2000 Adult Protection Convention and Article 12 of the HCCH 1996 Child Protection Convention see, Lagarde P., Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, The Hague Conference on Private International Law Permanent Bureau, 2017, p. 66-67 par. 83-85.

43 HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

tion.[44] This provision is intended to serve as a preemptive action in order to secure the debtors asset and thus provide assistance in the enforcement proceedings.[45]

4. PERCEPTION OF RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES IN THE WESTERN BALKANS LEGAL DOCTRINE

The notion present in the legal doctrine in the region was that recognition and enforcement of provisional measures is at least controversial. In this context, there are two predominant arguments supporting this claim. The first argument was the lack of finality, in the sense that they do not bring conclusion to the dispute between the parties, and second referring to the mere nature of the provisional or protective measures,[46] which is directly linked with the means of enforcement. As such, they were considered to be within the exclusive jurisdiction of the judicial authorities of the State where they were rendered.[47] However this position has been shifting towards more liberal acceptance of recognition and enforcement of foreign provisional measures.[48] It is undisputed that decisions which are final and are *res iudicata,* and also which are suitable for recognition and enforcement, can be considered enforcement titles, however, there is no clear standpoint whether provisional or protective measures can have the same consideration. So, this ambiguity is particularly important for the Western Balkan region since there were considerable transformation of the national PIL[49] but with certain resistance towards the cross-border effect of provisional measures.[50]

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44 Article 6(2)(i) of the HCCH 2007 Maintenance Convention.

45 Walker L., Maintenance and Child Support in Private International Law, Hart Publishing, 2015, p. 183.

46 Varadi, T.. *et al., op. cit.*, note 10, p. 545; Živković M.; Stanivuković M, *Međunarodno privatno pravo (opšti deo),* Beograd, Službeni glasnik, 2006, p. 418; Vuković Đ., Međunarodno građansko procesno pravo, Informator, Zagreb, 1987, pp. 150-151.

47 Kessedjian C., Note on Provisional and Protective Measures in Private International Law and Comparative Law, Preliminary Document No 10 of October 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, 1998, par. 34 and 108.

48 *Ibid.,* par.108.

49 Rumenov, I., Perspectives from Southeast European and EU Candidate Countries, in The HCCH 2019 Judgments Convention Cornerstones, Prospects, Outlook, Weller M. *et al.* (eds.), Hart Publishing, 2023, p. 212; Rumenov, I., Europeanisation of the Macedonian Private International Law – Legal Evolution of a National Private International Law Act, EU and Comparative Law Issues and Challenges Series (ECLIC), 4, pp. 299–328.; Jessel-Holst C., 'The Reform of Private International Law Acts in South East Europe, with Particular Regard to the West Balkan Region', 2016, 18 Anali Pravnog fakulteta Univerziteta u Zenici, Zenica pp. 133, 135–137.

50 Varadi, T. *et al., op. cit.*, note 10, p. 545; Jakšić A., Međunarodno privatno pravo, Beograd, 2008, p. 210.

4.1. The recognition and enforcement of provisional measures in the Western Balkan countries

The situation of the recognition and enforcement of foreign provisional measures in the Western Balkans can be described as perplexed. In essence most of these jurisdictions do not allow circulation of foreign provisional measures. Albania, has certain limitations in its legal framework of recognition and enforcement, giving focus on judgment as enforcement titles, limiting the possibilities of recognizing other such as authentic instruments or settlement agreements.[51] Such restrictive attitude is reflected also towards foreign provisional measures, with exception in some of the bilateral agreements.[52]

B&H and Serbia, have specific situation. These countries still apply the old Yugoslavian PILA (The Law on Resolution of Conflict of Laws with Regulations of Other Countries).[53] Its provisions did not provide a clear situation regarding the recognition and enforcement of provisional measures so it generally divided the legal doctrine. In the former Yugoslavian doctrine, there were different interpretation to the recognition or the non-recognition of foreign provisional measures. Poznić stated that the reasons for the non-recognition of provisional measures according to the old Yugoslavian PILA are: lack of substantive finality of the provisional measures; its supportive role to the final judgment and the fact that this decision does not relate to the claim per se.[54] Vuković, provided indirectly, that based on the interpretation of Art. 265 and Art.268 of the Enforcement Act, if domestic provisional measures could be recognized and enforced abroad, than based on the reciprocity principle, foreign provisional measures should be recognized in Yugoslavia.[55] Such ambiguity was reflected in the decision by the Supreme Court of Serbia which decided to recognize and enforce a foreign provisional measure that was met with fierce reaction by the legal doctrine.[56] The contemporary judi-

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51 Gugu Bushati A., Country Report: Albania, in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 20.

52 Exceptionally, the Agreement between Albania and Bulgaria on Mutual Legal Assistance in Civil Matters provides in art. 19 that the term "judgment" capable of recognition and enforcement means final and interim judgments as well, *Ibid.*, p. 20.

53 Official Gazette of SFRY, No 43/82 and 72/82.

54 Познић, Боривоје. 6/1983. О ПРИЗНАЊУ И ИЗВРШЕЊУ СТРАНИХ СУДСКИХ И АРБИТРАЖНИХ ОДЛУКА Анали Правног факултета у Београду, p. 1055.

55 Vuković Đ., *op. cit.,* note 46, pp. 150-151.

56 Supreme Court of Serbia, Gž. 46/93 (as cited by, Varadi T. *et al.*, *op. cit.,* note 10, p. 545). On the criticism of this decision see also Varadi T. *et al.*, *op. cit.,* note 10, p. 545; Jakšić A., *op. cit.,* note 50, p. 210.

cial practice in these two countries follow the more restrictive approach and do not recognize and enforce foreign provisional measures.[57]

In Montenegro, the situation is a bit clearer. The recognition and enforcement of foreign judicial decisions is regulated with the PILA and the Law on Enforcement and Securing of Claims.[58] With application of Article 19 of the LESC on foreign decisions, as enforcement titles in Montenegro the following are considered: foreign condemnatory judgment from civil proceedings and foreign condemnatory decision from civil, non-litigious and executive proceedings, foreign judicial decision on security, foreign payment and other foreign court orders, foreign arbitration awards, a foreign court settlement concluded before a court.[59]

Kosovo in 2022 adopted a new PILA.[60] However its stance on recognition and enforcement of provisional measures has not been changed and still, foreign provisional measures cannot be recognized and enforced in Kosovo.[61]

4.2. The recognition and enforcement of provisional measures in the Republic of North Macedonia

The position of recognition and enforcement of foreign provisional measures in the Republic of North Macedonia is still ambiguous. To clarify whether this type of decisions can pass the national filter and be enforced it is essential to understand the national recognition and enforcement system. This system is modeled according to the Regulation 44/2001 and it is consisted of three stages: first *ex parte* stage, second contentious stage and thirdly, the appellate stage. In the first stage, the recognition and enforcement is decided by a sole judge, that observes if

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57 Povlakić M., Country Report: Bosnia and Herzegovina: in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p.71; Đorđević S., Country Report: Serbia, in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 196.

58 Private International Law Act ("Official Gazette of Montenegro" no. 1/2014, 6/2014–corr., 11/2014–corr., 14/2014 and 47/2015 – other law); Law on Enforcement and Security of Claims ("Official Gazette of Montenegro" no. 36/2011, 28/2014, 20/2015, 22/2017, 76/2017 and 25/2019).

59 Kostić-Mandić M., Country Report: Montenegro, Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 132.

60 Law NO. 08/L -028 on Private International Law, Official Gazette of the Republic of Kosovo No. 30/2022.

61 Qerimi D., Country Report: Kosovo, Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 108.

there are any circumstances that prevent the recognition and enforcement. These circumstances are provided in Articles 159-163 of the Private International Law Act (hereafter PILA)[62]. They are inspected ex officio and if the judge finds that there are no circumstances that prevent the recognition, then it will issue a decision for recognition of the foreign decision. Second stage, starts with the service of this decision to the opposite party, that can object this decision in a timeframe of 30 days from the day when they received the decision. In this stage, the procedure becomes adversarial, and the court must hold hearing, where the opposing party to the decision can contest the recognition based on the infringement of the right of defense in the country of origin of the foreign decision. In this stage, the court decides as a council, consisted of three judges. The last stage is the appellate stage, where the unsatisfied party can file an appeal to the appellate court.

In context of the foreign provisional measures, the court would apply the same procedure. So, the main concerns regarding the effectuation of the foreign provisional measure would be: first, whether the foreign provisional measure fulfils the Article 1 criteria; secondly whether this decision can be considered to be a foreign judicial decision: and thirdly whether this decision is in legal force, i.e whether it is considered final and biding.

4.2.1. Do foreign provisional measures fall under the scope of Article 1 of the PILA?

One of the most commonly used arguments of denying provisional measure to have a cross border effect is that these measures do not fall under the scope of application of Article 1 of the PILA.[63] Article 1 of the PILA specifies the scope of application of the Law and it refers to the following aspects:

> [This Law establishes rules for the determination of the applicable law in respect of private law relations having an international element, rules on jurisdiction of courts and other authorities with respect to the said relations, rules of procedure, and rules on the recognition and enforcement of foreign court decisions and decisions of other authorities of foreign states.].

Moreover, the PILA when defining the term "foreign decisions" that are eligible for recognition and enforcement, covers not only foreign judgments and foreign court settlements, but also:

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62 Private International Law Act (Official Gazette of Republic of North Macedonia, No 32/2020).

63 Jakšić, A., *op. cit.*, note 50, p. 210.

> […A foreign decision shall also deemed to be a decision of another authority which in the state in which it was given is considered equivalent to a court judgment, or a court settlement, if such a decision regulates the relations referred to in Article 1 of this Law.].[64]

On first glance, it looks, like only the territorial aspect of the decision is decisive whether to initiate the recognition and enforcement procedure - opposite of the approach taken with the determination of the applicable law and the international jurisdiction, where it is specifically provided that the PILA applies in situation of "… private law relations having international element…". This aspect is cleared in Article 157 par. 3 of the PILA where the additional criterion to the territorial is that the foreign decisions "…regulates relations referred in Article 1 of this Law." By this interpretation is clear that in order to apply the provisions for the recognition and enforcement of foreign decision in the PILA, the foreign provisional measure should relate to "…private law relations having international element…". So, the question that arises is: do provisional measures in essence regulate private law relations having international element?

Legal relation is defined as a relation in society that is regulated by law, legal norms, i.e., relationship according to which persons are obliged to act upon legal norms.[65] In context of the elements of the legal relations, provisional measures are much more indirect then direct, because they do not refer to the subjective rights element of the legal powers, instead they are part of the protective mechanism of the legal relation, effectuated by the jurisdictional component of the legal powers.[66] Nonetheless, even indirectly, these measures are not standalone measures, since they are steamed out of a legal relationship, but with specific purpose, to conserve the legal relationship until the court could substantively settle the legal issue. If the domestic legal system provides possibility to recognize and enforce the foreign decisions on the merits, then these decisions which are integral part of the procedure should circulate also.[67] To deprive these measures a certain cross border legal effect, means that there is intolerance of the foreign legal procedure and certain distrust in its legal system. Another question is, whether they should fulfill other criteria which are specific to the nature of these decisions. Such nivellation of the procedural standards applied by the court of origin with the procedural standards of the country of recognition is in line with the immanent difference of the internal procedural laws.

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64 Article 157 par.3 of the PILA.

65 Лукић Р., Кошутић Б., Увод у право, Београд, 2008, p. 201.

66 *Ibid.*, p. 204.

67 *In contrario* see, Познић, Б., *op. cit.,* note 54, p. 1055.

4.2.2. Are provisional measures considered as foreign decisions according to PILA?

The second test, regarding the recognition and enforcement in the Republic of North Macedonia is whether they are considered to be judicial decisions under PILA? Article 157 of the PILA refers to the question of which type of decisions are recognized and enforced in the Republic of North Macedonia. The provisions in Article 157 are very broad and do not refer to specifical type of decisions (except of court settlements[68]). The delimitation of domestic and foreign decisions is provided by the principal of territoriality of the court that rendered the decision, i.e., foreign judicial decision is considered to be a decision that was rendered by a foreign court. Moreover, this provision is broadened by incorporating other non-judicial decisions that are rendered by other authority (except Courts) but who regulate relations that fall under the substantive scope of application of the PILA.[69]

The analysis of these provisions provides that there is a broad interpretation of the term "foreign decisions" in the PILA. The intention of the law is not to limit itself to the terminological aspect of the type of foreign decision (judgment, decision, or other) but to leave to the interpretation of the court of recognition whether the conditions in Article 157 are met. These conditions refer to two aspects: first territorial - that they are rendered by a court or other authority of a foreign country and secondly substantive - that the foreign decisions fall under the substantive scope of application of the PILA (…private law relations having international element…). Specifically, regarding provisional measures, it is undisputed that they represent decisions. If they were rendered by a foreign court, they would need to undergo the recognition and enforcement system of the PILA. On the other hand, the other issue is whether they fulfill the substantive criterion.

So, the second aspect which is problematic is the aspect of the existence or non-existence of the foreign element in provisional measures. These decisions are intended to provide effect in the territory of the court that rendered this measure. Often it was provided in the legal doctrine, that there is exclusive jurisdiction of the court that hears the case on the merits to enforce the provisional measures.[70] So, as a consequence in cross border cases the interest party should apply for another provisional measure to be rendered at the place where this measure should take effect.

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68 Article 157 par. 2 of the PILA.

69 Article 157 par.3 of the PILA.

70 Станивуковић М., Живковић М., *op. cit.*, note 10, pp. 451-452.

It is evident from Article 18 of the PILA, that there is territorial jurisdiction of the authorities of the Republic of North Macedonia to render provisional protective measures based on the law of the Republic of North Macedonia, for natural persons. Their duration is until foreign state does not render decision or takes the necessary measures. This provision is extended towards the property of that natural person, or a absent person.[71] However, there is ambiguity wheatear these decisions could extend towards third countries. For example, a provisional measure to provide for an effect of a temporary custodial in situation when it needs to escort the person under protection in a third country. So, it is vital for these measures to be able to have international element, since the legal relations that these measures are essential part of, can have cross border implications.

4.2.3. Do provisional measures contain the feature of finality?

Another common argument that was given as a reason for the non-recognition of provisional measures was that such decisions are lacking the attribute of finality i.e. they are not considered as decisions that resolve a certain relation in a definite manner. Such position of non-recognition is based on Article 159 of the PILA. This article provides that if the applicant seeks for recognition of foreign decision, a certificate of finality of the foreign decision should be provided together with the foreign decision.[72] Moreover, if the foreign decision is eligible for enforcement, then together with the certificate of finality, a certificate of enforceability should be also provided.[73] All of these documents that are submitted for recognition and enforcement must be translated into the language of the court.[74]

In context of provisional measures, it is undisputed that these decisions lack the substantive feature of finality. Also, it is undisputed that provisional measures have the feature of formal finality. So, the question here is transferred to Article 159 of PILA and weather it requires finality, i.e., in terms that the provisional measure lacks a definitive regulation of a certain legal relation, since in its substance, it is of provisory nature.

The goal of this provision is that the decision that requires recognition, is final and could not be later altered by the same authorities that rendered this decision. In that regard, the goal of Article 159 is to uphold the cross border legal certainty and restrain itself from annulment of the decision of recognition. Such position is

71 Article 18 par.3 of the PILA.

72 Article 159 par. 1 of the PILA.

73 Article 159 par. 2 of the PILA.

74 Article 159 par. 3 of the PILA.

especially important and applicable towards foreign final judgments in civil and commercial matters which bear the quality of *res iudicata*. However, the feature of finality depends on the substantive aspect of the foreign decision. Foreign final judgments in family matters regarding children do not posses the same quality of *res iudicata*, as do foreign final judgments in civil and commercial matters. These decisions depend on the factual situation and they can be altered depending on the situation (parental responsibilities could be shifted if some of the parents show certain negligence etc.). So, it is undisputed, that these foreign decisions could be recognized and enforced although they are having different feature of substantive finality.

The situation with provisional measures is different, since their goal is different. These decisions do not aim to permanently settle the dispute between the parties, but to temporarily conserve the factual situation in order to allow the court of origin to render a judgment that would settle the dispute and to create conditions for future fulfillment of the creditor's claims. On the other hand, these decisions are rendered in a certain legal system and are enforceable there. In other words, the court of recognition lingers in a peculiar position, between the cause and the consequence of the finality of the foreign decision. Both paths have arguments to follow, which puts the judge in an ambiguous position. If the court does not recognize the foreign provisional measure based on the lack of *res iudicata* effect, then a potential breach of the creditors right (from the original proceedings in the country of origin) becomes immanent since often recognition of foreign judgments becomes an almost too-late stage of cooperation.[75] The other alternative, to allow the provisional measure to produce effect in the country of recognition, that could potentially harm the debtors rights from irrevocable decision obtained through an accelerated proceedings with limited opportunities for a defense.[76] If we evaluate these two positions of the court, we could say that the later is much more protected. If the judge dismisses the request for recognition, it puts the creditor in an uncertain place, to initiate proceedings for rendering protective measure in the country of recognition, i.e where the property is located. But if the judge upholds the position that the foreign provisional measure possesses finality and it passes this filter, then still the provisional measure could not pass the other PILA criteria such as breach of defense and public policy and thus protect the foreign creditor.

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75 Noodt Taquela, M.B., International Judicial Cooperation as the Architecture of Engagement, in Diversity and Integration in Private International Law, Ruiz Abou-Nigm, V.; Noodt Taquela, M. B. (eds.), Edinburgh University Press, 2019, p. 118.

76 Hau, W., *op. cit.*, note 1, p. 1442.

In a specific case in front of the Basic Civil Court in Skopje, the Court recognized a foreign provisional measure that intended to prevent further disposition of the assets of the legal entities that were present in the Republic of North Macedonia.[77] What is interesting is that the Court specifically referred to the finality of the foreign provisional measure in the country of origin and this fact was in correlation with Article 158 of the PILA. Moreover, it highlighted that the foreign provisional measure is not against the public policy of the Republic of North Macedonia.

5. CONCLUSION

It is evident that there is immanent need for cross border circulation of provisional measures. The problem lies in the method of their incorporation. For the Member States of the EU, this position is much easier since the Brussels Ibis Regulation facilitates certain cross border circulation of provisional measures in civil and commercial matters. Moreover, other types of provisional measure are also facilitated. On the example of Spain, it can be seen that such solutions are present in the national legal systems that allow under certain conditions circulation of provisional measures. However, for the countries of the Western Balkan, still there is great objective and subjective legal uncertainty. So, what is the most appropriate approach to achieve this goal? There are two possible scenarios. First, to upkeep the status quo, and through judicial interpretation of the current legal provisions to allow their circulation. Although this approach in the Republic of North Macedonia is boldly uphold, however it does not solve the issue. Indeed, the judicial interpretation should provide for creation of the objective legal certainty and it is essential part of it, but if we look at the divergent interpretation of this problem in the regional legal doctrine and its effect that some countries recognize and others don't, we cannot with certainty say that this is the appropriate approach. Maybe it would be better to introduce specific recognition and enforcement provisions in the national private international law acts regarding provisional measures. They can be simple and transparent as the objective legal certainty requires, modeled to legal culture of the countries. Also, they could learn from the EU approach, get inspiration from their experience and balance between the practical need for recognition and enforcement of provisional measures and the finality. It is evident that there are still opponents to their circulation, however, it is more than clear, that the complexity and uncertainty of the cross-border cases dictates a solution. This solution needs to satisfy the subjective aspect of the legal certainty, to allow the natural and legal persons bring a predictable decision for their affairs. With other words we should let legal certainty and finality come to the same position from both directions at once.

[77] Decision of the Basic Civil Court Skopje, ІВПП no.820/20 from 14 November 2023.

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THE DEVELOPMENT OF THE RIGHT TO MATERNITY LEAVE IN THE REPUBLIC OF CROATIA - LOOKING BACK AT THE PAST AND A LOOK INTO THE FUTURE

Dragana Bjelić Gaćeša, PhD, Assistant Professor*
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
dbjelicga@pravos.hr

Jelena Kasap, PhD, Associate Professor**
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
jkasap@pravos.hr

Višnja Lachner, PhD, Associate Professor***
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
vlachner@pravos.hr

ABSTRACT

Today, the right to maternity leave is the right of an employed or self-employed pregnant woman, that is, an employed or self-employed mother, which she uses during pregnancy, childbirth and child care, and which has its own time and financial component. Since the accession of

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the Republic of Croatia to the European Union, Croatian legislation has been marked by the implementation of relevant European directives that emphasize gender equality and the balance of the private and business life of parents. However, if we look into the past, the situation was different. The aim of this article is to show the development of the right to maternity leave through different periods of Croatian legal history and, finally, by comparing the results with contemporary reality, question their continuity and suggest possible improvements. The article provides an overview of the time and financial components of maternity leave, the conditions for its realization, as well as the possibility of transferring it to the father. Applying the method of historical comparison of legal acts related to the topic of maternity leave, the article presents the development of legal acts, their current status in Croatian and contemporary European Union law, and proposes a perspective proposal for the future.

***Keywords**: Croatian and contemporary European Union law, Croatian legal history, maternity leave, time and financial components of maternity leave*

1. THE POSITION OF WOMEN IN LABOUR RELATED LEGISLATION FROM 1868 TO 1918

The development of legislation on the protection of employed women progressed with the regulation of issues related to the protection of women in the workplace, starting from the limitation of working hours, prohibition of working in dangerous jobs and finally by the protection of women during childbirth. Accordingly, the legal regulations related to maternity protection of employed women should be divided into these two groups: regulations on maternity protection of employed women in a narrower sense and regulations on maternity protection of employed women in a broader sense.[1] Regulations related to the protection of maternity in the narrower sense include regulations on the protection of women during pregnancy, childbirth (maternity leave) and breastfeeding. On the other hand, the regulations related to the protection of motherhood in a broader sense include measures aimed at taking care of children while a mother (a parent) is at work and measures to reduce the burden of household chores from employed mothers and women.[2]

Provisions on the protection of maternity in a narrower sense, i.e. on maternity leave, were introduced in the Croatian legislation in the later period of the development of protective labour legislation, in the second half of the 19th century. At that time, Croatia was part of the Austro-Hungarian Monarchy characterized by a dual system of government, in which Austria and Hungary were separate entities

1 Đuranović-Janda, S., Žena u radnom odnosu, Naprijed, Zagreb, 1960, p. 215.

2 For example, the introduction of part-time working hours with certain rights from such an employment relationship. More thereon, see in: Savić, B., *O skraćenom radnom vremenu*, Žena danas, No. 127, 1955.

with different legal systems.[3] By the Austro-Hungarian Settlement, the territories of Dalmatia and Istria became Austrian provinces, and thus, attached to the Austrian part of the Monarchy, whereas Croatia and Slavonia were attached to the Hungarian part.[4] Consequently, labour relations and the protection of workers in the territory of Dalmatia, but also in Slovenia, were regulated by the revised *General Civil Code* and the *Trade Regulation Act* of 1859, which pursuant to Art. 94 prohibited the employment of women for 4 weeks after giving birth.[5] However, the aforementioned legal regulations caused workers' dissatisfaction for providing only the minimum protection and insufficient inspection.[6]

In the late 19th century labour relations in Croatia and Slavonia were regulated by the Crafts Act of 1872.[7] This law set out the rules for industrial workers and apprentices, as well as special rules for factory workers. The rules were not clear, and women were only briefly mentioned. Special rules for the protection of employed women and children were proposed considering their abilities.[8] Many laws in the Austro-Hungarian Monarchy referred to women and children as unskilful in independent decision-making, which was a common practice. In June 1909, specific protection of employed women was introduced by Article XIX of the *Act on the Insurance of Professional and Commercial Workers in Case of Sickness and Accident*.[9] Pursuant to Art. 1 of that law, compulsory health insurance in case of sickness was introduced for all people "regardless of their gender, age and nationality".[10] However, the law also included a provision that a woman could not work for her husband because she was considered to be his assistant (auxiliary) and not an equal partner.[11] Nevertheless, the law guaranteed certain protection to socially insured

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3 In 1867, the Austro-Hungarian Settlement was concluded, the former single state was reorganized into a dual monarchy, but at the same time, it was stated that Austria and Hungary are unique and inseparable entities.

4 Heka, L., *Analiza Austro-ugarske i Hrvatsko-ugarske nagodbe (u povodu 150. obljetnice Austro-ugarske nagodbe*), Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 38, No. 2, 2017, p. 862.

5 Đuranović-Janda, S., *op.cit*., note 1, p. 51.

6 In 1888, based on the Law of 1888, insurance was established on the territory of Slovenia, which provided for "maternity allowance" amounting to 50% of the insurance class for 4 weeks after childbirth. See in: Pešić, R., *Nastanak i razvitak socijalnog osiguranja u Jugoslaviji*, Savezni zavod za socijalno osiguranje, Beograd, 1957, p. 19 ff.

7 Text of the Crafts Act in: Vežić, M., *Pomoćnik za javnu upravu: sbirka najvažnijih zakonah i naredabah u javnoj sigurnosti obćem zdravlju, i o narodno-gospodarskoj prigledbi u kraljevinah Hrvatskoj i Slavoniji s pripojenom bivšom hrv-slav. Krajinom*, L. Hartman (Kugli i Deutsch), Zagreb, 1884, pp. 580-596.

8 Đuranović-Janda, S., *op.cit*., note 1, p. 57.

9 Mihalić, A., *Zakon o osiguranju obrtnih i trgov. namještenika za slučaj bolesti i nezgode = sa provedbenom naredbom= (Zakonski članak XIX: 1907.),* Naklada akademske knjižare Gjure Trpinca, Zagreb, 1909, p. 5, 12, 51, 126-130, 138 – 139.

10 *Ibid.*

11 *Ibid*, p. 62.

employed women in the event of childbirth. During 6 weeks, the insured woman was entitled to maternity benefit amounting to half of her salary (wage). This benefit could increase to 75% of her salary and last for 8 weeks.[12] Moreover, women without any occupational record were also entitled to free health service during childbirth. Although the Act helped many people, in 1911 the total of insured women did not exceed 8,255. Moreover, women employed in state owned enterprises were entitled to special insurance and those working in agriculture were not entitled to any insurance at all.[13]

Along with the development of industry and social progress and with the need for a more qualified workforce, especially in factories, the demand for workers increased, which lead to intensive employment of women. Women became important actors in the development of the Austro-Hungarian Monarchy. However, the laws did not keep up with social changes demanding quick and effective legal solutions to the problems that employed women were facing. Although the laws at the time assumed that men and women should have the same occupational opportunities, they actually supported the idea that men and women should stick to their traditional roles.[14]

During the First World War, the position of employed women suddenly deteriorated because in terms of labour relations, the legal protection of women did not develop and no administrative or similar bodies were established that would, at least to some extent, ensure better working and living conditions for women.

2. THE POSITION OF WOMEN IN LABOUR RELATED LEGISLATION FROM 1918 TO 1945

After the end of the First World War in 1918, the Austro-Hungarian Monarchy collapsed and the State of Slovenes, Croats and Serbs was declared comprising the areas that were part of Austria-Hungary, populated by the peoples of South Slavic origin. On 1 December 1918, in Belgrade, the Serbian regent Aleksandar Karađorđević announced the unification and creation of a new state called the Kingdom of SHS. The legal system and legislation before the adoption of the *Constitution of the Kingdom of SHS* were defined by legal particularism. This means that in the Kingdom of SHS there were six legal areas, namely the Slovenian-Dalmatian, Croatian-Slavonian, former Hungarian, Bosnian-Herzegovinian, Serbian and

[12] Đuranović-Janda, S., *op.cit.*, note 1, p. 57.

[13] *Ibid*, p. 58.

[14] Rudančić, M., Žena, majka, radnica: Zaposlenost žena u središnjoj Hrvatskoj u međuratnom razdoblju (1918-1941), Diploma paper, Sveučilište u Zagrebu Filozofski fakultet, 2017, p. 26.

Montenegrin administrative unit.[15] However, the situation did not change significantly after the adoption of the Constitution, since the civil law in the country was not unified, and the laws governing civil society partly reflected feudal attitudes towards women's rights. Thus, the legal position of women in that new state was extremely complicated and the emancipatory processes were difficult.[16] However, when presenting regulations related to the protection of women in employment and the protection of maternity, it should be noted that women in the former Yugoslavia did not have any political rights, including the right to vote. In addition, there were laws that limited their legal and business capacity, especially for married women, which ultimately put them in a subordinate position to men.[17]

The special protection of women was based on Art. 19 of the *Vidovdan Constitution*, which determined that women and (minors) "shall enjoy special protection as regards the jobs harmful to their health".[18] Moreover, Art. 27 of the Constitution stipulated that motherhood protection is the domain of the state, whereas in the later *Octroyed Constitution of 1931*, this provision was omitted. The following legal regulations should be noted as regards the then labour legislation aimed at the protection of mothers (female workers): *the Law on Workers' Protection* (1922), *the Law on Workers' Insurance* (1922) and *the Law on Businesses* (1931), which were amended in the period between two wars. In addition to these laws, there were numerous ordinances whose provisions governed the protection of women in employment at the end of pregnancy, childbirth and during the period of breastfeeding: *Ordinance on the Provision of Benefits in Case of Illness, Exhaustion, Old Age, Death or Accident* (1937) and the *Ordinance on the Scope of Work of the Mother and Children Health Care Institute* (1930).

The first law that contained extensive provisions on the protection of women as mothers before and after childbirth was passed on 30 May 1922 under the title of the *Law on Insurance of Workers in Case of Illness, Exhaustion, Old Age, Death and Accident*.[19] According to the provisions of that law, insured workers and their wives

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15 Kosnica, I.; Protega, M., *Politička prava u Kraljevini Srba, Hrvata i Slovenaca: razvoj temeljnih obilježja*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, Vol. 35 No. 1, 2019, p. 146.

16 Vujnović, M., *Forging the Bubikopf nation: a feminist political-economic analysis of* Ženski *list, interwar Croatia's women magazine, for the construction of an alternative vision of modernity*, Thesis, University of Iowa, 2008, p. 48.

17 Prokop-Kulenović, A., *Ravnopravnost* žene*, brak i porodica po Ustavu FNRJ*, Antifašistička fronta žena Hrvatske, Beograd, 1946, pp. 5-7.

18 Constitution of the Kingdom of Serbs, Croats and Slovenians, Official Gazette No. 142a / 1921

19 Law on Insurance of Workers in Case of Illness, Exhaustion, Old Age, Death and Accident, Official Gazette 117/1922, in: Ostojić, D., *Naše radničko i nameštenička zakonodavstvo*, Časopis Ekonomsko-finansijski život, Beograd, 1934, p. 76.

were entitled to the paid maternity leave (chapter IX – Benefits in Case of Illness). This law entitled the insured women during childbirth to the necessary treatment and midwife assistance. They also had the right to "maternity" benefit for the period of two months before and two months after childbirth in the amount of ¾ of the wage per day, and to monetary support in the amount of 14 times the wage, provided that the child was born alive, as well as to breastfeeding support in the amount of ½ of the wage (maximum 3 dinars per day) for 20 weeks, starting from the day on which the "maternity" benefit ends (until the child reaches the age of seven months).[20] Mothers who could not breastfeed did not receive the monetary support but were entitled to receive support for "baby food", the value of which was not to be higher than the breastfeeding support.[21] Besides insured women, the wives of insured workers were also entitled to maternity benefit in the amount of 1.5 dinars per day for four weeks before and after childbirth, as well as to support for acquisition of baby essentials.[22] During the period in which a woman was entitled to the benefit, she was not allowed to work to earn money, and would otherwise lose her rights to the benefits.[23]

The Law on Amendments to the Provisions of the Law on Workers' Insurance of 14 May 1922, related to granting benefits in the event of childbirth, made social security rights requirements stricter to fulfil in order to acquire the right to childbirth benefit.[24] According to this amendment, the right to midwife support ("midwife benefit"), treatment and medicines were conditioned by uninterrupted duration of insurance for at least six months or ninety days prior to childbirth.[25] In addition, women were entitled to exercise their right to maternity benefit if they had been insured for the period of ten uninterrupted months or eighteen months for the last two years. Accordingly, the benefit was reduced to six weeks prior to and six weeks after childbirth, but the amount of the benefit remained unchanged i.e. ¾ of the wage per day.[26] In contrast, the amount of benefit (support) for breastfeeding increased to 4 dinars per day for the period of twelve weeks, and

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20 *Ibid*, p. 83.

21 *Zakon o osiguranju radnika, Kraljevina Srba, Hrvata i Slovenaca*, Zakoni. Beograd: Ministarstvo socijalne politike, Kr. zemaljska tiskara, Zagreb, 1922, p. 22.

22 Ostojić, D., *op.cit*., note 19, p. 84.

23 Đuranović-Janda, S., *op.cit*., note 1, p. 123.

24 The Law on Amendments to the Provisions of the Law on Workers' Insurance of 14 May 1922, Official Gazette No. 285a/1931.

25 Ostojić, D., *op.cit*., note 19, p. 83. See more in: Gojković, E., *Zakon o osiguranju radnika od 14 maja 1922 godine. Objašnjen sporednim zakonodavstvom i praksom*, Izdavačko i knjižarsko poduzeće Geca Kon A. D. 12, Beograd, 1936, p. 229.

26 *Ibid*, p. 83.

the amount of support for child equipment was 150 dinars.[27] According to this law, only the wife of an insured family member (married or unmarried woman who did not earn an independent income and lived in the same household with her husband) was entitled to the aforementioned support. Therefore, other family members (illegitimate and adopted children, grandchildren, mothers and sisters of the insured member of the family) could not receive these benefits.[28] *The Law on Officials* of 1931 set out that a woman official was entitled to maternity leave for the duration of six weeks.[29]

The legal basis for the protection of women is also provided in the *Law on the Protection of Workers* (1922)[30], and includes the legal protection of employed women and the protection of their children. According to the *Law on the Protection of Workers*, maternity leave was provided for a period of four months (two months before and two months after childbirth).[31] However, the *Labour Law* (1931) reduced the duration of maternity leave to 12 weeks (six weeks prior to and six weeks after childbirth – for three months).[32] A woman could not be fired during maternity leave. In this context, if the woman, due to health reasons, had to extend maternity leave for more than two months, the employer could not dismiss her.[33]

The Law on the Protection of Workers was more comprehensive than the *Law on Workers' Insurance* and this is supported by the fact that the law specified the paid breastfeeding breaks of 30 or 15 minutes for every 4-5 hours of work depending on whether the child resided at its mother's or in the children's shelter in the company.[34] Unfortunately, this provision did not apply in reality, because employed mothers were dismissed as soon as they started to exercise this legal right.[35]

After the reduction of maternity protection by the *Law on Amendments of the Law on Workers' Insurance* (1931), the provisions governing the rights of insured per-

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27 *Ibid*, p. 83.

28 *Ibid*, p. 84. See more in: Gojković, E., *Zakon o osiguranju radnika od 14 maja 1922 godine. Objašnjen sporednim zakonodavstvom i praksom,* Izdavačko i knjižarsko poduzeće Geca Kon A. D. 12, Beograd, 1936, p. 231.

29 Vragović, A., *Zakon o* činovnicima *: od 31. marta 1931 god. br. 36490* : (Č. Z.), Obnova, Zagreb, 1931, p. 41.

30 Law on the Protection of Workers (*Zakon o zaštiti radnika*), Official Gazette No. 128/1922.

31 Art. 22 of the Law on the Protection of Workers.

32 Art. 236 of the Labour Law (Trade Law), Official Gazette No 262/1931).

33 Art. 23 of the Law on the Protection of Workers, Official Gazette No. 128/1922.

34 Art. 24 of the Law on the Protection of Workers, Official Gazette No. 128/1922.

35 Đuranović-Janda, S., *op.cit.*, note 1, p. 122.

sons of the guild coffers changed as well.[36] Thus, the support for the food of the child amounted to 3 dinars, and the condition for obtaining the maternity benefit was still nine months of occupational record. However, in 1937, under the new *Rules of the Guild Coffers*, the amount of support for the child essentials increased to 300 dinars paid immediately after the birth of the child, and not later than three days upon birth.[37] Furthermore, according to the *Ordinance on the Provision of Benefits in Case of Illness, Exhaustion, Old Age, Death or Accident* of 1937, female employees were entitled to free essential midwife support, i.e. free hospital care for a period of 8 days, treatment costs and 150 dinars for the child's equipment.[38] The provisions of the *Ordinance on the Scope of Work of the Mother and Children Health Care Institute*,[39] which prescribed a few measures to improve the position of women as mothers, for example, the provision of childbirth essentials etc.[40]

3. REGULATION OF MATERNITY LEAVE FROM 1945 TO 1988

In the period prior to the adoption of the Constitutional Law of the Federal People's Republic of Yugoslavia in 1946,[41] the laws in force in the former Yugoslavia[42] regarding the special protection of women and maternity protection continued to apply. The provisions of this Constitution provide the basis for regulating the special protection of women, as well as the overall protection of maternity of women in employment (Articles 20, 24, 32 and 38). In this sense, Art. 24 applies exclusively to the female issues stipulating that women are equal before the law in all aspects of the public, economic and social-political life. Women are entitled to equal pay for the same work as men, and enjoy special privileges as female workers and employees. A special care is provided for employed mothers by establishing hospitals, children homes and establishing right of mothers to a paid job before and after childbirth. In Federal People's Republic of Yugoslavia, the duration of maternity leave was already regulated by this constitutional provision, as well. However, in the same year the Decree on the Absence of Women before and after Childbirth was issued, according to which maternity leave amounted to six

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36 Rules of the Guild Coffers, Official Gazette No 63 / 1933.

37 Rules of the Guild Coffers, Official Gazette No. 300/1937.

38 Đuranović-Janda, S., *op. cit.*, note 1, p. 125.

39 Ordinance on the Scope of Work of the Mother and Children Health Care Institute, Official Gazette No. 121/ 1930

40 Đuranović-Janda, S., *op. cit.*, note 1, p. 126.

41 Constitutional Law of the Federal People's Republic of Yugoslavia, Official Gazette No. 10/46.

42 Proposal for a decision on the repeal and invalidity of all legal regulations passed by the occupier and his helpers during the occupation, on the validity of decisions made during that time, on the repeal of legal regulations that were in force at the time of the enemy's occupation: Odluka o ukidanju i nevažnosti svih pravnih propisa, Official Gazette DFJ No. 4/45.

weeks prior to and six weeks after childbirth.[43] Even more, thorough provisions on the duration of maternity leave were contained in the Decree on the Protection of Pregnant Women and Nursing Mothers in Employment[44] and the Decree on Amendments to the aforementioned Decree[45], the provisions of which were in force until the adoption of the Law on Labour Relations (1957). According to these regulations, the duration of maternity leave was 90 days, out of which 45 days were used before and 45 days after childbirth. However, a woman had to take maternity leave 21 days before and 45 days after childbirth. According to the Law on Labour Relations of 1957, [46] the duration of maternity leave was extended to 105 days, and the leave had to be approved upon worker's request based on the medical findings determining the childbirth to occur within 45 days. In order to protect both mother and child, an employed woman can use her annual leave at the end of the maternity leave.[47] Similarly, in order to exercise a woman's right to maternity leave as effectively as possible, the fine of 10,000 to 200,000 dinars was imposed on the company or any other organisation and on the responsible person in the organisation for misdemeanour, if workers are denied maternity leave rights, etc.[48]

The right to salary, i.e. compensation in lieu of salary for the duration of maternity leave in the Federal People's Republic of Yugoslavia was governed by several different regulations. Thus, according to the Ordinance on Absence of Women Before and After Childbirth of 1946, a woman was entitled to "maternity benefit" paid from social insurance fund provided that certain requirements were met. If this benefit amounted to less than the regular salary, then she was paid the difference. Socially insured women were entitled to salary compensation in the form of "maternity allowance" in the amount of 73-100% based on a certain legal basis for cash benefits. Accordingly, the difference up to the full amount of the salary was paid by the company, institution or a private employer.[49] In contrast to this Ordinance, the Ordinance on the Protection of Pregnant Women and Nursing Mothers in Employment of 1949 stipulates that a woman is entitled to a salary during maternity leave (therefore, the Ordinance does not refer to compensation but expressly to the right to a salary) with other reimbursements depending on

43 Decree on the Absence of Women before and after Childbirth, Official Gazette FNRJ No. 56/46.

44 Decree on the Protection of Pregnant Women and Nursing Mothers in Employment, Official Gazette No. 31/49.

45 Decree on Amendments to the aforementioned Decree, Official Gazette No. 88/49.

46 Art. 61-64 of the Law on Labour Relations, Official Gazette No. 53/1957.

47 Art. 65 of the Law on Labour Relations, Official Gazette No. 53/1957.

48 Art. 394 of the Law on Labour Relations, Official Gazette No. 53/1957.

49 Art. 27 Social Security Law of workers and Officials and Their Families, Official Gazette No. 100/1946.

the job (title) that she regularly performed for the last month before the month in which the leave commenced.[50]

Since 1950, women exercised their substantive rights (the right to salary i.e. compensation in lieu of salary) during pregnancy and childbirth based on the provisions of the Social Security Law[51] and the amending regulations. In order to exercise the right to substantive insurance for the duration of maternity leave for a period of 90 days, women had to have an uninterrupted occupational record for 6 months or 18 months for the last two years.[52] In addition, the right to compensation instead of salary during absence due to pregnancy and childbirth for the entire period of maternity leave (105 days) was determined by the Law on Labour Relations.[53] Consequently, according to the provisions of the Law on Health Insurance, compensation instead of salary amounted to 100% of the basis for compensation, provided that by the day of childbirth, the woman had an uninterrupted occupational record of 6 months or 12 months with interruptions for the last two years. The compensation was determined regularly on the basis of the average salary with fixed allowances paid for regular working hours for the period of the last three months[54]. If the length of occupational record was less than three months, then the average salary was calculated according to the amount of salary that the woman received from the day of employment.[55] Likewise, the Law on Health Insurance provided for the duration of the above-mentioned substantive rights for the period of 90 days, which was not in accordance with the provisions of the Law on Labour Relations, by which the duration of maternity leave was extended to 105 days. However, the Law on Health Insurance of 1962 harmonised the aforementioned provision with the provision of the Law on Labour Relations of 1957, which stipulated that employed women were entitled to maternity leave of 105 days, during which they received 100 % of the average monthly salary. It was calculated on the basis of the previous three month salaries under the condition that they were insured for six uninterrupted months or for a total of twelve months in the last two years (otherwise the compensation amounted to 80 %).[56]

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50 Art. 2 Decree on the Protection of Pregnant Women and Nursing Mothers in Employment, Official Gazette No. 31/49.

51 Social Security Law of Workers and Officials and Their Families, Official Gazette No. 10/1950.

52 Art. 17 22 and 23 of the Social Security Law of workers and Officials and Their Families, Official Gazette No. 10/1950.

53 Art. 63 of the Law on Labour Relations, Official Gazette No. 53/1957.

54 Art. 23 Law on Health Insurance of Workers and Officials FNRJ, Official Gazette No. 51/1954.

55 *Ibid.*

56 Art. 70 Law on Health Insurance, Official Gazette No.12 /1962.

As regards significant novelties on the regulation of labour relations, in this period the new Constitution of the SFRY of 1963[57] and the Basic Law on Labour Relations of 1965[58] were adopted governing the labour relations of all employees in a unique way, while determining a unique socio-economic position of all working people. However, unlike the old Constitution, the new Constitution did not include a special provision related to equal rights of women and men.[59] Regarding the regulation of labour rights, this Constitution brought many changes, namely Articles 36, 37 and 38 prohibited forced labour, guaranteed the right and freedom of work, limited working hours (maximum 42 working hours per week), introduced the right to daily and weekly rest and paid annual leave of at least 14 days and, minimum personal income, compensation for the unemployed, the right to personal safety and to health and other protection at work for workers and those incapable to work. Consequently, special protection at work for young people, women and the disabled was established.

The Basic Law on Labour Relations of 1965 stipulated that in case of pregnancy and childbirth, a worker enjoyed the right to maternity leave of uninterrupted 133 days.[60] However, with the Law on Amendments to the Basic Law on Labour Relations of 1966, the duration of maternity leave was shortened to at least uninterrupted 105 days.[61],[62] Therefore, maternity leave could not be used intermittently, but uninterrupted. Likewise, a worker could take maternity leave 45 days, or obligatory 28 days prior to childbirth. A woman also had the right to take maternity leave in the case of a stillborn child or if the child died before the end of the maternity leave. The worker had the right to continue to use the leave for as long as it was necessary according to the medical findings for the woman to recover from childbirth and the mental trauma caused by the loss of a child, and in any case for at least 30 days.[63] During the absence from work due to maternity leave, the worker received personal income compensation as a special protection pursuant to the regulations on health insurance. Compensation for the duration of maternity leave amounted to 100% of the basis for compensation, and the

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57 The Constitution of the SFRY, Official Gazette SFRJ No. 19/1963.

58 Basic Law on Labour Relations, Official Gazette No. 17 / 1965.

59 Mihaljević, J., *Ustavna uređenja temeljnih prava u Hrvatskoj 1946.–1974.*, Časopis za suvremenu povijest, Vol. 43, No. 1, 2011, p. 42.

60 Art. 73 of the Basic Law on Labour Relations, Official Gazette No. 17 / 1965

61 Art. 76 the Law on Amendments to the Basic Law on Labour Relations of 1966, Official Gazette No. 52 /1966

62 At that time, there were proposals in Yugoslavia to extend maternity leave to 172 days, as well as to recognize the right to unpaid leave for one or more years. See more in: Tintić, N., *Radno i socijalno pravo*, Narodne novine, Zagreb, 1969, p. 520.

63 Art. 77. of the Basic Law on Labour Relations from 1970, Official Gazette No. 12/1970.

basis for determining compensation for personal income was the average personal income that the worker earned in the previous year (i.e. in the last 12 months) before the year in which she acquired right to compensation.[64] In the same way, a female worker who worked part time was provided at the end of her maternity leave a part of her personal income compensation in proportion to the time she did not work. The child's father was also entitled to compensation in the event that the mother was unable to take care of the child.[65]

The latest changes regarding the regulation of labour law in Yugoslavia began with the adoption of Constitutional Amendments XX-XLII of 1971, and amendments XXI-XXIII (the so-called workers' amendments) were particularly important. Consequently, the Constitution of the SFRY of 1974[66] also offered solutions provided for by constitutional amendments related to the organisation of labour unions and mutual relations of workers at work, which were broken down by the Law on Associated Labour of 1976.[67] This Constitution guaranteed both men and women the right to work and prohibited any form of sexual discrimination (every citizen had the right to equal pay for equal work for a minimum of 42-hour working week and for a minimum of 18 days of holiday), to health and social insurance, education; youth, women and the disabled enjoyed special protection at work.[68]

Employed women had the right to special protection during pregnancy and after childbirth including the right of pregnant female workers to protection from hard work, harmful substances at work, overtime and night work, maternity leave, shorter working hours after childbirth and for the care of a small child and other rights that guarantee the protection of motherhood.[69]

Since the Law on Associated Labour did not stipulate the duration of maternity leave, the Law on Mutual Relations of Workers in Associated Labour of 1973[70] determined that republic and provincial laws could also include other provisions on maternity leave (duration), protection of workers during pregnancy, childbirth and care for a small child. Namely, on the basis of this authorisation, the republic and provincial laws passed after 1973 included provisions that extended the

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64 General law on health insurance and mandatory forms of health protection of the population, Official Gazette of SFRJ No. 20 /1969.

65 *Ibid.*

66 The Constitution of the SFRY, Official Gazette of SFRJ No 9/1974.

67 Brajić, V., *Radno pravo*, Privredna štampa, Beograd, 1980, p. 50.

68 Art. 159-163 of the Constitution of the SFRJ 1974.

69 Art. 189 of the Law on Associated Labour, Official Gazette No. 53/ 1976.

70 The Law on Mutual Relations of Workers in Associated Labour, Official Gazette No. 22/1973.

duration of maternity leave.[71] Thus, the Law on Labour Relations of Workers in Associated Labour of the Republic of Croatia[72] stipulated that during pregnancy and childbirth, a worker had to use an uninterrupted maternity leave of at least 180 days, which is a novelty compared to the previous labour law system. Likewise, there is no reference to the right of a worker to maternity leave, but to the obligation of a worker to use it, which certainly speaks for the support to motherhood protection.[73] Based on the medical findings, a worker could start maternity leave 45 days before childbirth at the earliest, and had to take it 28 days before childbirth. If the delivery takes place before 28 days passed, starting from the commencement of maternity leave, then the female worker could use a longer leave after delivery.[74] On the other hand, a female worker who, due to a sudden delivery did not take maternity leave before delivery was entitled to use 180 days of maternity leave after delivery.

The law also included a provision that applied to cases in which a worker used more than 45 days of maternity leave before delivery based on medical findings. Then the worker was entitled to use at least 135 days of leave after delivery. The right of a worker who gave birth prematurely (premature baby) to have her leave extended for as long as the child was born prematurely was also regulated. Finally, if the child was stillborn, or if the child died before the end of the maternity leave, the worker had the right to use the leave for as long as the doctor determined it necessary for her to recover from childbirth and trauma caused by the loss of the child. In any case, this leave could not last less than 30 days.[75]

The child's father (employee) could also use maternity leave for up to 180 days instead of the mother (employee) in following cases: in the event of the mother's death, if the mother abandoned the child or if the mother could not take care of the child due to her poor health confirmed by an authorized doctor. However, when the mother is unemployed, i.e. when the person independently performs

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71 Art. 32 of the Law on Mutual Relations of Workers in Associated Labour (Official Gazette No 22/1973) stipulates maternity leave for an uninterrupted duration of 105 days, and that a female worker can start maternity leave 45 days before childbirth, and obligatory 28 days before childbirth.

72 The Law on Labour Relations of Workers in Associated Labour (Official Gazette No. 11/78, 32/82, 39/82, 40/82 – official consolidated version, 20/83, Official Gazette SFRJ No. 68/84, Official Gazette No 49/85, 27/87, 27/88, 31/88 - official consolidated version, 47/89, Official Gazette SFRJ No. 83/89, Official Gazette No. 19/90), Official Gazette No. 355/1978

73 *Ibid*, Art. 71 of The Law on Labour Relations of Worke.rs in Associated Labour.

74 Art. 71. para. 2 and 3. In practice, this means that the worker can enjoy the mentioned right only if she specifically requests it, and not otherwise. See in: Crnić, Z., *Komentar Zakona o o radnim odnosima radnika u udruženom radu i odgovarajućih odredbi ZUR-a sa sudskom praksom*, Narodne novine, Zagreb, 1988, p. 235.

75 Art. 71. para. 5, 6 and 7.

the activity through personal work with funds owned by citizens, the child's father (employee) has all the rights arising from maternity leave.[76] This aimed at eliminating misunderstandings that arose from the fact that the competent self-governing interest communities did not acknowledge these rights for the fathers of children whose mothers were not employed. All the rights enjoyed by the employee who is the father of the child apply to the employee as the child's adoptive parent, as well as to the person (employee) taking care of the child.[77] The father shall only exercise the aforementioned rights upon an opinion of an authorized primary health care physician and finding confirming the inability of the mother to take care of the child in an appropriate and complete manner.[78]

After the expiration of the compulsory maternity leave of 180 days, the worker had the right to work four hours a day if she so requested, until the child reaches the age of one year or to use optional maternity leave until the child reaches the age of one. This meant that only the employee herself decided which option suited her situation. The child's father, i.e. the person taking care of the child and the child's adoptive parent was entitled to exercise this right in case of the mother's death, if she abandoned her child or due to her poor health, confirmed by an authorized doctor's opinion that she could not take care of the child.[79] If, after the expiration of maternity leave, the employee decided to work part-time until the child turned one, she was entitled to a share in the distribution of funds for personal income on all grounds and according to the results of her four hour a day work, as well as to compensation for working more than four hours a day (which she did not perform) according to health insurance regulations. If, on the other hand, the worker decided to take optional maternity leave, then she was entitled to compensation of personal income, the amount of which is determined according to the health insurance regulations.[80] The father of the child, instead of the mother, also had the right to additional maternity leave, but could not enjoy it absolutely, but only under the following conditions: if he was caring for the child and if the parents agreed so, upon confirmation that the mother works full-time. If these requirements were not met, then the father could not enjoy this right instead of the mother.[81]

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76 Art. 73. para. 1 and 2.

77 Art. 73. para. 3.

78 Crnić, Z., *op. cit.,* note 75., p. 238.

79 Art. 72. para. 1. Of the Law on Labour Relations of Workers in Associated Labour.

80 Art. 72. para. 2 and 3.

81 Art. 72. para. 4.

At the end of the optional maternity leave or at the end of the period at which she worked part-time, the employee was entitled to work four hours a day until the child turns three, if, according to the assessment of the competent insurance authority, the child needed the mother's intensive care. The right to shorter working hours until the child turned three was granted to the employee only upon her request. During that time, the employee was entitled to a share in the distribution of funds for personal income on all grounds and according to the results of a four-hour a day work. For the remaining working time exceeding four hours a day, the employee was provided with a personal income allowance according to the health insurance regulations.[82] The aforementioned rights were also granted to the employee - the child's father, the employee - the child's adoptive parent and the person taking care of the child, in the event of the mother's death, if the mother abandoned the child or if the mother could not care for the child due to her poor health confirmed by an authorized doctor's opinion. It should be noted that the child's father could exercise the aforementioned rights only in the event that an authorized primary health care physician issued an opinion and finding stating the mother's inability to take care of her child in an appropriate and complete manner.[83]

Maternity leave, additional maternity leave, shorter working hours for the mother for the period until the child turns three were considered full time and are recognized in the insurance period. This means that occupational record was also acknowledged to an employee whose employment relationship ended in course of the maternity leave, and she continued to use maternity leave for up to 180 days. However, the legislator did not apply this provision to the child's father, the adoptive parent and the employee taking care of the child.[84]

After the expiration of maternity and optional maternity leave, or part-time work, the employee was entitled to return to the position or work tasks she had been performing before the onset of her maternity leave; in the event of their cancellation, she was entitled to perform other jobs or work tasks suited to her professional qualifications. Similar to the previous provision, these rights apply only to the female employee, and not to any other person who, for the reasons already listed above, would be able to enjoy the rights and obligations of a mother when she takes care of a child.[85],[86]

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82 Art. 74. para. 1.

83 Art. 74. para. 2, 3, and 4.

84 Art. 75.

85 Art. 76.

86 The authors of the Commentary on the Law of Labour Relations of Workers in Associated Work state that all persons who, on the basis of this Law, assume the role of mother (the father of a child, an

During maternity and optional maternity leave, workers are provided with personal income compensation as a special protection. Personal income compensation is granted to the employee for the period of 180 days, since the Law on Labour Relations of Workers in Associated Labour stipulated duration of maternity leave of uninterrupted 180 days.[87] This compensation is provided according to the regulations on health insurance[88] and it amounts to 100% of the compensation base during maternity leave. In course of the use of optional maternity leave, the compensation amounts to 70% of the compensation base. However, the Communities within the Union of Communities established the criteria and benchmarks by means of Self-Governing Agreement providing for the cases when this compensation can be less than 70% or more than 70%, but not exceeding 100% of the compensation base.[89] In this context, the Self-Governing Agreement stipulated that the amount of personal income compensation, depending on the economic and financial income ranged from 50% to a maximum of 100% of the compensation base.[90] Personal income compensation for the duration of the optional maternity leave applies until the child turns one.[91] The basis for determining the personal income allowance is the monthly average of the personal income paid to the beneficiary-employee in the last 12 months before the month in which the right to allowance was acquired.[92] The child's father, i.e. the child's adoptive parent or the person taking care of the child after the mother's death, or when the mother abandoned the child or could not take care of her child due to her poor health, as confirmed by an authorized doctor's opinion, were entitled to personal income compensation amounting to 100% of the compensation base. If the child's father used optional maternity leave until the child reached the age of one after the mother's death, or when the mother abandoned the child, he is entitled to personal income compensation amounting to 100%, or 90% of the compensation base if the income of the family household in the previous year exceeded 250% of the guaranteed personal income per family member.[93] In the event that the child's father used optional maternity leave because the mother could not take care of the child due to her poor health as confirmed by an authorized doctor, he was entitled

adoptive parent and a worker who cares for a child) enjoy the same rights indicated in these two legal provisions (Art. 75 and 76) as a working mother. Crnić, Z., *op. cit.*, note 75, p. 240.

87 Nikolovski, C., *Pravo na porodiljski i dodatni porodiljski dopust na rad sa skraćenim radnik vremenom i na isplatu naknade osobnog dohotka*, Informator, Zagreb,1986, p. 39.

88 Law on Health Care and Health Insurance, Official Gazette No. 10/1980.

89 Art. 53, para. 5 and 6 of the Law on Health Care and Health Insurance, Official Gazette No. 10/1980.

90 Samoupravni sporazum o kriterijima i mjerilima za utvrđivanje visine naknade osobnog dohotka za vrijeme korištenja dodatnog porodiljskog dopusta, Official Gazette No. 1/1981 (Art. 3).

91 Art. 72 of the Law on Labour Relations of Workers in Associated Work.

92 Art. 52 of the Law on Health Care and Health Insurance, Official Gazette No. 10/1980.

93 Nikolovski, C., *op. cit.*, note 88, p. 51.

to personal income compensation amounting from 50% to 90% of the compensation base, depending on the amount of income per family household member.

4. MATERNITY LEAVE IN THE PROVISIONS OF THE LAW ON BASIC RIGHTS IN EMPLOYMENT OF 1989 AND THE LAW ON EMPLOYMENT RELATIONS OF 1990

The intervention of the state regarding maternity leave was noticeable as early as in the socialist period and it aimed at protection of mothers, as well as at strengthening their rights within labour legislation. According to Dobrotić, at the end of the socialist period, maternity leaves began to gain greater importance. Industrialisation and lack of the labour force resulted in intensive employment of women, so that paid maternity leave in that period was considered a basic prerequisite for women to enter the labour market.[94] The regulation of the issue of maternity leave in transition countries was based on several basic features such as primarily pro-natal measures reflected in longer parental leaves for parents with multiple children, followed by gender equality features that tended to expand the rights of fathers when using the leave. Finally, it was based on inclusion features i.e. the expansion of rights related to maternity protection to new groups of parents.[95]

Although the federal Law on Basic Rights in Employment, regulating basic rights and obligations and responsibilities for the duration of the employment relationship applied at the entire territory of Yugoslavia, the republic, i.e. provincial laws to a certain extent regulated separate social rights and more extensive maternity leave schemes.

The federal law, i.e. the Law on Basic Rights in Employment stipulates the right of a mother to maternity leave for an uninterrupted duration of 270 days.[96] The legal provision sets out that based on the medical findings, the female worker is allowed to use the leave 45 days before childbirth, and obligatory has to take it 28 days before childbirth.[97] Thus, the right of a female worker to use maternity leave

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[94] Dobrotić, I.*, Promjenjiva narav društvenih i rodnih nejednakosti povezanih uz dizajn politika usmjerenih skrbi za djecu u post- jugoslovenskim zemljama*, Tehničko izvješće- INCARE project, April 2019. Available at [https://www.incare-pyc.eu/wp-content/uploads/2019/07/INCARE_final_hr.pdf], Accessed 26 January 2024.
Zrinščak, S.; Puljiz V., *Hrvatska obiteljska politika u europskom kontekstu*, Revija za socijalnu politiku 9, No. 2 (2002): 117-137. Available at [https://doi.org/10.3935/rsp.v9i2.170], Accessed 29 February 2024.

[95] Dobrotić, I., *op. cit*, note 1, p. 9.

[96] Law on Basic Rights in Employment, Official Gazette of the SFRY No. 60/1989, 42/1990, Official Gazette No. 34/1991, 19/1992, 26/1993, 29/1994, 38/1995, Art. 41, paragraph 1.

[97] Law on Basic Rights in Employment, paragraph 2.

during a period of 9 months protected both the mother and the child. Unlike the federal law, the Republic of Croatia regulated the issue of maternity leave by passing a separate regulation. The Law on Labour Relations stipulated the mother's obligation to use maternity leave for an uninterrupted period of 180 days.[98] In this context, female workers in the territory of the Socialist Republic of Croatia were entitled to use maternity leave for a duration of 180 days with salary compensation of 100% of the compensation base. After that, female workers were entitled to use the rest of the total of 270 days of uninterrupted maternity leave, as they were entitled to do so by the Law on Basic Rights in the Employment. According to the interpretation of the provisions of the two legal regulations, female workers were not allowed to terminate maternity leave and start work before the end of maternity leave for an uninterrupted period of 6 months. On the other hand, neither the labour organisation nor the employer were allowed to permit work after an interrupted maternity leave before the period expired in which the female worker using maternity leave was obliged to use the maternity leave.[99] Only after the obligatory period of maternity leave expired, the female worker could decide on whether to use the remaining maternity leave as stipulated by law for up to 270 days, or to terminate the maternity leave and start working.[100]

The federal legislation also regulates the protection of the mother in case of stillbirth or death of the child before the end of maternity leave. In that case, the female worker had the right to request an extended maternity leave for the time that, according to medical opinion, was necessary for the recovery from childbirth and trauma caused by the loss of the child, for at least 45 days.[101] During that time, she was entitled to enjoy the rights that normally apply to basic maternity leave.

Fathers could take maternity leave pursuant to Art. 41, paragraphs 1 and 2 of the Law on Basic Rights in Employment in exceptional cases such as in the event of the mother's death, if the mother abandoned the child, or if she was prevented from using the said right for justified reasons.

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98 Pursuant to the provisions on maternity protection of the Law on Labour Relations in the territory of the Republic of Croatia a female worker shall take uninterrupted 180 days of maternity leave during pregnancy, childbirth and child care (obligatory maternity leave). If the child is born prematurely, the period of leave will be extended by the length of time between the actual date of birth of the premature baby and the time in which the baby was due. Law on Labour Relations, Official Gazette No. 19/1990, Art. 47, paragraphs 1 and 2.

99 Crnić I.; Momčinović Z., *Law on Basic Rights in Employment*, *Commentary*, Informator, Zagreb, 1990, p. 70.

100 Crnić I.; Momčinović Z., *op. cit.*, note 6, p. 70.

101 See Art. 44 of the Law on Basic Rights in Employment.

All the rights enjoyed by parents in terms of using maternity leave also applied to the adoptive parents of the child.[102]

A more extensive protection scheme of maternity leave took place in Slovenia and Croatia with the introduction of the so-called institution of extended maternity leave. Pursuant to Art. 48, paragraph 1 of the Law on Labour Relations, upon expiration of compulsory maternity leave, one of the child's parents had the right to work part-time until the child reaches the age of one or to use optional maternity leave until the child reaches the age of one. The novelty in the field of maternity leave regulation in relation to federal legislation is the right of fathers to use optional maternity leave under certain conditions. Pursuant to paragraph 2 of the same article, fathers had the right to use optional maternity leave instead of the mother if they were taking care of the child and if the parents agreed to do so, provided that at the same time, the mother worked full-time. Furthermore, the law guarantees the right of fathers to take optional maternity leave in the event of the mother's death, if she abandons the child or if she is prevented from this right for justified reasons, regardless of whether the mother is employed or is employed less than full-time or if she performs an independent activity i.e. individually or individually and with funds owned by citizens.[103] Although the institution of optional maternity leave meant extended rights in terms of the protection of family life, Dobrotić believes that there was no flexibility in using it since it could only be used in one piece, and there was a possibility to use it partially as part-time work, which could not extend the duration of the leave.[104] Finally, it can be concluded that maternity leave is also defined in the provisions of the Law on Labour Relations as the primary right of the mother, and despite the possibility for fathers to use part of the leave, there was no significant change in parental practices, as Dobrotić claims, because the leave was almost always used by mothers.[105]

Article 50 of the Law on Labour Relations stipulates special protection for the parents of disabled children. This protection was realised through the right to work part-time granted to one of the parents of a child with severe disability as long as needed. A parent who worked part-time in accordance with Art. 50, paragraph 1 of the Law had the right to compensation of salary amounting to the difference between the salary earned by working part-time and the one earned in a full-time work.[106]

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102 See Art. 43, para.2 of the Law on Basic Rights in Employment.

103 Art. 48, para. 3 of the Law on Labour Relations.

104 Dobrotić, I, *op. cit*, note 1, pp. 5-6.

105 Dobrotić, I., *op. cit*, note 1, p. 9. Prema Korintus Stropnik 2009.

106 Article 66, paragraphs 1 and 2 of the Labour Law of 1995 (Official Gazette No. 38/95) sets out similar protection to the parents of a child with developmental disabilities, i.e. a child with severe disability,

To a certain extent, the Collective Agreements provided protection for the female worker during pregnancy and for the parent of a child with a severe disability who worked part-time since the transfer to a workplace more than 50 km away from the previous working place.[107]

Furthermore, certain shortcomings of the socialist legislation regarding the possibility of using the leave are evident in practice. First, the legal regulations that governed the issue of leave and compensation while exercising this right enabled the exercise of the right only for parents employed on the basis of the standard employment contracts. This means that the categories of temporary and occasionally employed parents are completely excluded from the possibility of exercising their rights to maternity leave. It was not until the early 80s that self-employed parents and parents employed in agriculture had the possibility to exercise the right.[108] Furthermore, in order to obtain the right to maternity benefits, employed beneficiaries had to fulfil the obligatory insurance period in order to obtain the right to full benefits for the duration of the leave. In Croatia, it was only in the late 1980s that the restrictive provision was alleviated, and the right to full compensation was made available to mothers with shorter occupational record.

The primary purpose of the provision of a three-year maternity leave pursuant to Art. 48, paragraph 4 of the Law on Labour Relations is not quite clear.[109] However, although the provision was in force until the adoption of the Labour Law in 1995, amidst the negative social and economic situation during the war period, the implementation of the three-year leave did not take root in practice.[110]

After the independence of the Republic of Croatia, the earlier legislation in the field of protection of labour relations was taken over by the Law on the Adoption of Federal Laws in the Field of Labour Relations and Employment that applied in

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thus determining that one of the parents was entitled to parental leave or work part time until the child is seven years old. After that, one parent is entitled to continue working part time, if needed. The parent is entitled to compensation in accordance with special regulations at the expense of social welfare funds.

107 The collective agreement stipulates the protection of female workers with children less than seven years old, as well as single parents of minor children. General Collective Agreement for the Economy, Official Gazette No. 47/1992 and the General Collective Agreement for Public Activities and Public Undertakings Official Gazette No. 66/1992. See more in Jelčić, V., Žena *u radno-socijalnom zakonodavstvu Republike Hrvatske*, Revija za socijalnu politiku 1, No. 4, 1994, p. 357.

108 Dobrotić, I., *op. cit*, note 1, p. 9.

109 Thus, in accordance with Article 48, paragraph 4 of the Law on Labour Relations, upon the expiration of extended maternity leave, the mother had the right not to work until the child reached the age of three years, during which time her rights and obligations acquired at work and based on work were suspended.

110 Dobrotić, I., *op. cit*, note 1, p. 9.

the Republic of Croatia as a republic law.[111] Thus, the maternity leave policy almost completely followed the normative solutions determined by the socialist laws passed before the change in the constitutional order. After passing the Labour Law of 1995, which entered into force on 1 January 1996, the previous laws related to labour law ceased to apply; these were the Law on Basic Rights in Employment (Official Gazette, 34/91, 26/93 and 29/94) and the Law on Labour Relations (Official Gazette, 25/92 - consolidated text, 26/93 and 29/94).

Before the Law entered into force, by passing the provisions of the Constitution of the Republic of Croatia adopted in 1990, family life and motherhood protection became protected categories.[112] Article 62 of the Constitution of the Republic of Croatia protects motherhood, children and youth and creates social, cultural, educational, substantive and other conditions that promote the exercising of the right to a dignified life. Furthermore, Article 64 paragraph 3 of the Constitution provides youth, mothers and disabled persons with special protection at work. By this, as Vinković points out: "...the aforementioned persons in the domain of work are subject to positive discrimination, and the protection of motherhood represents positive discrimination of the biological condition inherent exclusively to the female gender..."[113] In this sense, the Labour Law precisely established the framework for motherhood protection in the Croatian labour law.

5. MATERNITY LEAVE IN THE PROVISIONS OF THE LABOUR LAW OF 1995

Since demographic renewal was one of the basic social goals during the first half of the 90s, the family policy measures tended at that time to re-traditionalise women in the society and deviated from those deriving from the earlier socialist period.[114]

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111 The Law on Taking over the Federal Laws in the Field of Labour Relations and Employment was applicable for the Republic of Croatia, Official Gazette No. 34/91. The first Labour Law in the Republic of Croatia was adopted in 1995 (Official Gazette, No. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04 and 68/05) and entered into force on 1 January 1996. Until then, labour law issues were governed by the provisions of the Law on Basic Rights in Employment, which was taken over by the Law on the Adoption of Federal Laws in the Field of Employment Relations and Employment, which applied in the Republic of Croatia, Official Gazette no. 34/91, and the Law on Labour Relations, Official Gazette, No. 25/92, 26/93 and 29/94. Although amendments to the Law on Labour Relations entered into force in 1992, 1993 and 1993, they did not refer to the issue of maternity protection, i.e. normative regulation of maternity leave. Milković, D., *Ugovor o radu i zakon o obveznim odnosima*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 37, No. 1, 1991, p. 685.

112 Constitution of the Republic of Croatia, Official Gazette No. 56/1990.

113 Vinković, M., *Zaštita majčinstva- stanje i perspektive hrvatskog radnog zakonodavstva*, Radno parvo, No. 01/06, pp. 6-7.

114 Dobrotić, I., *Obiteljska politika,* in: Bežovan G.*, et al.*, Socijalna politika Hrvatske, 2nd ed., Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2019, p. 358.

The system of family benefits in the Republic of Croatia was supported in 1996 with the adoption of the National Programme of Demographic Development, which laid the foundations of a new family policy. The adoption of this document and the family focused proposed measures aimed at strengthening the social role of the family and increasing the birth rate. This document was also reflected in the Croatian labour, social and family legislation. A special chapter of the new Labour Law (Official Gazette, nos. 38/95, 54/95, 64/95, 17/01, 82/01, 114/03 and 30/04), which entered into force on 1 January 1996, referred to the protection of motherhood.[115] A number of measures, among these also the institution of mother-educators and a three-year maternity leave were normatively regulated in the Labour Law, tended to increase the birth rate, but according to research, they were not fully implemented in practice due to a lack of financial resources.[116]

Article 58, chapter IX of the Labour Law governs maternity leave.[117] The result of the discussion on the proposal of the Labour Law showed that due to negative demographic trends, the provisions governing protection of motherhood should be encouraging. Possible disagreements appeared only with regard to the limitation of financial possibilities in exercising certain rights.[118]

In comparison to the provisions of previous laws, the new legal framework adopted mainly earlier solutions, especially when it comes to Art. 41 of the Law on Basic Rights in the Employment, setting out the duration of leave, as well as Articles 47 and 48 of the Law on Labour Relations, that provide for the possibility of optional maternity leave. The Labour Law adopted two novelties in relation to the previously mentioned laws, namely the right to use the leave until the child reaches the age of three for twins, the third and every subsequent child, as well as

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115 The draft law on maternity and parental benefits, with the Final draft law, Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2019-04-15/122702/PZE_85.pdf], Accessed: 1 March 2024.

116 *Ibid,* p. 358.

117 Article 58 of the Labour Law (Official Gazette No. 38/95) in its original version, as well as in other articles governing this issue, uses the term "porodni dopust" to refer to maternity leave. The special regulation governing this issue, the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 24/96) uses the term "porodni dopust" (meaning: "maternity leave") to designate the rights and obligations deriving from the field of protection of parental rights and obligations related to upbringing and care for children. The Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 30/04) introduced the term "rodiljni dopust" (meaning: maternity leave) into legal practice, which is still in legal use today.
Note by the translator: The terms "porodni dopust"- "leave related to giving birth" and "rodiljni dopust" – leave related to a "woman giving birth" are lexical variants and near synonyms.

118 Ruždjak M.; Šrbar P.; Zuber M., *Zakon o radu s komentarom*, inženjerski biro, Zagreb, 1995, Art. 58.

the right of a woman to exceptional termination of the obligatory leave before the 6-month period expires, but not earlier than 42 days after childbirth.[119]

Amendments to the Labour Law of 2001 reduced the duration of the leave to the time when the child reaches the age of three for twins, the third and each subsequent child.[120] A new solution on shortening the duration of leave in the aforementioned case to two years was announced in a government document in August 2001, and then implemented in amendments to the Labour Law and other positive regulations.[121] This legal change was followed by changes of special regulations on which compensation for the duration of the leave was based.[122] Since the change in the form of shortening the duration of maternity leave was a measure of the centre-left government, in 2004, as a result of the pre-election policy of the new centre-right government, a three-year leave was reintroduced for twins, the third and every subsequent child, and the amount of flat-rate maternity benefits was corrected to the 2001 amount.[123] Furthermore, the duration of leave for unemployed parents is extended to one year with higher compensation amounts.[124]

In comparison to the first amendment, the law also determined a corresponding provision according to which fathers could use maternity leave instead of mothers who worked full-time for the child between six months and one year of age for twins and every third or the subsequent child until the age of three and upon

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119 Labour Law, Art. 58, paragraphs 3, 4 and 6.

120 The Law on Amendments to the Labour Law, Official Gazette No. 82/2001. amended the previous Art. 58, paragraph 4 of the Labour Law (Official Gazette No. 38/95, 54/95, 65/95 and 17/01) and female workers could take maternity leave for twins, triplets, quadruplets, or several children of the same age until the age of two. Amendments to the Labour Law (Official Gazette No. 30/2004) applied to this provision so that Art. 58, paragraph 4 of the Labour Law (Official Gazette No. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03 and 142/03) changed that a female worker could take maternity leave for twins, for the third child and every subsequent child until the child reaches the age of three. Amendments to the legal provisions also referred to other provisions of the law that regulated the rights of mothers, i.e. fathers to twins, the third child and every subsequent child. The aforementioned amendments to the Labour Law also reflected in a special regulation of the issue of maternity leave. The Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 82/01 and 30/04) also increases the rights of self-employed or unemployed mothers (beneficiaries) in the same way as for employed beneficiaries of this right, if the prescribed conditions are met. See more about the changes to the special regulation below.

121 See more on starting points for determining social policy until the end of 2001 and the basics of social policy in 2002. On the development of social policy in the Republic of Croatia and on appropriate family policy measures in: Zrinščak, S.; Puljiz V., *op. cit.,* note 1, p. 12.

122 See note 51.

123 Labour Law (Official Gazette 137/2004) Art. 66, paragraph 4.

124 Dobrotić, I., *op. cit*, note 20, p. 362.

agreement with the mother.[125] Amendments to the Labour Law of 2003 introduced two additional months of maternity leave in cases where fathers have partially already used the leave. This was an attempt to involve fathers in upbringing of the child to a greater extent, but in practice the aforementioned change did not result in intensive use of leave, so that the leave was still mainly used by mothers.[126]

The law further stipulates the right of a woman to use maternity leave during pregnancy, childbirth and childcare, in addition to the right of an employed woman to start using leave at the earliest 45 days before the expected birth, and at the latest until the age of one of the child.[127] The limits of compulsory leave are set by the law as follows. A woman is obliged to use maternity leave 28 days prior to delivery until the child reaches the age of six months.[128] Another novelty that the legislator emphasized *expressis verbis* is the right of the mother to use leave in the case of an earlier birth for as much time as the child was born earlier.[129] In comparison to the previous legislation, all the rights of a mother who gives birth to a stillborn child or whose child dies before the end of the maternity leave were retained. In this case, according to the medical opinion, mothers are allowed to use maternity leave for the time needed for her recovery, and at least for 45 days.[130]

Mothers with four or more children should gain the special status of mother-educator. According to the law, regardless of whether they are employed or unemployed, mothers-educators have the right to monetary compensation, pension and disability insurance, health insurance and other rights in accordance with special regulations.[131] The purpose of this provision was not an immediate application, but it was included in the Law as an obligation set by the legislator in anticipation of the elaboration implementation of this institution within the framework of a special law.[132] Undoubtedly, this was one of the pro-natal policy measures from the national programme of demographic renewal. According to the results of the research, the mentioned measure was not implemented for the lack of funds dur-

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125 Labour Law, Art. 58, paragraph 1. The father's right to use maternity leave instead of the mother when the child is between six months and one year old is stipulated by the earlier Law on Labour Relations (Article 48, paragraphs 1 and 2).

126 Amendments to the Labour Law (Official Gazette No. 114/2003), Art. 16.

127 Labour Law, Art. 58, paragraph 1.

128 Labour Law, Art. 58, paragraph 6.

129 Labour Law, Art. 58, paragraph 7.

130 Labour Law, Art. 64. Compare with the previously applicable provision: Law on Basic Rights in Employment, Art. 44.

131 Labour Law, Art. 63.

132 See explanation Ruždjak M.; Šrbar P.; Zuber M., *Zakon o radu s komentarom*, Inženjerski biro, Zagreb, 1995, Art. 63.

ing the 90s, but it was updated again, as Dobrotić claims, during the period of strengthening the national pro-natal agenda in 2016 in the City of Zagreb.[133]

When it comes to the rights of fathers related to upbringing and care of the child, in addition to the previously mentioned possibility of using the leave for the period until the child reaches the age of six months and three years of age for twins, every third or subsequent child, the legislator retained the earlier provision of the Law on Basic Rights in the Employment. Accordingly, one of the parents was thus entitled to work part time after the expiration of the obligatory maternity leave until the child reaches one year of age.[134] The right of fathers is temporary extended by the new Law in comparison to the fathers of twins, the third or every subsequent child until the child reaches the age of three. Fathers could use these rights in an agreement with mothers if the mothers worked full time. By the Amendments to the Labour Law of 2003, a provision was added to the existing regulation of paternal leave according to which the father exercises the right to paternal leave for at least three months. Maternal leave pursuant to Article 58, paragraphs 2 and 4 of the Labour Law was extended for two months.[135] The right of the father to exercise the rights of the mother if case of her death, or if she abandoned the child or was unable to take care of the child due to illness is also retained.[136] Fathers acquired the right not to work after the maternity leave expired until the child reaches the age of three, and during that time, their employment rights were suspended. Previously, the Law on Labour Relations, Art. 48, paragraph 4, recognized this right exclusively for mothers, and by the provisions of this Law, this right was recognized for fathers as well.

The law also regulates the right of an adoptive parent or guardian, i.e. a person to whom a child is entrusted based on the decision of the competent social welfare body, to exercise the rights established by the Law for the purpose of motherhood protection and raising a child.[137]

A novelty in the category of maternity protection, which is granted to women after the expiration of maternity leave or part-time work, is the right to continue

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133 See for details in: Dobrotić, I., *op. cit*, note 1, p. 13.

134 Labour Law, Art. 59, paragraph 1. Compare with the previous applicable provision: Law on Basic Rights in Employment Art. 42, paragraph 1.

135 Amendments to the Labour Law, Official Gazette No. 114/2003., Art. 16.

136 Labour Law, Art. 61, paragraph 1. Compare with the previous applicable provision: Law on Basic Rights in Employment, Art. 43, paragraph 1, and the Law on Labour Relations, Art. 48, paragraph 3. These rights are enforceable upon meeting the conditions prescribed by the ordinance on determining the inability of the mother to take care of the child. Adopting of the ordinance is the responsibility of the Minister of Health. See Art. 61, paragraph 2.

137 Labour Law, Art. 67, paragraph 1.

breastfeeding their children during full-time work, in the form of two breaks of one-hour during the working day.[138] A woman could exercise this right until the child reaches the age of one, and she was entitled to receive a salary compensation calculated according to special regulations.

In comparison to the previous legislation, the legislator introduced another novelty in the framework of the new Labour Law, and that is the compulsory notice to the employer of the use of maternity leave, adoption leave or the suspension of the employment contract until the child reaches the age of three, at least one month prior to exercising the aforementioned rights.[139]

When it comes to the compensation for the duration of maternity leave or working part time, the Labour Law stipulates the way the amount of compensation is regulated by special regulations. In this regard, a more detailed regulation of this issue is governed by separate regulations, the Law on Maternity Leave for Self-Employed and Unemployed Mothers, the Health Insurance Law and the Law on the Execution of the State Budget of the Republic of Croatia, which are discussed further below.

As the subject of this part of the research largely focuses on determining the normative changes that followed the changes in the Labour Law in the area of maternity leave policy, the following text analyses the regulation in the provisions, later amendments to the special regulation governing maternity leave, i.e. the Law on Maternity Leave of Self-Employed and Unemployed Mothers. The content of other positive regulations governing certain rights related to maternity leave will be dealt with sporadically, when needed for the analysis of a separate right.

6. REGULATION OF MATERNITY LEAVE IN THE PROVISIONS OF THE LAW ON MATERNITY LEAVE FOR SELF-EMPLOYED AND UNEMPLOYED MOTHERS

The Law on Maternity Leave for Self-Employed and Unemployed Mothers entered into force in 1996 (hereinafter: Law on Maternity Leave)[140], and amendments to the Law of 1997 and 2001 sought to provide a broader framework of legal protection, especially when it comes to the duration of the leave and the compensation. In relation to the provisions of the Labour Law, the Law on Mater-

138 Labour Law, Art. 61.

139 Labour Law, Art. 67, paragraph 1. See the explanation in the commentary to the Law.

140 The Law on Maternity Leave for Self-employed and Unemployed Mothers will be cited below in the original text. (Official Gazette, No. 24/96), while the amendments to the Law will be explained separately.

nity Leave of 1996 provided the right to use the leave primarily to mothers who are self-employed, perform crafts, agricultural or other activity, and who, based on their work, are insured by pension, disability and health insurance, as well as to unemployed mothers with Croatian citizenship and residence in the Republic of Croatia, for twins, the third and every subsequent child (Article 1, paragraphs 1 and 2). Regarding the duration of compulsory leave, even a self-employed mother had the right to maternity leave during pregnancy, childbirth and childcare, from 28 days before childbirth until the child reaches the age of six months (compulsory maternity leave). However, even with the earlier Labour Law, which regulated the issue of maternity leave, a self-employed mother could start using maternity leave 45 days before the due birth and could use it until the child reaches the age of six months.[141] At her own request, a self-employed mother could, by exception, start working before the child is six months old, but not before the end of 42 days after giving birth.[142] In the same way, i.e. in accordance with the previously adopted Labour Law, other issues of maternity protection are also regulated. The right to compensation during the maternity leave is governed by the provisions of the Health Insurance Law.[143] The monetary compensation for the use of compulsory maternity leave was paid from the funds of the Croatian Institute for Health Insurance, from the first day of use of that right.[144]

The funds for financial compensation for the period of use of maternity leave until the child reaches the age of one and for the period of use of maternity leave until the child reaches the age of three were provided in the budget of the Republic of Croatia, and funds for monetary compensation for maternity leave for unemployed mothers were provided in the budget of the Republic of Croatia.[145]

The Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette 109/1997) expanded the circle of beneficiaries of the right to maternity leave in such a way that the Law enabled and regulated the right to maternity leave for unemployed mothers, but it is she could exercise the right only if she gave birth to twins, the third and every subsequent child.[146] Furthermore, pursuant to Art. 2 of the Amendments to the Law, mothers - pension beneficiaries exercise the right to maternity leave and to monetary com-

141 Law on Maternity Leave for Self-Employed and Unemployed Mothers, Art. 2, paragraphs 1, 2, and 3.

142 Law on Maternity Leave for Self-Employed and Unemployed Mothers, Art. 2, paragraph 4.

143 Pursuant to the provisions of Articles 25, 33 and 34 of the Law on Health Insurance (Official Gazette, No. 75/93).

144 Art. 9. para. 1.

145 Art. 9. paragraphs 2 and 3.

146 See Article 1 of the Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette No. 109/1997).

pensation for the period of maternity leave the same as unemployed mothers.[147] Regarding compensation for the duration of the leave, the legislator did not foresee any changes; only a provision was added in Art. 8 on the method of determining monetary compensations for the duration of the leave of unemployed mothers and mothers who are pension beneficiaries.[148]

Later amendments to the Law of 2001 expanded the circle of beneficiaries of the right to maternity leave, and the right to use the leave was also guaranteed to mothers in full-time education with Croatian citizenship, continuous residence in the Republic of Croatia for at least three years before submitting the request for recognition of rights, and health insurance.[149]

The biggest amendment compared to the earlier version of the law was the adoption of Article 2, which shortened the duration of leave for mothers of twins, triplets, quadruplets, or with multiple children of the same age and for mothers who were self-employed to up to the maximum of two years.[150] The aforementioned amendment corresponded to the earlier amendment to the Labour Law that entered into force in 2001. Furthermore, unemployed mothers and mothers in full-time education had the right to maternity leave from the day the child was born until the child was six months old.[151] In relation to the earlier provision of the Law allowing unemployed mothers to use maternity leave after the birth of twins, the third or each subsequent child,[152] this amendment facilitated the use of the leave for all unemployed mothers, regardless of the number of children, on the condition that they had Croatian citizenship, uninterrupted residence in the Republic of Croatia for at least three years prior to submission of the request for the recognition of rights and health insurance in the Republic of Croatia.[153] This has undoubtedly expanded the circle of maternity leave beneficiaries. Unemployed mothers and mothers in full-time education were entitled to maternity leave from

147 See Article 2 of the Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette No.109/1997).

148 See Article 3 of the Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette No. 109/1997).

149 Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette No. 82/2001). Art. 1, paragraphs 1 and 2.

150 Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers). Art. 2, paragraph 2.

151 Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette 82/2001). Art. 2, paragraph 3.

152 See the Law on Maternity Leave for Self-Employed and Unemployed Mothers, which will be cited below in the original text. (Official Gazette No. 24/96), Art. 3, paragraph 3.

153 Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 82/2001). Art. 1, paragraph 2.

the child's birth until the child reaches the age of six months.[154] Furthermore, the right to maternity leave was also available to unemployed mothers who were entitled to a disability pension due to professional incapacity for work based on the decision of the Croatian Institute for Pension Insurance (Article 1, paragraph 4). However, with this Law, self-employed mothers and unemployed mothers were not equal to the employed mothers/parents according to labour regulations. Some issues of adoption leave, working part time, leave for the nursing of a child until it reaches the age of three, leave or part time work until the child reaches the age of seven, and the rights of guardians are still not governed by a regulation.[155]

The Law on Amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers (Official Gazette 30/04) amended and supplemented the provisions of the Law on Maternity Leave (24/1996, 109/1997, 82/2001), and the very title of the law was changed into the Law on Maternity Leave for Self-Employed and Unemployed Mothers.[156] Bearing in mind the unfavourable demographic trends in the Republic of Croatia, the Government of the Republic of Croatia in 2004 in its report on the Final Proposal of the Law on Maternity Leave for Self-Employed and Unemployed Mothers stipulated that there is an essential need for improved family protection in the care and upbringing of children.[157] Therefore, the proposed law aimed at helping mothers who gave birth to twins, triplets and every subsequent child in such a way that they can use maternity leave and the right to monetary support until the child reaches the age of three.[158] Thus, mothers who are self-employed, if they used the mandatory maternity leave from Article 2 of this Law, could continue using maternity leave until the child reaches the age of one, that is, for twins, the third and every subsequent child until the

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154 Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 82/2001). Art. 2, paragraph 3.

155 The legislative proposal establishing maternity and parental benefits, with the Final Bill, Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2019-04-15/122702/PZE_85.pdf], Accessed 1 March 2024.

156 Law on Maternity Leave for Self-employed Mothers and Unemployed Mothers (Official Gazette 30/2004).

157 As part of the changes to the positive regulations governing the maternity leave and "...maternity benefits amounts changed to the amount preceding the restrictive measures at the beginning of this decade. Since 1 July 2004, the lowest maternity allowance for all mothers was HRK 1,600.00; employed mothers were entitled to maternity benefit ranging from HRK 1,600.00 to HRK 2,500.00, depending on the basis for salary compensation for the first six months of the maternity leave, for the time of extended maternity leave until the child reaches the age of one. "Draft law on maternity and parental benefits, with the Final draft law, available at [https://www.sabor.hr/sites/default/files / uploads/sabor/2019-04-15/122702/PZE_85.pdf], Accessed 1 March 2024.

158 The Draft Law on Amendments to the Law on Maternity Leave for Self-employed Mothers and Unemployed Mothers, available at https://vlada.gov.hr/UserDocsImages//2016/Sjednice/Arhiva//01-06.pdf. Accessed: 23 February 2024.

child reaches the age of three.[159] On the other hand, unemployed mothers, mothers in full-time education and unemployed mothers receiving a disability pension due to professional incapacity for work had the right to maternity leave until the child reaches the age of six or for twins, the third and every subsequent child until the child reaches the age of three.[160]

Although much has been done in the field of maternity leave regulation compared to the period at the beginning of this chapter, some questions are still open. They are reflected in the unequal treatment of leave users, which is reflected in the fact that the Labour Law allows the extension of the right to optional maternity leave until the child reaches the age of one, provided that the child's father used that leave for at least three months. In contrast, fathers of children whose mothers are self-employed did not have such an opportunity.[161] Likewise, the laws do not stipulate the same rights of parents who are self-employed in cases where the child has severe developmental disabilities. In such a case, working parents are granted the right to childcare leave, i.e. the right to part-time work until the child is seven years old, unlike self-employed parents.[162] An example of unequal treatment is that an adoptive mother, who is self-employed, according to the current provisions of the Law, is only entitled to maternity leave if it is a younger child for whom the leave can still be used, but she has no right to adoptive leave if the child is older than one or three years, unlike an employed adoptive parent (worker) who can exercise this right even after that age. The question of recognizing the right to work part-time for the mother or father, who is self-employed, is still open.[163]

When it comes to standardizing monetary benefits in accordance with the amendments to the Law on Maternity Leave for Self-Employed and Unemployed Mothers, there were also changes to the Health Insurance Law, which regulated the issue of compensation for the duration of the leave.[164] Furthermore, the amount of

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159 Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 30/2004). Art. 1, paragraph 1.

160 Law on Amendments to the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers (Official Gazette No. 30/2004). Art. 1 paragraph 2.

161 Assessment of the situation and the basic issues to be regulated by this law as well as the consequences that will result from passing the law: in the Draft Law on Maternity and Parental Support, with the Final Draft Law, available at https://www.sabor.hr/sites/default/files/uploads/sabor/2019-04-15/122702/PZE_85.pdf], Accessed 1 March 2024.

162 *Ibid.*

163 *Ibid*.

164 The Law on Amendments to the Law on Health Insurance (Official Gazette No. 30/04), Art. 1 changed the content of the earlier regulation (Law on Health Insurance Official Gazette No. 94/01, 88/02 and 149/02) and from the day of entry into force of the changes in item 8, Article 23, the right to salary compensation was granted for the time of taking the maternity leave until the child is one year old, or

compensation is regulated by the Law on the Execution of the State Budget for the Republic of Croatia for the year 2004.[165] There were discussions in legal science on the amount of compensation depending on the positive regulations that regulated this issue, and as the amount of compensation changed depending on social and economic circumstances and the approach to family policy, herewith a reference to some sources is indicated.[166]

7. MATERNITY LEAVE IN THE PROVISIONS OF THE LAW ON MATERNITY AND PARENTAL BENEFITS OF 2008

In July 2008, the Law on Maternity and Parental Benefits[167] was adopted and it entered into force on 1 January 2009. It regulates the rights of parents related to the birth of a child, which until then were governed by the provisions of two laws, i.e. the Labour Law and the Law on Maternity Leave of Self-Employed and

for twins, triplets, quadruplets, or for more children of the same age the maternity leave was used until child is two years old, taking „maternity leave" pursuant to Article 58, paragraph 9 of the Labor Law, adoption leave, right to work part time for one or two years of age of the child pursuant to Article 59 paragraph 1 of the Labor Law and the right to work part time until the child reaches the age of three pursuant to Article 59 paragraph 3 of the Labor Law. Furthermore, a provision was added to the Law on the right to compensation for the salary of an employee who is temporarily prevented from working due to the use of maternity leave and the right to work part-time in accordance with the law governing maternity and parental benefits and defining who is temporarily unable to work due to taking the leave for the death of a child, a stillborn child or the death of a child during the use of maternity leave in accordance with the law governing maternity and parental benefits. See: Art. 23. item 11a of the Law. See more in: Đukanović, Lj., *Rodiljni dopust- pravo i naknada*, Suvremeno poduzetništvo, Vol. 4, 2004, pp. 150-151. More on amendments that followed in 2004 in: Knežević, N. *Ponovno povoljniji uvjeti za porodni (rodiljni) dopust*, Računovodstvo, revizija i financije, Vol. 4, 2004, p. 149.

165 The Budget provides funds for exercising rights from basic health insurance according to Article 68, paragraph 1 of the Health Insurance Law, which include: 1. salary compensation for the period of maternity leave until the child reaches the age of one, maternity leave until the child reaches the age of two years in case of twins, triplets, quadruplets, or more children of the same age, maternity leave according to Article 58, paragraph 9 of the Labour Law, adoption leave, rights to work part time for the time until the child reaches the age of one or two years pursuant to Article 59 paragraph 1 of the Labour Law and the right to work part time until a child reaches the age of three pursuant to Article 59 paragraph 3 of the Labour Law. Law on the Execution of the State Budget of the Republic of Croatia of 2004 (Official Gazette 31/2004) Art. 15, paragraph 1, item 1.

166 Đukanović, Lj., *Rodiljni dopust- pravo i naknada*, Suvremeno poduzetništvo, Vol. 4, 2004, p. 151. Knežević, N. *Ponovno povoljniji uvjeti za porodni (rodiljni) dopust*, Računovodstvo, revizija i financije, 04/2004, p. 149. A detailed calculation of the amount of maternity leave from 2004 until 2007 in: Bartulović, N., *Pravo na rodiljni dopust i naknadu plaće*, Financije i porezi, Vol. 3, 2007, pp. 87- 90. On maternity leave allowance amount after the Law on Maternity and Parental Benefits is in force (NN, 85/08, 110/08) please see: Sirovica, K., *Rodiljni i roditeljski dopust*, Računovodstvo i financije, 2010, pp. 62- 63; Turković-Jarža, L., *Novosti o rodiljnom i roditeljskom dopustu*, Računovodstvo, revizija i financije, Vol. 5, 2011, pp. 84- 85.

167 Official Gazette No. 85/2008.

Unemployed Mothers. The Law on Maternity and Parental Benefits sets out the purpose of the Law in Article 1 as "protection of motherhood, care and rearing of a new-born child, and harmonisation of family and business life". In this regard, the Law stipulates "the right of parents and persons exercising one of the rights equal to parental rights taking care of the child to temporal and monetary benefits, the conditions and the ways of their realization and financing."[168]

Pursuant to Article 12 maternity leave as temporal benefit is taken by an employed or self-employed mother[169] during pregnancy, childbirth and childcare until the child reaches six months of age. Premature birth of a child affects the length of maternity leave and in that case, the maternity leave is extended for the equivalent of time in which the child was born prematurely. The law also provides for the institution of compulsory maternity leave, which an employed or self-employed mother should use for an uninterrupted period starting from 28 days before the due date of the expected birth to the 42nd day after the birth of the child. Exceptionally, maternity leave can start 45 days before the due date of the expected birth, if indicated by the findings and the gynaecologist. Therefore, in accordance with the aforementioned Law, the mother of the child uses compulsory maternity leave for the period of 70 or 87 days. After the compulsory maternity leave, i.e. from the 43rd day after giving birth until the child reaches 6 months of age, an optional maternity leave is used.[170] Moreover, while compulsory maternity leave is an exclusive right of the mother and non-transferable[171], optional maternity leave is transferable, i.e. it can be used by the child's father, provided there is an agreement between the parents.[172] As regards the monetary component of the maternity leave, in accordance with the provisions of Article 24 of the aforementioned Law, it should be pointed out that an employed or self-employed parent is entitled to 100% salary compensation of the basis for compensation determined by the regulations on compulsory health insurance, and paid at the expense of the Croatian Health Insurance Fund.[173] In order that an employed or self-employed parent

168 Article 1of the Law on Maternity and Parental Benefits.

169 The right to "maternity leave" is the right of an employed or self-employed mother. On the other hand, parents who earn other income, farmers and unemployed parents have the right to "maternity and parental exemption from work", in accordance with Articles 27 and 28 of the Law on Maternity and Parental Benefits.

170 Pursuant to Article 15, paragraph 2 of this Law, an employed or self-employed parent has the right to take the remaining part of the maternity leave as a right to work half time after the expiration of the compulsory maternity leave.

171 Exceptionally, in special situations, it can be used by the father (e.g. in the case of the death of the mother), According to: European Comission, *Benefits for maternity/paternity/parenthood*, [https://ec.europa.eu/social/main.jsp?catId=1104&intPageId=4454&langId=hr], Accessed 25 February 2024.

172 Art.12 para 5 of the Law on Maternity and Parental Benefits, Official Gazette No. 85/2008.

173 *Ibid*. Art. 24 para.1.

may receive the above-mentioned monetary compensation, they should fulfil the requirement of an insurance period of at least 12 uninterrupted months. Failure to meet this requirement results in the right to salary compensation of 50% of the budget base.[174]

The Law on Maternity and Parental benefits was first amended in 2011, and the changes affected the temporal component of maternity leave as well as the insurance period requirement for the right to monetary compensation. In accordance with the aforementioned amendments, an employed or self-employed pregnant woman, i.e. an employed or self-employed mother during pregnancy, delivery and care of a new-born child, has the right to maternity leave for the period of 28 days before the due date of the birth until the child reaches the age of 6 months, consisting of compulsory and optional maternity leave.[175] It should be pointed out that the duration of the compulsory maternity leave has been extended and that an employed or self-employed pregnant woman or mother should use it for an uninterrupted period of 98 days, i.e. 28 days before the due date and the remaining 70 days after the birth of the child.[176] Exceptionally, maternity leave can be used 45 days before the due date of childbirth, if required by the condition and the health of the employed or self-employed pregnant woman, as confirmed by the findings by a gynaecologist.[177] Thus, compulsory maternity leave can last 98 or 115 days. After the compulsory maternity leave, i.e. from the 71st day after the birth of the child until the child reaches 6 months of age, optional maternity leave follows. The child's mother can transfer this leave to the child's father by means of a written statement, completely or partially with his prior consent.[178] The same as the aforementioned amendments to the Law, the compulsory maternity leave remains the exclusive right of the mother and is non-transferable, whereas the optional maternity leave is transferable, i.e. it can be used by the child's father in accordance with the previously mentioned requirements. As regards the monetary component of the maternity leave, the provision according to which an employed or self-employed parent has the right to a 100% salary compensation of the basis for salary compensation determined according to the regulations on compulsory health insurance fund has remained unchanged. However, the condition of the insurance period for exercising the right to monetary compensation has been changed so that it should now last for an uninterrupted period of 12 months or

174 *Ibid*. Art. 24 para 9.

175 Art. 6 of the Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 34/2011.

176 *Ibid.*

177 *Ibid.*

178 *Ibid.*

18 months with interruptions for the last two years.[179] Failure to comply with these requirements, as before, results in the right to compensation of salary in the amount of 50% of the budget base.[180]

The Law on Amendments to the Law on Maternity and Parental Benefits of 2013[181] incorporated three EU Directives into the Croatian legal system, namely: Directive 92/85/EEC of 19 October 1992 on the introduction of measures to improve the safety and health of pregnant workers and workers who have recently given birth or breastfeed at the workplace (tenth individual directive in the sense of Article 16 paragraph 1 of Directive 89/391/EEC) (OJ L 348, 28 November 1992), Directive 2010/18/EU of 8 March 2010 on the implementation of the revised Framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and on the repeal of Directive 96/34/EC (OJ L 68, 18 March 2010) and Directive 2010/41 /EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment to men and women engaged in self-employment and on the repeal of Council Directive 86/613/EEC (OJ L 180, 15 July 2010). However, with regard to the temporal and monetary components of maternity leave, the conditions of the insurance period, as well as the possibility of transferring its optional part, this law does not bring any news. Neither the Law on Amendments to the Law on Maternity and Parental Benefits of 2014[182] introduces news regarding the previously indicated components of maternity leave, conditions of insurance duration and transferability. The Law on Amendments to the Law on Maternity and Parental Benefits of 2017[183] harmonized with the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant female workers and female workers who have recently given birth or are breastfeeding (tenth individual directive in the sense of Article 16, paragraph 1 of Directive 89/391/EEC) (OJ L 348, 28 November 1992), Council Directive 2010/18/EU of 8 March 2010 on the implementation of the revised Framework agreement on parental leave concluded by BUSINESEUROPE, UEAPME, CEEP and ETUC and on the repeal of Directive 96/34/EC (Text with EEA relevance) (OJ L 68, 18 March 2010) as well as Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on

179 Art. 17 of the Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 34/2011.

180 *Ibid.*

181 The Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 54/2013.

182 The Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 152/2014.

183 Official Gazette No. 59/2017.

the application of the principle of equal treatment to men and women who are self-employed and the repeal of Council Directive 86/613/EEC (OJ L 180, 15 July 2010).[184] With the aforementioned amendments, the amount of compensation for employed or self-employed parents who do not meet the requirement of an insurance period of at least 12 uninterrupted months or 18 months with interruptions for the last two years, and who are now entitled to a monetary compensation amounting to 70% of the budget bases.[185] With the next amendment to the Law on Maternity and Parental Benefits, namely the one passed in 2020,[186] the insurance period requirement that employed or self-employed parents must fulfil in order to obtain the right to financial compensation in the amount of 100% of the salary compensation base determined according to the regulations on compulsory health insurance is now reduced to 9 uninterrupted months or 12 months intermittently for the last two years.[187]

8. MATERNITY LEAVE IN THE PROVISIONS OF THE LAW ON MATERNITY AND PARENTAL BENEFITS OF 2022

The new Law on Maternity and Parental Benefits was adopted in 2022[188], and it entered into force on 1 January 2023. The purpose of the Law determined by Article 1 has been changed in relation to the Law of 2008 and now, in addition to "protection of motherhood, care of a new-born child and its rearing, harmonisation of family and business life", it includes "equal division of the rights and obligations of child-care between both parents". In order to achieve the stated purpose, the Law sets out "the right of parents and persons exercising one of the rights equal to parental rights to temporal and monetary benefits, the requirements and the method of their realization and financing."[189] It is important to point out that the following directives are taken over by the said Law into the Croatian legislation: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage the improvement of safety and health at work for pregnant female workers and female workers who have recently given birth or breastfeed (tenth individual directive in the sense of Article 16, paragraph 1 of Directive 89/391/EEC) (SL L 348, 28 November 1992), Directive 2010/41/

184 Art.1 of the Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 59/2017.

185 *Ibid*. Art.3.

186 Official Gazette No. 37/2020.

187 Art. 1 of the Law on Amendments to the Law on Maternity and Parental Benefits, Official Gazette No. 37/2020.

188 Official Gazette No. 152/2022.

189 Art.1 of the Law on Maternity and Parental Benefits, Official Gazette No. 152/2022.

EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment to self-employed men and women and repealing Council Directive 86/613/EEC (OJ L 180, 15 July 2010) and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on the work-life balance of parents and carers and repealing Council Directive 2010/18 /EU (OJ L 188, 12 July 2019). [190]Although all three mentioned directives are extremely important, for the purposes of this work, special reference will be made to the Council Directive 92/85/EEC of 19 October 1992, since it, among other things, regulates the issue of maternity leave, specifically its temporal component. Article 8 of the mentioned Directive sets out that: "Member States shall take the necessary measures to ensure that female workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after childbirth in accordance with national legislation and/or practice." [191]

The applicable Law on Maternity and Parental Benefits in the context of the temporal component of maternity leave stipulates that it is used by "an employed or self-employed pregnant woman, or an employed or self-employed mother during pregnancy, confinement and care of a new-born child, for the period of 28 days prior to the due date of confinement until the child reaches the age of six months, consisting of compulsory and optional maternity leave".[192] Obligatory maternity leave is used by an employed or self-employed pregnant woman or mother for a continuous period of 98 days, of which 28 days prior to the due date of confinement and the remaining 70 days after the birth of the child. Exceptionally, maternity leave can be used 45 days prior to the due date of confinement, if the condition and health of the employed or self-employed pregnant woman so require, as determined by the selected gynaecologist of the compulsory health insurance.[193] Optional maternity leave follows after the compulsory maternity leave expires and lasts until the child reaches the age of 6 months. The child's mother can transfer the leave completely or partially to the child's father by a written statement, subject to his prior consent.[194] Optional maternity leave can be extended if the child was born prematurely or before the 37th week of pregnancy, for as many

190 *Ibid*. Art. 2

191 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ, Chapter 05, Volume 004, pp. 73-80, Art. 8 (2), [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:31992L0085], Accessed 16 February 2024.

192 Art. 15 of the Law on Maternity and Parental Benefits, Official Gazette No. 152/2022.

193 *Ibid*. Art.15, para. 3 and 4.

194 *Ibid.* Art.15, para. 5.

days as the child was born prematurely.[195] In conclusion, considering the above, the current law also distinguishes between compulsory and optional maternity leave, which differ in duration but also in the degree of flexibility, i.e. the possibility of transfer. Obligatory maternity leave is used by the pregnant woman or the mother of the child for a period of 98 days or 115 days and cannot be transferred to the father. On the contrary, optional maternity leave, which starts on the 71st day after the birth of the child and lasts until the child reaches six months of age, can be transferred by the mother of the child to the father, completely or partially, with her written statement, subject to the father's prior consent. Furthermore, the Law provides for the possibility of an employed or self-employed mother to use optional maternity leave as a right to work part-time.[196] In the context of the monetary component of maternity leave, the current Law on Maternity and Parental Benefits stipulates that "during the exercise of the right to maternity leave, the salary compensation amounts to 100% of the salary compensation base determined according to the regulations on compulsory health insurance".[197] In order to be entitled to the salary compensation in the specified percentage, employed or self-employed parents must meet the requirement of previous insurance of at least 6 uninterrupted months or 9 months with interruptions for the last two years. Failure to fulfil the stated condition results in monetary compensation in the amount of 125% of the budget base for full-time work.[198]

9. MATERNITY LEAVE IN THE EUROPEAN UNION

Taking into account the fact that the Republic of Croatia as of 1 July 2013 became a member of the European Union, the paper deals with the issue of maternity leave in some of the EU member states through the prism of its time and money components as well as with the possibility of its transfer. It should be noted that in accordance with Council Directive 92/85/EEC, female workers have the right to uninterrupted maternity leave of at least 14 weeks distributed before and/or after childbirth. According to European Parliament data for the year 2023, the EU member states with the shortest duration of maternity leave, where the leave lasts 14 weeks, are Sweden and Germany.[199] In other countries, maternity leave lasts longer, for example in Finland 21 weeks, in Cyprus 25 weeks, in the Republic of

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195 *Ibid.* Art.15, para 6 and 7.

196 Art. 19, para.1 of the Law on Maternity and Parental Benefits, Official Gazette No. 152/2022

197 *Ibid,* Art. 32, para. 1

198 *Ibid.* Art. 32, para. 8

199 European Parliament, *Maternity and paternity leave in the EU*, 2023, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA(2023)739346_EN.pdf], Accessed 15 February 2024

Croatia 30 weeks[200], in Ireland 42 weeks.[201] The EU member state with the longest duration of maternity leave is Bulgaria, where the leave lasts 58 weeks, and Portugal is the only EU member state that does not differentiate the term "maternity" from "paternity" leave, but speaks only of parental leave.[202] For the purposes of this work, the temporal and monetary components of maternity leave will be analysed in Germany and Bulgaria as a country with the shortest and the country with the longest duration of maternity leave in the EU. Mothers in Germany are allowed 14 weeks of maternity leave, which is the minimum stipulated by the Directive. Maternity leave in Germany, specifically its temporal component, is governed by the Law on the Protection of Mothers at Work, in Training and at the University[203] (hereinafter: the Law on the Protection of Motherhood). The Section 1 of the Paragraph 3 of the aforementioned Law under the heading "Protection periods before and after childbirth" regulates the "protection period before childbirth" stating that the expectant mother may work for the last 6 weeks before childbirth only if she expressly consents to such work.[204] Furthermore, section 2 of the same paragraph regulates the "period of protection after childbirth", which states that the employer must not employ a woman until eight weeks after childbirth. The period of protection after childbirth is extended to 12 weeks in the event of premature birth, multiple births and if the child is diagnosed with a disability.[205] Only mothers are entitled to this leave, whereas fathers in Germany can use the right to parental leave. When it comes to maternity benefits, it should be pointed out that the Law on Maternity Protection in paragraph 19, section 1, stipulates that a woman with the status of insured in the state/compulsory health insurance receives maternity benefits for the period of protection before and after childbirth,

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200 According to the current Croatian legislation, maternity leave is not expressed in weeks but in days and months. Namely, the applicable Law on Maternity and Parental Benefits stipulates the duration of maternity leave to 28 days before the day of the expected birth until the child reaches the age of six months, and comprises compulsory and optional maternity leave. Compulsory maternity leave is taken for a continuous duration of 98 days, of which 28 days are taken before the day of the expected birth and 70 days are taken after the birth of the child. Exceptionally, maternity leave can be taken for 45 days before the day of the expected birth, if the pregnancy and health condition of the employed or self-employed pregnant woman so require, as determined by the selected women's health care doctor of the compulsory health insurance. Optional extended maternity leave follows the expiration of the compulsory maternity leave period and lasts until the child reaches the age of 6 months.

201 European Parliament, *op.cit.*, note 33.

202 *Ibid.* Parental leave lasts for 120 or 150 days. Reimbursement of the earning in case of a 120-day leave is 100%, whereas in case of a 150-day leave it is 80%.

203 The Law to protect mothers at work, in training and at university (Gesetz zum Schutz von Müttern bei der Arbeit, in der Ausbildung und im Studium - Mutterschutzgesetz - MuSchG) [https://www.gesetze-im-internet.de/muschg_2018/MuSchG.pdf], Accessed 03 February 2024

204 *Ibid.*

205 *Ibid.*

as well as for the confinement date in accordance with the provisions of the Social Security Law or the Farmers' Health Insurance Law. On the contrary, a woman who does not have the status of insured person in the state/compulsory health insurance receives maternity benefits at the expense of the federal state for the period of protection before and after childbirth and for the day of confinement, in accordance with the provisions of Book Five of the Social Code on Maternity Benefits, but not exceeding the total of 210 euros.[206] The net salary paid to the worker in the last 3 months before the start of the protection period, i.e. 6 weeks before the date of confinement, is relevant for the amount of maternity benefits. The maternity benefit amounts to a maximum of 13 euros per day.[207] A female worker who has the status of the insured in the state/compulsory health insurance, the employer pays the difference between the maximum amount of compensation of 13 euros per day and the net salary as a maternity benefits subsidy.[208] A female worker who does not have the status of the insured in the state/compulsory health insurance, but is privately insured, receives a one-time maternity benefit of a total of 210 euros, which is paid by the Federal Office for Social Insurance. If the average daily net salary of a female worker exceeds 13 euros per day, the employer pays the female worker a subsidy.[209] Female workers with family insurance and those employed in "mini-jobs" receive a one-time maternity benefit of a total of 210 euros, which is paid by the Federal Office for Social Insurance. It should be pointed out that a worker who works on "mini-jobs" receives maternity benefits of a total of 13 euros per day from her health insurance funds. In both cases, female workers are entitled to a subsidy from the employer if the average daily net salary of the female worker exceeds 13 euros per day. [210]

The EU member state with the longest duration of maternity leave is Bulgaria with 58 weeks or 410 days for each child, of which 45 days are used before the due date of confinement.[211] If the child is stillborn, dies or is placed in a childcare institution or is given up for adoption, the mother has the right to use the leave

206 *Ibid.* paragraph 19, section 2.

207 The Fifth Book of the Social Security Code (Das Fünfte Buch Sozialgesetzbuch - SGB V), Art. 24i, [https://sozialversicherung-kompetent.de/index.php?option=com_content&view=article&id=578:mutterschaftsgeld&catid=14:leistungsrecht-gkv], Accessed 07 February 2024.

208 The Law to protect mothers at work, in training and at university (Gesetz zum Schutz von Müttern bei der Arbeit, in der Ausbildung und im Studium -Mutterschutzgesetz - MuSchG), *op.cit.,* note 37.

209 Beta Institut gemeinnützige GmbH, *Maternity benefit (Mutterschaftsgeld),* [betanet.de/mutterschaftsgeld.htlm], Accessed 03 February 2024.

210 *Ibid.*

211 Art. 163, para 1 of the Bulgarian Labour Code, SG No. 109, [https://www.mlsp.government.bg/uploads/37/politiki/trud/zakonodatelstvo/eng/labour-code.pdf], Accessed 20 February 2024

until 42 days after confinement.[212] However, if the mother is not able to work after the aforementioned 42 days, the leave is extended in accordance with the assessment of the competent health authorities.[213] After the child reaches six months of age, the remaining leave of up to 410 days can be used by the child's father instead of the mother, with the consent of the mother.[214] It is important to emphasize that in Bulgaria, in addition to the child's father, the parents of the child's mother or father can also use the leave. Thus, the Labour Law in Art. 163, paragraph 10, stipulates that in the event when the child's father is unknown, leave can be used by either of the mother's parents, while in case of death of the child's father, the leave can be used by either of the child's father's or mother's parents. It should be noted that in Germany, fathers can use parental but not maternity leave.

The monetary component of maternity leave in Bulgaria is regulated by the provisions of the Social Security Law.[215] In accordance with the provisions of this Law, the daily monetary compensation for pregnancy and childbirth amounts to 90% of the average daily gross salary or average daily salary. The aforementioned compensation can be obtained under the condition of payment of insurance contributions, and in the case of self-insured persons, under the condition of payment of contributions in case of illness or maternity and for the period of 24 months preceding the month in which temporary incapacity for work occurred due to pregnancy or childbirth.[216] A mother who is insured in case of illness and maternity has the right to financial compensation for a period of 410 days, of which 45 days before childbirth.[217] If the child is stillborn, or dies, is placed in a childcare facility financed by the state budget, or if it is given up for adoption, the mother receives financial compensation for up to 42 days after the confinement. However, if, due to childbirth, the working capacity of the mother has not been restored 42 days after confinement, the mother is entitled to this compensation until she restores her working capacity by the decision of the competent health authority.[218] The analysis of maternity leave on the example of Germany and Bulgaria supports the existence of significant differences between these two analysed countries in the context of its duration, its monetary component, but also the possibility of its transfer.

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212 *Ibid*. Art.163 para. 4.

213 *Ibid.*

214 *Ibid*. Art.163 para. 10.

215 Bulgarian Social Insurance Code, SG No. 67/2003, [https://www.mlsp.government.bg/uploads/37/politiki/trud/zakonodatelstvo/eng/social-insurance-code-title-amended-sg-no-672003.pdf.], Accessed 24 February 2024.

216 *Ibid*. Art. 49 para.1 and 2.

217 *Ibid.* Art. 50 para. 1.

218 *Ibid*. Art. 50 para. 3.

In addition to the significant differences between EU member states regarding the temporal component of maternity leave, the available data show that there are also differences when it comes to its monetary component. Thus, in 12 EU member states, the salary compensation amounts to 100% (Estonia, Austria, Germany, Malta, the Netherlands, Luxembourg, Greece, Cyprus, France, Croatia, Slovenia and Estonia).[219] On the other hand, Hungary and the Czech Republic (70%) and Slovakia (75%) have the lowest wage compensation.[220]

The possibility of transferring maternity leave to fathers in EU countries, in most countries, as well as in Germany, is only available to mothers. However, in the Czech Republic, Croatia, Spain and Bulgaria, the mother can transfer part of the leave to the father in the event of no exceptional circumstances such as a serious illness of the mother. In other countries, maternity leave can be transferred to fathers only if there are exceptional circumstances such as the death or serious illness of the mother.[221]

10. CONSLUDING REMARKS

The area of the former Yugoslavia was characterized by an early state intervention in the area of maternity leave. In 1927, the then Kingdom of Serbs, Croats and Slovenes ratified the Convention of the International Labour Organisation on the Employment of Women Before and After Childbirth of 1919, according to which women were entitled to 12 weeks of paid maternity leave. Maternity leave became more important during the socialist period, when both parents were expected to work. At that time, marked by a sudden and strong increase in number of factories and industry, and need for workers, many women started to work. The paid maternity leave for working mothers was considered a prerequisite for women's entry into the labour market. In this way, through framework laws applicable throughout Yugoslavia, the right to paid maternity leave was gradually extended, and by the end of the socialist period, it amounted to 180 days. Namely, as the former Yugoslav republics were allowed to develop their own legislation, Croatia was in the 1970s one of the first republics in Yugoslavia to pass a new law stipulating a longer paid parental leave of 180 days, compared to the 105 days stipulated as a minimum at the federal level. In addition, at that time, Croatia, along with Slovenia, was the only republic that introduced the so-called optional maternity leave

219 European Parliament, *op.cit.*, note 33.

220 *Ibid.*

221 International Network on Leave Policies and Research, *14th International Review of Leave Policies and Related Research 2018*, [https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/Leave_Review_2018.pdf], Accessed 22 February 2024

that allowed fathers to use the leave to a certain extent. Since fathers could use optional maternity leave, instead of mothers, only if the parents agreed, i.e. if the mother agreed to it, the leave therefore still remained the mother's primary right and thus a more equal application of the right to maternity leave was not achieved.

Along with the development of family policy through norms that regulated the issue of maternity leave in the period between 1990 and 2008, when the Law on Maternity and Parental Support entered into force, the regulation of maternity leave changed as well in terms of the expansion of users of the right, but also its duration in accordance with the intensity of the changes in the normative acts. In the observed period, the right to leave and parental benefits became a universal right of all parents, parents of both sexes, both employed and unemployed. Although general principles of the universal maternity leave are defined by the Labour Law of 1995 and subsequent amendments to the Law, the regulation within the framework of special regulations, primarily the Law on Maternity Leave for Self-Employed Mothers and Unemployed Mothers expanded the number of beneficiaries of the right to maternity leave and to unemployed mothers, mothers in full-time education and unemployed mothers receiving a disability pension due to professional incapacity for work. Although the affirmed principles in the field of institution regulation in the late 1990s were in accordance with the state family policy, the restrictive measures of 2001 were a strong blow to the previously promoted and generally accepted measures. Namely, with the Amendments to the Labour Law and the Law on Maternity Leave for self-employed mothers, the right to maternity leave for mothers/parents in the period until the child reaches the age of three was reduced from three to two years, together with the amounts of monetary compensation for the period in which the right to maternity leave was exercised. These measures were corrected in 2004 by amendments to the analysed regulations in the field of maternity leave when the legal regulations re-adopted the principles and norms regulated by the earlier legislation, which coincided with the political change in power, leading to the affirmation of the family policy that had begun to develop in the mid-90s.

At the end of the observed period, and in accordance with the needs of harmonisation of Croatian legislation in the field of labour law with EU legislation, significant advances were made in terms of extending the duration of maternity leave. However, as Dobrotić claims, it should be researched more closely whether the measures that in the post-war period aimed exclusively at pro-natal policy, such as a three-year parental leave and pro-natal allowance, resulted in negative consequences for parents in terms of their status on the labour market.

Analyzing the issue of maternity leave in the Act on Maternity and Parental Support from 2008 until today, it can be concluded that maternity leave is the right of an employed or self-employed mother, which she uses during pregnancy, childbirth and child care.

In the context of the time component of maternity leave, the aforementioned Law distinguishes between cumpalsory and additional maternity leave. The difference between compulsory and additional maternity leave is not only in duration, but also in the possibility of their transfer. In the observed period, i.e. from 2008 until today, the duration of compulsory maternity leave changed, more precisely its duration was extended from 42 days after childbirth to 70 days after childbirth. It is important to point out that the Law from 2008 still considered compulsory maternity leave as the exclusive right of the mother and as such non-transferable. On the contrary, there was a possibility of transfer for additional maternity leave. Namely, the child's mother could transfer this leave to the father in whole or in part with a written statement, of course, the father's consent was also required. This solution has been maintained even today and clearly follows from the provisions of the Act on Maternity and Parental Support from 2022.

Regarding the monetary component of maternity leave, it should be emphasized that throughout the observed period, an employed or self-employed parent has the right to salary compensation during maternity leave in the amount of 100% of the salary compensation base determined according to the regulations on mandatory health insurance. This is the average amount of salary that was paid in the last 6 months before the month of starting maternity leave. It is important to emphasize that the 2008 Act on Maternity and Parental Allowances prescribes the condition of insurance years as a special condition for obtaining the aforementioned compensation. In the observed period, i.e. from 2008 to the present day, the insurance length requirement was changed so that from the initial 12 months continuously (in 2008) it has been gradually reduced and today, in accordance with the valid Maternity and Parental Support Act, it amounts to 6 months continuously or 9 months intermittently for the last 2 years. In the entire observed period, failure to meet the special condition of insurance length of service resulted in the right to salary compensation for the duration of maternity leave in a reduced amount.

If the state of maternity leave in the Republic of Croatia is compared with that in the European Union, it should be noted that there are significant differences between EU member states. There are differences regarding the time component of maternity leave (from 14 to 58 weeks), but there are also differences when it comes to its monetary component. In 12 EU member states, including the Republic of Croatia, the salary allowance is 100%. On the other hand, there are also countries

where the salary compensation amounts to only 70%. Regarding the possibility of transferring maternity leave to fathers, it should be noted that in most EU countries it is only available to mothers. However, in the Czech Republic, Croatia, Spain and Bulgaria, the mother can transfer part of the leave to the father without exceptional circumstances such as a serious illness of the mother.

Therefore, taking into account all the above, it can be concluded that the Republic of Croatia has made significant positive changes in the area of maternity leave. A particularly important step is that the insurance period requirement for exercising the right to salary compensation during maternity leave has been significantly eased, so that it now amounts to 6 months continuously or 9 months with interruptions in the last 2 years. This kind of condition, in our opinion, will be easier to achieve for all those numerous parents who work in the Republic of Croatia on the basis of a fixed-term employment contract. A step forward towards gender equality and harmonizing the family and professional life of parents is certainly the possibility of transferring additional maternity leave to the child's father. However, the question arises here, what if the father of the child dies during the pregnancy of the mother or during the mandatory maternity leave? In accordance with the provisions of the current law, which foresees the possibility of transferring additional maternity leave only in relation to the father, it can be concluded that in such an assumed situation, additional maternity leave would become practically non-transferable. Taking into account the positive effects that the possibility of transferring additional maternity leave has on the harmonization of family and professional life, we are of the opinion that the above should be changed and in such exceptional situations it should be possible for the mother of the child to transfer the additional maternity leave, under certain conditions, to other persons, for example to her or the parents of the child's father. Such a solution already exists in Bulgaria.

Furthermore, in the Republic of Croatia, according to the available data, a special problem is the fact that only a small number of fathers use the aforementioned leave. There are many reasons for this state of affairs, ranging from those of a financial nature to traditional social beliefs about gender roles in the family. Changes are necessary, and we consider raising the level of awareness about the importance of involving fathers in a child's life in the first years of life to be a good start.

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Original scientific paper

EUROPEAN CONSUMER IN SALES CONTRACT – THE ANCIENT APPROACH, *DE LEGE LATA & DE LEGE FERENDA**

Consumers, by definition, includes us all.
J. F. Kennedy

Marko Sukačić, PhD, Assistant Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, Osijek, Croatia
msukacic@pravos.hr

ABSTRACT

This paper delves into the historical roots of consumer protection in European legal history, looking beyond its contemporary association with EU regulations from the mid-70s. It explores buyer-seller dynamics, prevalent in both ancient and post-industrial societies, with a particular focus on ancient Rome. Specifically, it studies the need to shield buyers, as the vulnerable party, in sales contracts with professional sellers. It also examines who qualified as a consumer in ancient European legal history and compares it to the contemporary definition in European private law.

The first section explores the position of the consumer in ancient Roman society, analyzing legal and non-legal sources to uncover measures aimed at enhancing consumer rights against professional sellers. The role of the curule aediles, particularly their legal innovations in buyer protection, is scrutinized. The paper then transitions to EU law, specifically examining the definition of consumers in Directive 1999/44/EC and the subsequent changes introduced in Directive (EU) 2019/771.

The paper concludes with a proposal for a unified definition of consumers at the EU level, drawing insights from the ancient Roman society. It questions the feasibility of crafting a comprehensive consumer definition applicable across directives to foster consistency in consumer protection laws. In essence, the paper explores the historical inception of consumer protection, its current status in contemporary law, and suggests a forward-looking proposition for the future.

Keywords*: consumer, defect, European private law, Roman law, sales contract*

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1. INTRODUCTION

Consumer protection is hardly a contemporary concept in European legal history. While it has been a focal point of European Union (EU) consumer protection regulations since the mid-70s, its roots reach far back into European legal order, including in ancient Roman law. Across both ancient and contemporary societies, there was and is a consistent need to shield individuals, often the weaker party, from unfair practices of professional sellers. Yet, the definition of the consumer remains a subject of interpretation, both historically and today.

To truly grasp the fundamentals of consumer protection, it is crucial to delve into its historical and present-day understanding. Given the vastness of consumer protection law (encompassing the consumer's right to be informed, protection of health, and procedural right), this research zooms in on consumer protection within the realm of sales contracts, given their prevalence.

This paper unfolds in three main parts. Firstly, it traces the concept of consumerism back to ancient Roman law, examining the legal safeguards that were established for added consumer protection in sales contracts. Next, fast-forwarding to EU law, it provides a brief overview of consumer policies from the inception of the European Union to contemporary legal frameworks. This part segues into an analysis of the definition of the consumer in Directive 1999/44/EC, and the amendments introduced with Directive 2019/771, shedding light on the evolution (and similarities) of consumer definitions (in terms of sales contracts) across ancient and modern European legal history.

Furthermore, to streamline future directives within EU law and ensure consistency, the paper explores the potential for a unified definition of the consumer. In doing so, it navigates through the origins, evolution, and current status of the legal concept of consumers, while contemplating future solutions.

2. THE CONSUMER IN ANCIENT ROMAN LAW

2.1. Consumerism in Ancient Rome and Emperors' Approach to Consumer Protection

Sociologist Max Weber viewed ancient Rome as a consumer city – a notion later debated, affirmed, contested, and expanded by various scholars.[1] Under this socio-

[1] Weber, M., *The City*, translated and edited by Martindale, D.; Newuwirth, G., The Free Press, New York, 1958, p. 69, 208. For instance, see: Parkins H., *The 'consumer city' domesticated? The Roman city in élite economic strategies,* in Parkins, H. (ed.), *Roman Urbanism, Beyond the Consumer City*, Routledge, London, 1997., p. 105; Morley, N., *Cities in context: urban systems in Roman Italy*, in Parkins, H. (ed.),

historical and socio-economic model, Rome was the government and military hub, providing services to its inhabitants in exchange for taxes, land rent and other non-market transactions. Historian Finley expanded on this concept, suggesting Rome was both a consumer and a parasite city, exploiting rural residents – an idea that stirred academic discourse.[2]

Whether Rome was primarily a consumer or a parasite city remains a matter of debate, especially during the Republic and early Empire era (200 BC to 300 AD). However, if we consider Rome a consumer city, it is fitting to label its inhabitants as consumers, given that the English verb 'to consume' derives from the Latin *consumere*, meaning to use up, devour, or spend.[3]

Various sources suggest that ancient Roman society, particularly in the early Empire era, was one of consumption and pleasure, evident in various aspects of daily life.[4] Traces of consumerism beyond basic needs, particularly of luxury items such as ivory from Africa and silk from China, are well-documented.[5] This indicates that certain aspects of consumerism existed in the early Empire era, coinciding with territorial expansion and economic development, which, in turn, provided relative security to many inhabitants.[6]

However, applying the contemporary term 'consumer' to ancient Rome requires caution to avoid projecting modern perceptions onto ancient society. If regarding the consumer as one who gathers basic commodities for one's own use, then one of the earliest comprehensive measures aimed at their protection can be traced to the *Lex Iulia de Annona*. The legislation was enacted by Emperor Augustus in 18

Roman Urbanism, Beyond the Consumer City, Routledge, London, 1997, p. 41; Erdkamp, P. M., *Beyond the Limits of the 'Consumer City. A Model of the Urban and Rural Economy in the Roman World*, Historia: Zeitschrift für Alte Geschichte, Vol. 50, No. 3, 2001, pp. 332-356.

2 Finley, M. I., *The Ancient Economy*, University of California Press, Berkeley, 1973, p. 125. *Cf.* Ellickson, R.C., *Ancient Rome: Legal Foundations of the Growth of an Indispensable City,* in Dari-Mattiacci, G.; Kehoe, D.P., (eds.), Roman Law and Economics Volume 2 Exchange, Ownership, and Disputes, Oxford University Press, Oxford, 2020, p. 169.

3 Lewis, C. T.; Short, C., *A Latin Dictionary,* Clarendon Press, Oxford, 1879. Available at: [https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=consumo&highlight=consumo], Accessed 03 January 2024.

4 *Cf.* Rodgers, D.K., *Taking the Plunge: A Twenty-First-Century Look at Roman Bathing Culture*, in: Gretzke, A.E.; Brice, L. L.; Trundle, M. (eds.), *People and Institutions in the Roman Empire*, Brill, Leiden, 2020, p. 147.

5 Zimmermann, R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*, 1996, Oxford Univeristry Press, Oxford, 1996, p. 406.

6 Green, K., *Learning to consume: consumption and consumerism in the Roman Empire*, Journal of Roman Archaeology, Vol. 21, 2008, p. 67.

BC when he assumed control over the public supply of grain and wheat in Rome.[7] With a population of approximately one million inhabitants, including slaves, Rome required a significant amount of food to sustain itself.[8] Although the original text of Augustus' legislation lacks in preserved original text, fragments from Roman jurists like Marcian, Ulpian, and Papirius Justus confirm its existence and content.[9]

According to Marcian, slaves could bring criminal charges against their masters for defrauding the public grain supply.[10] Ulpian's writings in his ninth book on consular duties detailed penalties under the *Lex Iulia de Annona* for prejudicial actions harming grain supply, such as price manipulation (through forms of proto-cartels) or obstruction of transport (holding back ships). These penalties included fines of 20 aurei.[11] Additional insight into the grain supply issues is offered in the preceding book. There, Ulpian referred[12] to those profiting from raising the prices of *annona* as *dardanarii,* noting that they were subject to various punishments such as trade prohibition, deportation, or even community service.[13] A few centuries later, Justinian's *Institutiones* (I.,4,18,11) confirmed the *Lex Iulia de Annona* measures against price manipulation, with penalties less severe than death.

While the said measures targeted fraudulent sellers and their immoral practices aiming to boost profits, it is doubtful whether the population receiving free grain qualifies as consumer-buyers. After all, they did not purchase these products from

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7 *Cura annona* was Rome's grain import and the distribution system, akin to a government program providing free grain to its citizens. Initially *ad hoc*, it evolved into a permanent institution associated with the Roman state, doubling as an important political instrument. Emperor Augustus is credited for creating the permanent post of *praefectus annonae*, magistrates tasked with overseeing the city's grain supply. Emperor Tiberius later acknowledged this duty as personal and imperial. See more in: Rickman, G. E., *The Grain Trade under the Roman Empire,* Memoirs of the American Academy in Rome, *vol.* 36, 1980, p. 263.; Casson, L., *The Role of the State in Rome's Grain Trade,* Memoirs of the American Academy in Rome, *vol.* 36, 1980, p. 21-33.; Erdkamp, P. *The Food Supply of The Capital,* in: Erdkamp, P. (ed.), *The Cambridge Companion to Ancient Rome,* Cambridge University Press, New York, 2013, pp. 262-264.

8 Garnsey, P.; Saller, R., *The Roman Empire, Economy, Society and Culture*, Bloomsbury, London, 2014, p. 109, 121 *et seq.* Crisofori notes that, before Augustus implemented his measures, there were over 320,000 beneficiaries of free grains in 46 BC. Cristofori, A., *The grain distribution in the Late Republican Rome,* in: Jensen, H. (ed.), *The Welfare State. Past, Present and Future*, Edizioni Plus, Pisa, 2002, pp. 150-151.

9 Title of D. 48.12, *De lege Iulia de annona* (Lex Iulia on grain supply).

10 D. 48,12,1 Marc. 2 Inst.

11 D. 48,12,2 Ulp. 9 Off. Pro. See more in: Hamza, G., *Wirtschaft und Recht im Römischen Recht, eine Skizze zum römischen Kartellrecht,* Annales Universitatis Scientiarum Budapestinensis de Rolando, Vol. 23, 1981, pp. 91-92.

12 D. 47,11,6pr. Ulp. 8. Off. Pro.

13 The name of the delict itself was *dardanariatus. Cf.* Cowen, D.V., *A survey of the law relating to the control of monopoly in South Africa,* South African Journal of Economics, *vol.* 18, no. 2, 1950, p. 126; Hamza, *ibid.*, p. 93. Bekker, E.E., *Monopolies and the role of the competition board,* Journal of South African Lax, No. 4, 1992, p. 619.

professional sellers but received them either for free or at preferential prices. Nevertheless, without a doubt, these measures can be viewed as a form of proto-consumer protection legislation.

A similar perspective on consumers could be viewing them as amateur buyers entering mandatory sales contracts with professional sellers to buy essential goods like food and basic provisions. The professional sellers' advantage then stems from their business and negotiation experience honed through the sheer number of sale contracts.

In this context, one explicit legal text with the provision aiming to protect consumers in the Roman Empire was the *Lex Flavia Irnitana*,[14] a municipal law issued by Emperor Domitian in 91 AD for communities in Spain. This law, stemming from an earlier grant of *ius Latii* by Emperor Vespasian, prohibited speculative practices, hoarding, and cartel arrangements aimed at price manipulation, clearly with a view to safeguarding the interests of consumer-buyers by preventing price distortions and ensuring fair market distribution.[15]

Although the impact of this provision is uncertain, particularly due to its brevity and ambiguity, it indubitably applied to all goods (as visible from the Latin word *quit*),[16] not just essentials like food, indicating a broader intent to prevent excessive pricing. Given its provincial origin, similar administrative measures likely existed in Rome, possibly much earlier.

A harsh yet unsuccessful attempt at price control was made by Emperor Diocletian in 301 AD. With the Roman Empire facing economic and military challenges, trade reverted to barter, leading to rampant inflation and economic crisis. Diocletian responded by issuing the *Edictum de pretiis rerum venalium*.[17] While the original text of the edict was not preserved, plentiful epigraphic evidence shows that

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14 Lex Flavia Irnitana 75: *Ne quis in eo municipio quid coemito supprimito neve coito convenito, societatemue facito, quo quit carius veneat, quove / quit ne veneat setiusue veneat.* Full translation available in González, J.; Crawford, M., *The Lex Irnitana: A New Copy of the Flavian Municipal Law*, The Journal of Roman Studies, Vol. 76, 1986, p. 193.

15 Casico, E. L., *Setting the Rules of the Game*, in: Dari-Mattiacci, G.; Kehoe, D.P., (eds.), Roman Law and Economics Volume 2 Exchange, Ownership, and Disputes, Oxford University Press, Oxford, 2020, p. 117.

16 Galsterer, H., *Municipium Flavium Iridium: A Latin Town in Spain,* The Journal of Roman Studies, Vol. 78, 1988, p. 85.

17 Zimmermann, R., *op. cit.,* note 5, p. 260; Temin, P., *The Roman Market Economy,* Princeton University Press, Princeton, 2013, p. 77; Alonso, J.J.; Babusiaux, U., *Papyrologische und epigraphische Quellen,* in: Babusiaux, U. *et al.* (eds.), *Handuch des Römischen Privatrechts,* Band I, Mohr Siebeck, Tübingen, 2023, p. 294. Full text and translation (in German) in: Lauffer, S., *Diokeltians Preisedikt*, de Gruyter, Berlin, 1971, p. 90 *et seq.*

it imposed maximum prices for over 900 goods and services (products, materials, slaves, animals, labor etc.), excluding certain (major) commodities like iron, copper and bronze.[18] Despite severe penalties for non-compliance, including death, the edict's effectiveness in protecting consumers was undeniably minimal. After Diocletian's death, it became obsolete, highlighting the impracticality of such measures. While most goods and services subject to fixed prices were those purchased by the army,[19] the edict reflects Diocletian's aim to curb market profiteering by those controlling prices, indirectly contributing to consumer protection. Nonetheless, history has repeatedly demonstrated the ineffectiveness of such measures.

2.2. The *Curule Aediles* impact

The origins of institutional consumer-buyer protection can be traced back to the Western Roman Empire, particularly in the Rome predating the above described emperors' measures. If considering a typical Roman consumer as a buyer, not necessarily of groceries, then the crucial role in protecting their legal position was introduced rather early by magistrates known as *aediles curules.* In most of early Roman history, *aediles* were semi-police magistrates responsible for preventing forgery of legislative *senatus consulta*, which they safeguarded in the Temple of Ceres.[20,21] However, their role expanded as early as 367 BC, when they gained additional competences and the name *curules*.[22] Among their vital duties was supervising and controlling the slave and livestock market, with the authority to adjudicate disputes between sellers and buyers, giving them both a policing and judicial role, as evidenced by their power of *iurisdictio* and *ius edicendi*.

Similar to *praetor*, the key Roman magistrate, *aediles* also issued an edict specifying cases in which they would enable litigation.[23] Under the edict, sellers in the market were obligated to inform buyers about certain unwanted features and defects in slaves they were selling (illness, physical handicaps), or behavioral issues (prone-

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18 Michell, H., *The Edict of Diocletian: A Study of Price Fixing in the Roman Empire*, The Canadian Journal of Economics and Political Science, Vol. 13, No. 1, 1947, p. 2, 6.

19 *Ibid.*

20 Ceres was a goddess of agriculture, grain crops, fertility and motherly relationships.

21 According to Pomponius and Varro, their name derived from their temple (*aedes*) overseeing duties. Pomp. D. 1,2,2,21; Varro, De lingua latina libri XXV, V, 81. *Cf.* Jakab, E. *Praedicere und cavere beim Marktkauf*, Beck, Münich, 1997, p. 98.

22 The term *curules* also refers to the right to use the *curule* seat, which symbolizes power. See more in: Herbert Felix Jolowicz, H. F.; Nicholas, B., *A Historical Introduction to the Study of Roman Law*, Cambridge University Press, Cambridge, 1972, pp. 49-50; Lintott, A., *The Constitution of the Roman Republic*, Oxford University Press, Oxford, reprint 2009, pp. 129-130.

23 Only partial quotes of the edict remain in Justinian's Digest. The most influential source containing a direct quote of *aediles*' edict is D. 21,1,1,1, Ulp. 1 ed. aed. cur.

ness to escape or attempt suicide), or noxal liability. Some cases were borderline and might seem trivial from a contemporary perspective, such as disputes among jurists regarding whether a missing tooth constituted a hidden defect.[24]

If sellers failed to disclose defects specified in the *aediles*' edict and the bought slave displayed them, sellers were liable regardless of their knowledge. Buyers had two options: rescind the contract and return the slave for a refund (later known as *actio redhibitoria*) or keep the slave but seek price reduction on account of the defect's impact of value (*actio quanti minoris*).[25] Additionally, *aediles* required sellers to provide buyers with a contractual warranty in oral form (*stipulatio duplae*) promising the absence of defects in slaves or livestock,[26] offering buyers assurance against deception (with the seller promising to refund "double the price" if the buyer was deceived).

The emergence of *aediles*' legal practice stemmed from issues of information asymmetry, where buyers were unaware of potential defects or mislead about the goods they were purchasing.[27] Many sellers exaggerated or lied during pre-contractual negotiations, which was permissible to a certain extent. For instance, classical jurist Florentin noted that visible defects exempted sellers from liability, as the buyers had the chance to observe them.[28] Nevertheless, the fine line between permissible embellishment and impermissible deception varied case by case and was open to interpretation.

As Frier and Kehoe highlight, large commercial transactions, particularly those involving complex goods like slaves, attracted swarms of less scrupulous traders,

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24 D. 21,1,11 Paul 11 ad Sab. or Gellius, Noctes Atticae 4,2,12.

25 Buyers could rescind the sales contract within six months of its conclusion, and could request a price reduction within a year. See more in detail in: Arangio-Ruiz, V., *La compravendita in diritto romano,* Jovene, Naples, 1954, pp. 361-393; Kaser, M., *Das Römisches Privatrecht*, Erster Abschnit, Beck, Münich, 1971, p. 559; Zimmermann, R., *op. cit.,* note 5, pp. 315-316; Ernst, W., *Klagen aus Kauf,* in: Babusiaux, U. *et al.* (eds.), *Handuch des Römischen Privatrechts,* Band II, Mohr Siebeck, Tübingen, 2023, p. 2231 *et seq.*

26 D. 21,2,37,1 Ulp. 32 ed. or D. 21,2,31 Ulp. 42 Sab. The seller's liability could also be reduced to *stipulation simplae.* See more in: Platschek, J., *Strict Liability for Defects as to Quality of an Object Sold*, in: Babusiaux, U.; Igimi, M., (eds.), *Messages from Antiquity, Roman Law and Current Legal Debates*, Böhlau, Köln, 2019, pp. 18-19, 31.

27 Wyrwinska, K., *New Institutional Economics in Research on Roman Law*, in: Benincasa, Z.; Urbanik, J., (eds.), *Mater Familias, Scritti Romanistici per Maria Zabłocka*, The Jorunal of Juristic Papyrology, Varsaw, 2016, pp. 1194-1195.

28 D. 18,1,43pr. Flor. 8 inst. *Cf.* Nicholas, B., *Dicta Promissave*, in Daube, D. (ed.), *Studies in the Roman Law of Sale,* Clarendon Press, Oxford, 1959, p. 98-99; Donadio, N., *La tutela del comparatore tra actiones aedilicae e actio empty*, Giuffre editore, 2004, p. 177-179; Sukačić, M., *Some remarks on slave sellers' liability under Roman Law,* Pravni vjesnik, Vol. 38, No. 1, 2022, p. 52, 60.

creating what they termed a "lemon market." In such markets, prices were driven down due to an influx of low-quality slaves, and buyers insisted on hefty discounts. Consequently, sellers offering defect-free slaves were deterred from entering the market, fearing they would not receive fair value.[29] Thus, relying solely on freedom of contract and the unofficial paradigm of *caveat emptor*[30] was insufficient. A degree of institutional intervention was necessary to protect inexperienced buyers, restore market equilibrium and encourage honest sellers to participate. This illustrates that the proto-consumer was not merely someone buying groceries but rather a disadvantaged buyer forced to engage with professionals in a market where rule-breaking was common. When the imbalance heavily favored sellers, the entire market suffered, prompting the need for institutional action.

Over time, extending from the era of Emperor Diocletian (284-305 AD) to the reign of Emperor Justinian in the sixth century, the scope of rules governing contract rescission or price reduction began to encompass all goods traded, not just slaves and livestock. This evolution culminated in the Byzantine Empire, when Emperor Justinian compiled the Digest, incorporating classical jurists' quotes. These sources explicitly state that the rules set by the *curule aediles* apply to all goods in legal transactions, including immovables.[31] Given that other sources primarily addressed slaves and livestock, the inclusion of 'all goods' in the Digest likely reflects interpolations made by the Digest's compilers. The broadening of consumer protection measures was likely prompted by the effectiveness of the *aedile* rules in dealing with issues concerning slaves and livestock, prompting their application to other goods as well. This likely occurred well before the Digest was compiled.[32]

Hence, the ancient Roman legal system did provide some form of institutional proto-consumer-buyer protection, albeit with notable limitations. Initially, this

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29 Frier, B. W.; Kehoe, D., *Law and Economic Institutions*, in Scheidel, W.; Morris I.; and Saller, R., (eds.), *The Cambridge Economic History of the Greco-Roman World*, Cambridge University Press, Cambridge, 2007, pp. 119-120.

30 The paradigm essentially means "let the buyer beware," suggesting that buyers should exercise extreme caution when inspecting goods they intend to purchase. While the term originates from seventeenth-century common law (not from Roman law sources) and is in Latin, it applies, to some extent, to Roman law on sales. *Cf.* Rabel, E., *Nature of Warranty of Quality*, Tulane Law Review, Vol. 24, No. 3, 1950, pp. 274–276; Zimmerman, T. *op. cit.,* note 5, pp. 306–308; Ernst, W. *op. cit.,* note 25, pp. 2208-2209.

31 D. 21,1,1pr. Ulp. 1 ed. aed. cur.

32 *Cf.* Lanza, C., *D. 21.1. "res se moventes" e "morbus vitumve"*, Studia et documenta historiae et iuris, *vol.* 70, 2004, p. 120; Donadio, *op. cit.* (n. 28), p. 241; Sukačić, M., *Primjena pravila edikta kurulskih edila na nekretnine* (rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes*)* [*The Application of the Curule Aediles Rules on Immovables (*rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes*)*], Zbornik Pravnog fakulteta u Zagrebu, Vol. 72, No. 6, 2022, pp. 1459-1460.

protection was contingent on the type of goods sold (*ratione materiae*) and the location of the transaction, i.e., contract conclusion (*ratione loci*). Although the surviving sources do not explicitly state that these rules were primarily intended to regulate transactions involving professional sellers, it is inferred from their (and the *aediles*') intent, mainly targeting such sellers. Therefore, the extent of protection was also contingent on the parties involved (*ratione personae*). As these rules specifically pertained to livestock and slaves traded in markets, the explicit definition of the consumer itself is not mentioned in sources. However, by way of deduction from the above, one could propose defining a consumer-buyer in classical Roman law as an amateur buyer entering into a mandatory sales contract for slaves or livestock at a market, where the seller is a professional in that trade.

3. EVOLUTION OF CONSUMER AGENDA IN EU LEGISLATION

3.1. First Steps in EU Policies

Moving from ancient times to the post-modern era, the need for consumer protection remains unchanged. As if no time had passed, consumers are still in need of legal and administrative protection. Even at the outset of the European Community, policies were not aimed at consumers or their protection whatsoever. The Treaty of Rome,[33] the Community's founding document, provided no consumer-related competences to the Community. References to consumers were sparse, primarily confined to agricultural policies (Articles 39 and 40) and competition policies (Articles 85 and 86).[34] However, Article 117, addressing social provisions, provided a window. It empowered the Community to enhance living standards and working conditions, paving the way for consumer protection to be recognized as a social policy, specifically, at the Paris Summit of October 1972. Despite this, consumers were profoundly affected by the inception of the Common Market, particularly in regard to agriculture and competition.[35]

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33 Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

34 Article 39 emphasizes ensuring that "supplies reach consumers at reasonable prices," while Article 40 prohibits "discrimination between producers or consumers within the Community" under the common organization. Article 85 prohibits agreements between undertakings that impede the common market, except when they contribute "to improving the production or distribution of goods or to promoting technical or economic progress," while ensuring consumers benefit fairly. Lastly, Article 86 addresses the abuse of dominant position, citing examples such as limiting production, markets or technical development to the detriment of consumers.

35 Leucht, B.; Meyer, J. H., *A citizens' Europe? Consumer and environmental policies*, in: Leucht, B.; Siedel K.;Warlouzet, L. (eds.), *Reinventing Europe, The History of the European Union, 1945 to Present,* Bloomsbury Academic, London, 2023, pp. 204, 212-213.

Other important aspects of consumer protection in the early days of the European Union include consumer interest groups, such as the *Bureau européen des unions de consommateurs*,[36] advocating for consumer protection within the new Common Market. They underscored concerns about how open borders, protectionism, and other Member State interventions (as aimed at protection of social values and goods) might affect consumers and disrupt the free flow of goods envisioned for the Common Market.[37] These groups argued that while consumers could benefit from European market integration, they also risked losing out. As a response, the Council of the EEC adopted a preliminary program for consumer protection and information policy in 1975.[38]

> The program introduced five fundamental rights for consumers:
> (a) the right to protection of health and safety,
> (b) the right to protection of economic interests,
> (c) the right of redress,
> (d) the right to information and education,
> (e) the right of representation (the right to be heard).[39]

While the wording of these five rights may seem original, it was actually adapted from US President John Kennedy's 1962 special message to Congress on consumer interest protection, with minor modifications.[40] Following the adoption of the program, the Commission embarked on aligning the varying legislation on consumer protection across Member States.[41] However, progress was slow. For instance, the Commission's proposal Directive concerning liability for the defective products of 1976 was not adopted by the Council until 1985,[42] a nine-year gap. Subsequent to the initial program, second and third preliminary programs

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36 See more in: Docter, K., *The Early Years of the European Consumer Organization BEUC, 1962-1985,* in: Micklitz, H. W. (ed.), *The Making of the Consumer Law and Policy in Europe,* Hart, Oxford, 2021, p. 32.

37 *Ibid.,* 214. *Cf.* Bourgoignie, T.; Trubek, D., *Consumer Law, Common Markets and Federalism in Europe and the United States vol.* 3 in: Cappelletti, M.; Secommbe, M.; Weiler, J. (eds.), *Integration Through Law, Europe and the American Federal Experience*, de Gruyter, 1986, p. VI.

38 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. OJ C 92, 25 Apr 1975.

39 Preliminary programme of the European Economic Community for a consumer protection and information policy OJ C 92, 25 Apr 1975.

40 Kennedy, J.F, *Special message to Congress on protecting consumer interest*, 15 March 1962, available at: [https://www.jfklibrary.org/asset-viewer/archives/jfkpof-037-028#?image_identifier=JFKPOF-037-028-p0001], Accessed 3 January 2024.

41 Leucht, B.; Mayer, J. H., *op. cit.,* note. 35, p. 215.

42 Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7 Aug 1985.

for consumer protection and information policy were introduced in 1981,[43] and 1986,[44] respectively, highlighting the molasses-like impact of the so-called soft law.[45]

The landscape changed significantly with the landmark Cassis de Dijon case,[46] where the Court of Justice of the EU (CJEU) introduced the doctrine of mutual recognition. This gave the Commission a more efficient tool for developing a new approach to the creation of the Common Market.[47] The recognition of consumer protection as an autonomous policy goal in the internal market was introduced in 1987 with Article 100a of the Single European Act.[48] Regrettably, this legislation did not grant the Community competences for secondary legislation. Another recognition and direct mention of the 1975 preliminary program by the CJEU came with the GB-INNO case in 1990,[49] confirming the program's influence and importance. In other words, case law aimed at the completion of the Common Market ultimately significantly influenced consumer protection. The 1993 Maastricht Treaty marked another significant step, explicitly addressing Consumer Protection in Title XI, Article 29a:

"The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."[50]

The Maastricht Treaty marked a shift from non-binding soft law to granting legislative competences to the Community. In doing so, it officially broadened the EU's competences in the field of consumer protection. However, its powers were limited with the subsidiarity principle, allowing the EU to act only where the ob-

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43 Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ C 133, 03 June 1981.

44 Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests OJ C 167, 5 July 1986.

45 Benöhr, I., *EU Consumer law and Human rights,* University Press, Oxford, 2013, p. 19.

46 Case 120/78 Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649

47 Leucht, B.; Mayer, J. H., *op. cit.,* note 35, p. 215. *Cf.* Weatherill, S., *EU Consumer Law and Policy,* Elgar Publishing, shining, 2005, pp. 46-47.

48 Single European Act OJ L 169, 29 June 1987.

49 Case C-362/88 GB–INNO–BM v. Confédération du Commerce Luxembourgeois (CCL) [1990] ECR I-667.

50 Treaty on the European Union (Maastricht Treaty), OJ C 191, 29 July 1992.

jectives of a given action cannot be sufficiently achieved by the Member States.[51] This Maastricht Treaty novelty substantially limited the possible actions of the Community. As a result, consumer protection largely relied on existing tools: one being the enforcing of competition rules and ensuring of free movement, and, the other, harmonizing of (mostly private) law.[52] This trend continued with the Amsterdam Treaty[53] and its Article 153(1), which mandated the Community to ensure a high level of consumer protection, and expanded consumer rights to include information, education, and organization.

After 2000, three significant changes unfolded in consumer policy. Firstly, the principle of full harmonization was introduced with the Consumer Policy Strategy 2002–2006.[54] This aimed to progressively adapt existing consumer directives from minimum to full harmonization measures. While full harmonization fosters economic integration and encourages cross-border consumer trade, thus promoting competition and potentially reducing prices, it could also dilute consumer protection in certain states (specifically, the states that had granted the consumer broader rights, under the minimum harmonization approach).[55]

Secondly, the Charter of Fundamental Rights,[56] signed in 2000 and enforced in 2009, and, specifically, its Article 38 addressing solidarity, mandated all EU policies to ensure a high level of consumer protection. The extent of its application, however, remains debatable.

Thirdly, the Lisbon Treaty, which came into force in 2009,[57] did not introduce substantial changes in consumer protection. However, it relocated the former Article 153(2) of the Amsterdam Treaty, which dealt with consumer affairs, to Article 12 of the Treaty on the Functioning of the European Union, indicating the growing importance of the topic. Additionally, the Treaty on European Union, in Article 6, recognizes the rights, freedoms and principles outlined in the Charter of Fundamental Rights, stipulating that they hold the same legal value as the Treaties. In essence, this places a high level of consumer protection on par with the Treaties, underscoring the acknowledgment of its significance.

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51 Weatherill, S., *op. cit.,* note 47, p. 19.

52 Leucht, B.; Mayer, J. H., *op. cit.,* note 35, p. 216.

53 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10 Nov 1997.

54 Communication from the Commission of 7 May 2002— 'Consumer Policy Strategy 2000–2006', COM (2002) 208 final—OJ 2002 C137/2.

55 Benöhr, I., *op. cit.,* note 45, p. 33.

56 Charter of Fundamental Right of the European Union, OJ C 326, 26 Oct 2012.

57 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010.

3.2. Sale Contract Solutions

Having reviewed the evolution of consumer protection agenda and policies, the paper zooms in on consumer protection in the domain of sales contacts. Navigating the diverse landscape of consumer protection across the 27 EU Member States poses a challenge due to significant variations in sales rules and respective consumer concepts. Unlike a uniform consumer society, the EU comprises numerous (mini) consumer societies. (This also holds true for the legal cultures of Member States.) Consequently, defining the consumer becomes complex, mainly due to differing approaches to EU private law (at the EU and national levels). Additionally, the approach to national legislation development is also contingent on the national legal culture.[58] This diversity makes crafting a universal definition applicable across all Member States exceedingly difficult, if not virtually impossible.

Prior relevant directives aside, the Commission's 1993 Green Paper, concerning guarantees and after-sales services, marked a significant milestone in the realm of sales contracts. This document reviewed guarantee laws across the then 12 Member States, addressing disparities and proposing solutions.[59] Of particular relevance is Chapter 2.2, titled 'Harmonisation focusing on consumer protection.' It suggests a definition of the consumer akin to that in the preceding consumer protection directive (Unfair Terms Directive) as "any natural person who […] is acting for purposes which are outside his trade, business or profession."[60] While dubbed a consumer wish list of guarantees protection,[61] the Green Paper's influence cannot be overstated. It influenced the creation of the Consumer Sales Directive (CSD 1999),[62] a cornerstone legislation in EU consumer protection.

The CSD 1999 exemplifies the minimum harmonization approach, setting a baseline for consumer protection across EU Member States.[63] Despite its value, issues inherent to minimum harmonization persist. The preamble underscores the

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58 Beale, H., *et al., Cases, Materials and Text on Contract Law,* third edition, Hart, Oxford, 2019, p. 175. *Cf.* Scarpellini, E., *Consumer societies in Europe after 1945,* in: Hesee, J.O. *et al.* (eds.), *Perspectives on Euroepan Economic and Social History,* Nomos, Baden, 2014, p. 174.

59 Green Paper concerning guarantees and after-sales services, COM/93/509 final, p. 83.

60 Article 2(b) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 Apr 1993.

61 Zollers, F. E.; Hurd, S. H.; Shears, P., *Consumer Protection in the European Union: An Analysis of the Directive on the Sale of Consumer Goods and Associated Guarantees*, University of Pennsylvania Journal of International Law, Vol. 20, No. 1, 1999, p. 105.

62 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999.

63 Howells, G.; Đurović, M., *The Rise of EU Consumer Law between Common Law and Civil Law Legal Traditions*, in: Elizade, de, F. (ed.), *Uniform Rules for the European Contract Law? A Critical Assessment,* Hart, Oxford, 2018, p. 118.

fundamental role that consumers play in the completion of the internal market, emphasizing the need to safeguard their economic interests. Echoing sentiments from the 1975 preliminary program, economic protection stands as a fundamental consumer right. The Directive's first chapter offers definitions, characterizing the consumer as "any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession" – a definition consistent with the Green Paper and the Unfair Terms Directive. Notably, the definition of the consumer is slightly narrower than those of other directives.[64] For instance, the Consumer Rights Directive[65] broadens the scope of the definition to include "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession." Even though the two may appear identical, 'purposes that are not related to the trade, business or profession' is more restrictive then 'purposes that are outside of the trade, business, craft or profession.' This subtle difference suggests that if a buyer's purpose for purchasing goods is linked to their professional activity, they may not qualify as a consumer under the CSD 1999.

In the Faber case, the CJEU ruled that national courts of Member States hold the authority to determine whether a buyer qualifies as a consumer on a case-by-case basis.[66] This means that Member States have the autonomy to interpret the definition as their own discretion, potentially adding to the legal ambiguity. Some Member States have opted for a broader interpretation, encompassing small businesses and other legal persons.[67] While extending protection to such entities is understandable, especially when purchasing goods unrelated to their business, it seriously undermines the uniformity of the definition and may introduce ambiguity in its application.

The CSD 1999 defines the consumer as a natural person, a concept generally clear in both practice and academic discourse. However, the condition that the purpose of the purchase should not be related to trade, business or profession can lead to complexities, as illustrated by a German case.[68] Here, a buyer purchased goods

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64 Howells, G.; Twigg-Flesner, C.; Wilhelmsson, T., *Rethinking EU Consumer Law,* Routledge, Milton Park, 2018, p. 173.

65 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011.

66 Case C-497/13 [2015] Froukje Faber v Autobedrijf Hazet Ochten BV. ECLI:EU:C:2015:357.

67 Canavan, R., *Contracts of Sale,* in: Twig-Flessner, C. (ed.), *Research Handbook on EU Consumer and Contract Law,* Elgar, Cheltenham, 2016, p. 270.

68 BGH 30 Sep 2009 VIII ZR 7/09. *Cf.* Suzuki-Klasen, A.K., *A Comparative Study of the Formation of Contracts in Japanese, English, and German Law*, Nomos, 2020, p. 214.

for personal use but requested delivery to their workplace. The German national court ruled the buyer as a consumer, emphasizing that delivery to the workplace did not negate their consumer status. Similarly, the Hungarian Supreme court determined that even suppliers (businesses) can, in certain circumstances, classify as consumers, granting them legal protection.[69] Lastly, the Dutch Court of Appeal extended consumer status to natural persons who initially purchase goods for personal use but later sell them professionally.[70]

The CSD 1999 defines the seller as any natural or legal person who, under a contract, sells consumer goods in the course of their trade, business or profession. The challenge lies in determining when a transaction falls under trade, business, or profession. Canavan questioned whether this relates to profit or if even incidental sales by professionals could fall under the CSD 1999.[71] Article 7 of the CSD 1999 makes any pre-contract agreements between the consumer and the seller that waive or limit the rights under the CSD 1999 invalid once a lack of conformity arises. Thus, it is crucial to ascertain the applicability of the CSD 1999 before entering a contract. Although the CSD 1999 lacks a definition of a sales contract, its absence during consumer protection law harmonization is understandable, given that its incorporation could have impacted traditional civil law concepts of sale in Member States. Lastly, the CSD 1999 defines the object of the sales contract, i.e., consumer goods, as tangible movable items,[72] raising potential disputes over distinguishing between typical goods and consumer goods (especially since there is no clear distinction between tangible consumer goods and other tangible goods). Ultimately, the application of CSD 1999 rules hinges more on defining the parties involved (consumer and seller) rather than the object itself.

The CSD 1999 reshaped the private legal frameworks of Member States, introducing a distinction between consumer sales (between professional sellers and consumer buyers) and non-consumer sales (all other forms of sales contracts).[73] Implementation varied across Member States with Germany undergoing a comprehensive obligations law reform (*Schuldrechtsmodernisierung*), while the Neth-

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69 Magyar Köztársaság Legfelsőbb Bíróság Legf Bír Gf VI. 30.642/2000.

70 Court of Appeal, Hertogenbosch, 17 April 2018, 200.223.477_01. Summary available at: [https://e-justice.europa.eu/caseDetails.do?idTaxonomy=36728&idCountry=20&plang=nl], Accessed 25 January 2024.

71 Canavan, R., *op. cit.,* note 67, p. 271.

72 Certain exclusions apply, such as goods sold by way of execution, water, gas, and electricity. Member States may add further exclusions, such as second-hand goods.

73 Keirse, A. L. M.; Loos, M. B. M., *Alternative Ways to Ius Commune, The Europaisation of Private Law*, Intersentia, Cambridge, 2012, p. 7.

erlands[74] and Croatia took different approaches. The Netherlands supplemented existing regulations, a method also adopted by Croatia, then a candidate state, which amended its civil obligations act instead of enacting a new consumer protection act.[75] However, this approach, while technically correct, lacks transparency and clarity in legal texts, especially since additional acts on consumer protection were enacted, but only in regard to other consumer protection directives.[76] While nomothetically sound, this scattered approach makes it challenging for everyday buyers to discern when they are consumers and when they are not – a distinction with significant consequences.

On 20 May 2019, the EU replaced the CSD 1999 with the new Directive 2019/771/EU on certain aspects concerning contracts for the sale of goods (CSD 2019).[77] Unlike its predecessor, the CSD 2019 is a full harmonization directive,[78] meaning Member States no longer have the discretion to implement regulations that are more lenient or more stringent than the CSD 2019. The definition of 'consumer' remains unchanged, referring to any natural person who is acting for purposes which are outside that person's trade, business, craft or profession. Additionally, the CSD 2019 introduces a definition of the sales contract, specifying it as any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer in exchange for payment. While the CSD 2019 aims for legal clarity with this definition (paragraph 17 of its preamble), its impact on the fundamental structure of civil law in Member States remains uncertain in the long term, particularly concerning the sales contract – a cornerstone of private law. This definition solely applies to consumer sales contracts, effectively creating two distinct sets of sales contract rules within each Member State.

The definition of the consumer in the CSD can lead to complexities, especially when a natural person is acting for both private and professional purposes, such

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74 Hesselink, M., *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*, in: Vogenauer, S.; Weatherill, S., *The Harmonisation of European Contract Law Implications for European Private Laws, Business and Legal Practice*, Hart, Oxford, 2006, p. 46; Zimmermann, R., *Contract Law Reform: The German Experience*, in: idem, pp. 71-72.

75 At that moment, *Zakon o obveznim odnosima* [Civil Obligations Act] (Offical Gazette No. 35/05, 41/08) was in effect.

76 At that moment, *Zakon o zaštiti potrošača* [Consumer Protection Act] (Official Gazette No. 96/03) was in effect.

77 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22 May 2019.

78 Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

as buying software for personal use on a computer also used for business.[79] A similar scenario was addressed in the Gruber case of 2005, concerning international jurisdiction. The CJEU ruled that the definition of the consumer should be interpreted restrictively.[80] According to the ruling, a person who enters a contract for goods intended for purposes that are partially connected to their trade or profession may be considered as a consumer only if the professional purpose of the trade is minimal compared to the overall context of the contract. In essence, if a contract is partially related to a person's profession (but not entirely), they may not be regarded as a consumer under procedural (private international law) rules of jurisdiction.

In a more recent case, the Milivojević decision tackled a similar issue in private international law.[81] Here, the CJEU ruled that a person who concluded a credit agreement to renovate property (specifically, their domicile) for tourist accommodation purposes cannot be classified as a consumer under the Brussels 1 Regulation.[82] This Regulation defines the consumer in relation to the purpose of the contract, specifying that it applies when the contract is clearly for private purposes, i.e., outside the buyer's trade or profession – a determination made by the competent court. However, under national and material private law, such individuals may still be considered consumers, as seen in cases from Germany or Netherlands,[83] and even under the new CSD 2019. The preamble of the CSD 2019 acknowledges this, allowing Member States to determine whether buyers in dual-purpose contracts should be considered consumers. However, as seen before, this dual system can lead to confusion and legal uncertainty, leaving buyers, sellers, and even courts unsure of the buyer's (consumer) status.

Considering all the points discussed, it is clear that both the old and the new CSD primarily address the sales contract, specifying the parties involved and the object of the contract.[84] While the definition of the consumer remains unchanged, the

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79 Loos, M., *Consumer Sales and Digital Contracts in The Netherlands after Transposition of the Directives on Digital Content and Sale of Goods*, Amsterdam Law School Research Paper No. 16, 2022, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155453#], Accessed 25 January 2024.

80 Case C-464/01 Johann Gruber v Bay Wa AG [2005] ECLI:EU:C:2005:32.

81 Case C-630/17 Anica Milivojević v Raiffeisenbank [2019] ECLI:EU:C:2019:123. See more on both Gruber and Milivojević in: Calvo Caravaca, A. L., *Consumer contracts in the European Court of Justice case law. Latest trends*, Cuadernos de Derecho Transnacional, Vol. 12, No. 1, 2020, pp. 93-94.

82 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 Dec 2012.

83 Loos, M, *op. cit.,* note 79. *Infra,* cases quoted in notes 68 and 70.

84 *Cf.* Kanceljak, I.*, Reform of Consumer Sales Law of Goods and Associated Guarantees - possible impact on Croatian private law*, in: Petrašević, T.; Duić, D., (eds.), *EU and comparative law issues and challenges*

new CSD introduces a definition for the sales contract, potentially clarifying when a buyer qualifies as a consumer. However, the inclusion of rules on private international law adds to the confusion and uncertainty, as a person may be a consumer under material law but not for jurisdictional purposes. This does not affect their material rights but adds complication to an already complex legal landscape. Thus, the seemingly straightforward question of who qualifies as a consumer is fraught with unanswered sub-questions that complicate the matter.

4. CONCLUSION OR FORWARD-LOOKING PROPOSITIONS

This research reveals that defining who qualifies as a consumer hinges on several factors. Looking back to ancient Roman times, it is evident that the concept centered on protecting the less privileged party in a sales contract, often the buyer, from exploitation by professional sellers. Though Roman law does not explicitly define the consumer, historical records show legal measures were in place to safeguard their interests, including protection from unfair pricing by emperors and oversight by *curule aediles* in sales contracts. The *aediles* protection was contingent on factors such as the type of goods sold (*ratione materiae*), where the contract was concluded (*ratione loci*), its nature (*ratione negotii*), and the parties involved (*ratione personae*). A possible definition of the consumer-buyer in classical Roman law might be: "an amateur buyer concluding the mandatory sales contract for slaves or livestock in the market, with the seller being a professional in such transactions."

In revisiting recent legal developments in Europe, consumer protection emerges as a growing concern. Despite the absence of direct mentions in the early European Community texts, the consumer's position was formally acknowledged in 1972, and has since evolved. Interestingly, while the Treaties, the Single European Act and the Charter of Fundamental Rights of the European Union emphasize consumer rights and protection, none provide a clear definition of the 'consumer.' However, both the old and the new CSD offer definitions akin to Roman law, revolving around the (consumer) goods involved (*ratione materiae*), the contract itself, as defined in CSD 2019, (*ratione negotii*), and the parties involved, specifically, the consumer and the seller (*ratione personae*).

The quest for a uniform definition of the consumer across all Member States hinges largely on the political landscape of the EU. It requires Member States' consent for further harmonization, which may entail the loss of longstanding legal traditions and identities, thus explaining the Member States' resistance. However, the reality of the single market and cross-border shopping does not wait for consensus. The

series, Vol. 2, 2018, p. 593.

complexity of EU and national legislation often leaves everyday consumers grappling with uncertainty. After all, we are all consumers in some form or another when purchasing goods, but sometimes the line blurs, like when using software on a personal computer for both personal and business purposes. Determining the strength of this connection is subjective and open to debate. Even in casual discussions, crafting a universal definition proves challenging. Overly complex definitions risk excluding much-needed consumer protection, leaving individuals uncertain about their status. This research only scratches the surface, focusing solely on consumer protection in regard to sales contracts. Kennedy's simple yet profound statement, which influenced the Community policies, "c*onsumers, by definition, includes us all*," resonates here. Without a comprehensive and less formal approach, consumer protection will only grow more convoluted under EU law.

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Review article

THE GROWING ROLE OF SOCIAL CONTEXT AS A CRITERION OF JUDICIAL INDEPENDENCE

Magdalena Hilt, Attorney-at-law, PhD candidate
University of Warsaw, Doctoral School of Social Sciences
ul. Krakowskie Przedmieście 26/28 00-927 Warsaw, Poland
m.hilt@uw.edu.pl

ABSTRACT

Judicial independence is immanently connected with the rule of law and as such is regularly scrutinized by multiple international organizations. Bodies such as the Council of Europe and the Venice Commission have issued numerous "soft law" instruments establishing guidelines for judicial independence standards. Meanwhile, the European judiciary system, on its part, has analyzed and ruled on specific issues on a case by case basis.

The judiciary reforms introduced in Poland within the past decade have sparked immense discussions as to whether they remain in line with the EU rule of law, in particular whether the judicial independence standard has been upheld or jeopardized. As a result, an ideal environment has been created for the European Court of Justice to shape the EU standards, as the number of recent rulings on the matter of judicial independence has grown rapidly. While the European Court of Justice is key in establishing common standards across the EU, the Court seemingly avoids creating general, common standard of judicial independence.

Recently, while assessing the judicial independence the European Court of Justice has focused on aspects such as social perception and impressions of individuals involved in the proceedings, thus stressing the importance of the "context", rather than working towards establishing a clear European standard for the assessment of the independence (or lack thereof) of judges. With such ambiguous rules, however, it cannot be excluded that an objectively independent court could fail the test due to e.g. a widespread misinformation campaign, while a judiciary subjected to numerous minor reforms kept under the radar of the public eye, which effectively undermine its independence, could avoid the ECJ's scrutiny. As the concerns regarding the future of the rule of law in the European Union spread, the need for a clear and objective roadmap becomes more evident.

In this context, this article aims at analyzing a sample of three recent ECJ cases: Land Hessen (Case C-272/19), W. B. et al. (Joined Cases C 748/19 to C 754/19) and Asociația "Forumul Judecătorilor din România" (Case C-216/21) in order to assess whether such roadmap has been created – or whether steps towards its creation have been taken by the European institutions.

Keywords*: judicial independence; social perception test of judiciary independence; rule of law; EU standards on independence of judiciary.*

1. INTRODUCTION

Anyone looking for the core principles of the European Union will inevitably come across numerous analysis and references to the concept of judicial independence[1]. The independence of the judiciary is one of the foundations underlying the rule of law, which – as set forth in Article 2 of the Treaty on European Union – is one of the core values[2] the European Union is founded on: "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[3] Such is the importance of the rule of law for the European integration process that since 1993 it has been included as one of the accession criteria against which applications of the countries willing to join the EU are assessed.[4]

The concept of rule of law is not easily definable. On one hand, its importance and fundamental meaning for the integration of the Union requires it to be a supranational concept. On the other hand, "the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system".[5] The European diversity is additionally strengthened by the fact that the organization of justice in the Member States falls within the competence of those Member States. The systems can differ greatly, thus setting common standards can be very challenging. However, the organization of justice does not remain completely outside of the European control – the European Court of Justice (hereinafter as "the ECJ") has confirmed, that it has the right to examine if the Member States fulfil their requirement to comply

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1 Mikłaszewicz P., *Niezależność sądów i niezawisłość sędziów w kontekście zasady rządów prawa - zasadniczy element funkcjonowania UE w świetle orzecznictwa TSUE*, PiP 2018/3.

2 "Needless to say, just as happens at national level, those three values are interdependent at EU level: there can be no democracy without the rule of law and fundamental rights; there can be no rule of law without fundamental rights and democracy, and there can be no respect for fundamental rights without democracy and the rule of law. From a constitutional perspective, this means that the EU may be described as a 'Union of democracies', a 'Union of justice' and a 'Union of rights'.", Lenaerts, K., *The European Union as a Union of Democracies, Justice and Rights*, International Comparative Jurisprudence, Vol. 3, Issue 2, 2017.

3 Article 2 of the Treaty on European Union (Consolidated version 2016), OJ C 202, 7 June 2016 (hereinafter as "TEU").

4 Article 49 of the TEU.

5 Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

with their obligations deriving from EU law[6, 7], which can at times be connected with assessment of certain elements of justice organization of a Member State.

In order to better define the rule of law, as well as the concept of judicial independence, a number of guidelines have been prepared.[8] Additionally, both the independence of the judiciary and the rule of law have been discussed extensively throughout the time of European Union's existence and yet the interest in and the frequency of these two concepts coinciding has grown immensely in recent years.[9] However, the role of the ECJ has remained the closest to the core of judicial independence, as the issues and doubt connected with Member States' solutions were brought to the ECJ to be assessed in specific cases.[10]

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6 "the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (see, by analogy, judgments of 13 November 2018, Raugevicius, C-247/17, EU:C:2018:898, paragraph 45, and of 26 February 2019, Rimšēvičs and ECB v Latvia, C-202/18 and C-238/18, EU:C:2019:139, paragraph 57) and, in particular, from the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 40). Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence." - Case C-619/18, European Commission v Republic of Poland, paragraph 52. See also: Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), paragraph 68; Case C-896/19, Republika, paragraph 48; Case C-487/19, W. Ż. V KRS, paragraph 75.

7 See also: Pech L.; Platon S., *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case*, Common Market Law Review, 55, 2018, pp. 1827 – 1854.

8 See e.g. European Commission For Democracy Through Law (Venice Commission), *Rule Of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016); European Commission For Democracy Through Law (Venice Commission), *Report On The Independence Of The Judicial System Part I: The Independence Of Judges*, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); *Recommendation (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges*, (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

9 During the Conference "*WJA Tribute to Anthony M. Kennedy*" organized on 4-5 March 2024 by the World Jurist Association (a non-governmental organization in special consultative status with the United Nations ECOSOC) one of the Panels has been dedicated to the topic of "*Independence of the Judiciary and the Rule of Law*" – the speakers included e.g. Presidents of highest judiciary bodies from around the world.

10 „Submitting more than a dozen references for a preliminary ruling in recent years bears proof that doubts related to the independence of courts, especially in the external aspect, are being tackled by courts of various member states, which in turn shows that on the level of the European Union (hereinafter: EU), this problem is still current and unsolved.", Celiński M., *Independence of the courts and judges in Germany and the Land of Thuringia in the light of the case law of the Court of Justice. Case study – analysis of the reference for a preliminary ruling brought by the Landgericht Erfurt in the case of A.G.E. p. BAG (C-276/20)*, International Law Quarterly 2023, I (I), p. 59.

2. IN SEARCH OF THE COMMON STANDARD – THE ECJ CASE LAW

As the discussion on the rule of law backsliding in the European Union made its way into the ECJ, an opportunity presented itself to steer the case law in the direction of coherent set of rules and standards, pointing out the core fundaments of judicial independence. As was especially underlined by the President of the Court of Justice of the European Union "whilst the topic of judicial independence, as a core constituent of the respect for the rule of law, is often perceived as a "regional" or an "era-specific" issue, it is in fact a universal yardstick of a functioning democracy, to which all Member States must be – and are - held accountable in the same manner."[11]

The concept of judicial independence in the case law of ECJ is rooted in the Wilson ruling of 2006[12,13], however, the ECJ case law on the matter has grown significantly since then. In a briefing note of the European Parliamentary Research Service published in October 2023[14], which regards recent ECJ case law on judicial independence and covers the period of years of 2018 up to 2023, twenty-three ECJ cases were analyzed. Out of those, sixteen involved (directly or indirectly) the Polish courts. While the disputes surrounding the Polish judiciary and the rule of law have mostly monopolized the academic discussion, the subject of judicial independence most certainly has to be debated in a broader context (especially in light of the fact that the European Commission has finalized its analysis on the rule of law situation in Poland in the context of the Article 7(1) TEU procedure[15]). While the framework of an article does not allow to study all of the recent ECJ case law, in this paper I would like to analyze in more detail three of the recent ECJ rulings, with each of them regarding the judiciary system of a different Member State (Germany, Poland and Romania). The focus on cases concerning different Member States aims to verify what were the tests performed by the ECJ and whether they can indeed create a clear and abstract standard for the future where the rule of law backsliding may appear in many shapes and forms.

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11 Lenaerts, K., *Rządy prawa w Unii Europejskiej*, Europejski Przegląd Sądowy, Wolters Kluwer, nr 7(214)/2023, p. 4.

12 Case C-506/04, Wilson, EU:C:2006:587.

13 Lenaerts, K., *Rządy prawa w Unii Europejskiej*, Europejski Przegląd Sądowy, Wolters Kluwer, nr 7(214)/2023, p. 4.

14 Mańko, Rafał, *ECJ case law on judicial independence. A chronological overview*, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)753955], Accessed 15 April 2024.

15 European Commission press release, *Commission intends to close Article 7(1) TEU procedure for Poland*, [https://ec.europa.eu/commission/presscorner/detail/nl/ip_24_2461], Accessed 22 May 2024.

2.1. The Land Hessen Case (C-272/19)

In case C-272/19 (*VQ v Land Hessen*) a German court made a request for a preliminary ruling in a personal data case. However, the court additionally expressed its doubt as to its status as a "court or tribunal" within the meaning of Article 267 TFEU[16], read together with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter as the "Charter"), in the light of the criteria set out by the ECJ in that regard, in particular the criterion pertaining to the independence of the body concerned.[17]

The German court referred to the (previously established in the ECJ case law) existence of two aspects of judicial independence[18]. The external one, assuming that the judicial functions are exercised autonomously, without subordination to any other body, which aims to ascertain that an independent judgement, free from external influence, will be granted; and the internal one, closely linked to the concepts of impartiality and objectivity, allowing for a strict application of the rule of law and absence of judge's interest in the outcome of the proceedings.

The doubts of the referring court were connected with both the external and internal aspects of its independence. As pointed out in the request, the organization of the courts or tribunals in Land Hessen is determined by the Ministry of Justice of that Land. As a result, the Ministry decides on the appointment, appraisal and promotion of judges (including those who are members of the referring court) and decides on the work-related travel abroad of judges. Additionally, the Ministry influences also the everyday aspects of the organization of the judiciary, as it determines (among others) the means of communication and the IT facilities. More concerns were raised in relation to the governance of the personnel employed in the courts – German laws allow for a public official to be appointed as a temporary judge in cases of additional staff needs; the Ministry of Justice decides also on the number of judges and number of posts at each court or tribunal. When it comes to the Judicial Appointments Committee, the referring court brought to the ECJ's attention the fact, that the majority of its members are chosen by the legislature.

While assessing the doubts raised by the referring court, the ECJ seems to have made three main arguments. Firstly, none of the concerns raised, including the fact that the referring judge himself had doubts about his own independence, did not

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16 Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7 June 2016 (hereinafter as "TFEU").

17 Case C-272/19 *VQ v Land Hessen* [2020], paragraph 26.

18 Kalisz, A.; Wojciechowski, B, *Standardy niezależności sądów i niezawisłości sędziowskiej – wybrane zagadnienia na przykładzie orzecznictwa sądów europejskich*, in: Przegląd Sejmowy, Wydawnictwo Sejmowe, nr 5(172)/2022, p. 271.

imply on their own a lack of judicial independence[19], neither such doubts should arise simply due to the fact that the majority of members of the Judicial Appointment Committee are chosen by the legislature[20]. Secondly, the ECJ's statements indicate that the alleged acts of influence of legislative or executive branch, which are infringing the judiciary's independence should be proved, not just hypothetically possible[21].[22] Thirdly, once again the social perception test has been cited as a binding standard of EU assessment of judicial independence.[23]

2.2. W. B. *et al.* (Joined Cases C 748/19 to C 754/19)

In joined cases C 748/19 to C 754/19 seven requests for a preliminary ruling were submitted. One of the questions raised in the requests concerned the inter-

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19 When commenting on the fact that the majority of the Judicial Appointment Committee are chosen by the legislature, the ECJ stated: "However, that fact cannot, in itself, give rise to any doubt as to the independence of the referring court. The assessment of the independence of a national court or tribunal must, including from the perspective of the conditions governing the appointment of its members, be made in the light of all the relevant factors. […] In this instance, it cannot be concluded that a committee such as that at issue in the main proceedings is not independent solely because of the factor mentioned in paragraph 55 of the present judgment." – Case C-272/19 VQ v Land Hessen [2020], paragraph 56 and 58.

20 It was, however, not clarified why the composition of the Appointment Committee of which the majority of the members are chosen by the legislature does not give rise to doubts as to the principle of independence. See: Beems, B., *VQ v Land Hessen: From 'Court of Tribunal' in the Meaning of Article 267 TFEU to the GDPR's Concept of a 'Controller'*, European Data Protection Law Review, 7(2), 2021, p. 300.

21 "As regards, in the second place, the role of the Ministry of Justice of Land Hessen with respect to the management of work-related travel of judges or the organisation of the court or tribunals, the determination of staff numbers, the management of means of communication and IT facilities, as well as the management of personal data, suffice it to state that the request for a preliminary ruling contains no information from which it can be ascertained to what extent those factors are liable to call into question, in the main proceedings, the independence of the Verwaltungsgericht Wiesbaden (Administrative Court of Wiesbaden)." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 50.

22 "As regards the conditions governing the appraisal and promotion of judges, which are also called into question by the Verwaltungsgericht Wiesbaden (Administrative Court of Wiesbaden), suffice it to state that the documents submitted to the Court contain no indication as to how the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 59.

23 "In accordance with settled case-law, the guarantees of the independence and impartiality of the courts and tribunals of the Member States require rules, particularly as regards the composition of the body and the appointment and length of service of its members, and as regards grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 63 and the case-law cited)." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 52.

pretation of the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU. The referring court's doubts were connected with the composition of the adjudicating panels (called upon to rule on the above-mentioned cases), as concerns arose whether they are in line with the second subparagraph of Article 19(1) TEU, having regard to the presence in those panels of a judge seconded in accordance with a decision of the Polish Minister for Justice.

Among numerous judicial reforms introduced in Poland, the one that was subjected to ECJ's analysis in the case at hand was a regulation allowing the Minister for Justice to assign a judge (by way of secondment) to a higher court. The doubts were connected with the fact that the secondment criteria were not specified and the secondment decision was not amenable to judicial review. Additionally, the Minister could terminate a judge's secondment at any time, without such termination being subject to criteria that were predefined by law or having to be accompanied by a statement of reasons.

In view of the referring court those circumstances could allow the Minister to influence the seconded judges in two ways. Firstly, a secondment of a judge to a higher court could be perceived as a 'reward' granted by the Minister to such judge for the work performed by him or her in previous positions, or even set out certain expectations as to how that judge might adjudicate in the future, with that secondment then being a substitute for a promotion. Secondly, by terminating a judge's secondment, the Minister for Justice may 'penalize' that seconded judge for having adopted a judicial decision which did not approve of.

The ECJ stressed that even though the Member States have full competence in the field of the organization of justice, they are required to comply with their obligations deriving from EU law, in particular when drawing up national rules relating to the secondment of judges. The ECJ's analysis again focused on three points of discussion. Firstly, each of the issues raised by the referring court has been analyzed in detail, both separately, as well as together with all of the other cited circumstances in order to establish if the judicial independence may be endangered. Secondly, the ECJ's concerns were connected with the possibility that the Minister's decisions (which could be arbitrary, as no strict prerequisites of a secondment or its cancelation were introduced) may have such effect, that the judge's independence and appearance of impartiality may be undermined[24]. The

[24] "The rules applicable to the status of judges and the exercise of their judicial functions must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire

judgment does not mention any proof of Minister's influence on seconded judges, thus it must be assumed that the risk of influence has remained only hypothetical throughout the proceedings[25], which in this case (as opposed the Land Hessen case) was judged as a sufficient risk by the ECJ. Finally, the social perception test was cited[26], however, in this case the ECJ was very heavily[27] leaning towards a different final opinion than in Land Hessen case (while emphasizing that the final assessment is to be carried out by the referring court), indicating that the standards of judicial independence have been violated.

2.3. Asociaţia "Forumul Judecătorilor din România" (C-216/21)

The most recent case regarding judicial independence has been issued as a result of a request for a preliminary ruling of a Romanian court. In light of the arguments presented to the referring court by a Romanian association of judges, the referring court had doubts as to the compatibility of a promotion scheme of judges introduced by a new Romanian law with the principle of the independence of judges.[28]

The new system for promotions to a higher court introduced a procedure allowing for the promotion of a candidate based on an assessment of the candidate's work and conduct during their last three years of service (thus through a quite limited time period). The assessment was meant to be carried out by a board composed of the president of the court of appeal concerned and four members of that court who have the specializations corresponding to the sections within which there are

in individuals (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C 487/19, EU:C:2021:798, paragraph 110 and the case-law cited)." - Joined Cases C 748/19 to C 754/19, paragraph 69.

25 See also paragraphs 81-82 of the Joined Cases C 748/19 to C 754/19.

26 "It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C 487/19, EU:C:2021:798, paragraph 109 and the case-law cited)." - Joined Cases C 748/19 to C 754/19, paragraph 67.

27 "Such a power cannot be considered compatible with the obligation to comply with the requirement of independence, in accordance with the case-law referred to in paragraph 73 of this judgment" - Joined Cases C 748/19 to C 754/19, paragraph 87.

28 "the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, is to be interpreted as meaning that a piece of national legislation relating to the scheme for the promotion of judges is required to ensure compliance with the principle of the independence of judges." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 57.

vacant posts to be filled by the selection procedure. Those members were to be appointed upon a proposal from the college of the court of appeal concerned.

As pointed out by the referring court, the new procedure has caused doubts as it was considered as moving away from the principle of merit-based promotion and was instead relying on discretionary and subjective assessments. In addition, by conferring greater power to the presidents of the courts of appeal, the new procedure allegedly had the effect of encouraging attitudes of hierarchical subordination towards the members of the higher courts who would be called to assess the work of judges who are candidates for promotion[29]. As a result, the applicants were concerned that the independence of judges applying for a promotion would be impaired, as they would aim to satisfy the preferences of their superiors, who would later on decide on their promotion. The criteria of the promotion, which could be perceived as quite subjective and vague, would not exclude such risk.

The case offered the ECJ an opportunity to speak on an interesting aspect of the judicial independence, as this time the doubts did not concern influence of the legislative or executive branches, but the influence exercised by the other members of the judiciary. The ECJ ruled that in general the fact that certain judges exercise control over the professional activity of their peers is not on its own indicative of a potential problem regarding the independence of judges[30]. It did not seem that this approach was affected by the fact that the concerns presented in the case were brought up by an association of judges. Similarly to the Land Hessen case, the ECJ pointed out that no proof of influence over judges had been presented[31], seemingly indicating that solely the hypothetical risk of abuse (which has been explained in detail by the referring court) would not suffice to establish an infringement of the judicial independence. Additionally, the ECJ consistently referred to the social perception test[32],

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29 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 36.

30 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 77.

31 "Indeed, it would also be necessary to establish that that concentration of power, taken in isolation or combined with other factors, is liable to offer, in practice, the persons on whom it is conferred the ability to influence the decisions of the judges concerned, and thus create a lack of independence or an appearance of partiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals. However, the file before the Court does not contain any material capable of establishing that such a potential concentration of power could, in itself, confer, in practice, such an ability to influence; nor does it point to any other factor which could, combined with that concentration of power, produce effects which would be such as to give rise to doubts, in the minds of individuals, as to the independence of the judges who have been promoted." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 80-81.

32 "The guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality

citing it six times in the judgment[33]. The concluding remarks indicated, however, that in the ECJ's view the standards of the judicial independence had been upheld.[34]

3 THE SOCIAL PERCEPTION OF JUDICIAL INDEPENDENCE TEST: EVALUATION

The presented cases diverge in many aspects: starting from the required standard of proof of influence exercised over judges and moving on to whether doubts of judges themselves are a strong indicator of infringement of judicial independence standards[35]. However, a recurring theme of judicial independence assessment in the case law of ECJ – seemingly overriding other applicable judicial independence tests – is the social perception test[36], which aims to verify whether the rules are such as to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of the assessed body to external factors and its neutrality with respect

with respect to the interests before it (judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 95 and the case-law cited). In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence and impartiality. The rules applicable to the status of judges and the performance of their judicial duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 96 and the case-law cited). […] It is therefore necessary that the substantive conditions and procedural rules governing the adoption of decisions to promote judges are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted (see, by analogy, judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 97 and the case-law cited)." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63-64 and 66.

33 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63, 66, 71, 81, 89 and in the Operative part of the judgment.

34 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 88.

35 See: "The ECJ also puts an emphasis on individual judges' self-perceived independence – for instance, a judge fearing that their secondment to a higher court might be terminated at any time by the minister of justice, at the minister's will, is prone to developing the idea that they need, in their judicial office, to act in such a manner as to live up to the minister's (presumed) expectations (PR w Mińsku Mazowieckim" - Mańko Rafał, EPRS (European Parliamentary Research Service), *ECJ case law on judicial independence. A chronological overview*, 2023, page 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024; vs the approach presented by the ECJ in Case C 272/19 VQ v Land Hessen and Case C-216/21, Asociația "Forumul Judecătorilor din România".

36 "The ECJ's approach to judicial independence as a binding standard of EU law is based on a social perception test […]" – Mańko Rafał, EPRS (European Parliamentary Research Service), ECJ case law on judicial independence. A chronological overview, 2023, page 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024.

to the interests before it.[37] The social perception test seems to represent the current binding standard promoted by the ECJ. This approach, however, while undoubtedly offering a lot of flexibility, also causes significant ambiguities and does not seem to define the judicial independence any better than the approximate definition which had already been offered by the international guidelines.

Firstly, with the proposed approach the ECJ assumes that the impartiality and independence of judges is dependent on a subjective impression.[38] A well-organized misinformation campaign could easily manipulate such standard to ensure a positive feedback for legislative changes which, in the long run, could effectively disable the judiciary. Conversely, a similar campaign could mistakenly create negative reception of valid changes in judicial organization. Not to mention that the social perception test does not prevent in any way an action consisting of numerous minor legislative changes stretched over an extended period of time, which could easily avoid any public scrutiny whatsoever.

Secondly, the case law does not provide an example of model individuals, whose doubts surrounding the imperviousness of the assessed body to external factors and its neutrality could indeed indicate lack of judicial independence. It seems that the individuals must be citizens and not judges, as the doubts raised by the Romanian judicial association in Asociația "Forumul Judecătorilor din România" case and by the German court in Land Hessen case have not been sufficient as to imply a lack of independence. A very clear example of how this approach could prove problematic if the social perception test was to be broadly considered a binding standard would be the case of Poland. A Polish public opinion polling institute (Fundacja Centrum Badania Opinii Społecznej (CBOS) - Centre for Public Opinion Research) has conducted cyclical studies on the public perception of judicial independence by the Poles. The poll results from the years of 2012, 2017 and 2022 have remained almost identical, as the public's responses to the question: "In your opinion, are judges in Poland independent when pronouncing judgements, i.e. are they not subject to any external pressure?" have been (respectively for 2012, 2017 and 2022) affirmative in case of 22%, 24% and 17 % of respondents, negative in case of 22%, 23% and 20% of the respondents and

[37] See e.g.: Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63, 66, 71, 81, 89 and in the Operative part of the judgment; Joined Cases C 748/19 to C 754/19, paragraph 67; Case C 272/19, VQ v Land Hessen, paragraph 52; Case C-274/14, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 63; Case C-222/13, TDC, EU:C:2014:2265, paragraph 32; Case C-506/04, Wilson, EU:C:2006:587, paragraph 53.

[38] Similarly: Mańko Rafał, EPRS (European Parliamentary Research Service), *ECJ case law on judicial independence. A chronological overview*, 2023, p. 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024.

ambiguous ("sometimes the judges are independent, sometimes they are not") in case of 44%, 38% and 49% of the respondents[39]. While a slight decline in affirmative opinions can be noticed, it is also accompanied by a slight decline of negative opinions, which (especially considering the very public and long lasting rule of law debate between the EU and the Polish government) seems to prove that average citizens are not much invested in the rule of law and judicial independence debates. Moreover, in another poll where the respondents were asked about their opinion as to the judicial reforms introduced by the Polish government the groups of supporters, opposers and the Poles partly supporting and partly opposing the reforms were almost equal (respectively 30%, 31% and 30% of the respondents).[40]

In light of the above, it seems that the social perception test introduced by the ECJ risks leaving the ECJ itself with no specific guidance as to the content and prerequisites of judicial independence.

What remains then? The contextualization of the jurisprudence seems to be the main and approved approach of both the ECJ and AGs. In one of the most commented, analyzed and criticized[41] cases of the ECJ connected with the rule of law backsliding debate – that is the Getin Noble Bank S. A. Case[42], a quite straightforward admission has been made. As stated by the AG Bobek in his opinion: "Given the variety of situations in which an issue of independence of the judiciary could be raised, it is impossible to say *a priori* which type of elements should carry more weight. The significance of those elements – which, I repeat, must in any event be assessed together – depends obviously on the specific characteristics of the case in question. Moreover, the overall context in which the rules operate and how they relate or interact with other rules and actors is equally important. (In)dependence is by definition relational: it is the independence from or the dependence on something or somebody. Thus, metaphorically speaking, its assessment cannot be limited to a microscopic study of one slice of a salami, without having regard to the rest of the salami stick, how and where it is normally stored, its distance and relation to other objects in the storage room, and while nonchalantly ignoring the fact that there is a rather large carnivore lurking in the corner of the room. Second, and perhaps even more importantly, it is simply impossible to lay down ex ante

[39] Komunikat z Badań CBOS Nr 95/2022, "Społeczne oceny wymiaru sprawiedliwości", ISSN 2353-5822, p. 8, available at:
[https://www.cbos.pl/SPISKOM.POL/2022/K_095_22.PDF], Accessed 15 April 2024.

[40] Komunikat z Badań CBOS Nr 22/2020, "Polacy o zmianach w sądownictwie", ISSN 2353-5822, p. 6, [https://www.cbos.pl/SPISKOM.POL/2020/K_022_20.PDF], Accessed 15 April 2024.

[41] Although it seems that the analysis angle was mostly focused on the "court or tribunal" test under the EU law.

[42] Case C-132/20 BN and Others v Getin Noble Bank S.A.

a universally valid test for assessing judicial independence irrespective of the EU provision that is applicable in the case at hand. To attempt to state conclusively, in the abstract, when exactly a certain court will be 'independent', without knowing either the purpose for which the question is formulated – that is to say whether it is in the context of Article 267 TFEU, Article 47 of the Charter, or Article 19(1) TEU – or the circumstances of an individual case, comes rather close to asking the Court to put the proverbial cart before the horse."[43]

While the AG's statement clarifies well the growing impact of contexts and social perceptions in the recent judicial independence case law of the ECJ, his acceptance and recommendation for a full contextualization of the judicial independence test seem to – quite unapologetically – close the door to any other possible solution or future change of course, while expressing little to no criticism towards such arbitrary approach.

4. SUMMARY AND CONCLUDING REMARKS

In light of the analysis above, one has to consider whether and to what extent the ECJ's opinions on the standards of test for judicial independence diverge on a case by case basis. It appears that no uniform standard has been created and no such standard is in the works. The open admission of AG Bobek as to the need of contextualization of the judicial independence and the impossibility of creation of a universally valid test leaves no guidance and could be taken as a confirmation of certain degree of arbitrariness of the ECJ's rulings. Furthermore, such approach also puts in question if e.g. the rulings concerning rule of law backsliding in Poland would bring an opposite result had the package of reforms been split over an extended period of time or if the political rift between Poland and the EU did not become so evident.

The position of the ECJ could prove gravely insufficient in the days to come. By inferring that similar circumstances can be judged differently depending on the context that surrounds them the ECJ, instead of setting forth a reliable standard of judicial independence, seems to have created the conditions for a future decline of the rule of law which may go undetected as long as it advances gradually and its promotors abstain from too open anti-EU declarations. A hazardous approach in times of rule of law backsliding.

[43] Case C-132/20, BN and Others v Getin Noble Bank S.A., Opinion of AG Bobek, paragraphs 99-101.

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CROATIA'S CONSTITUTIONAL DEBATE ON *DE IURE* AND *DE FACTO* INDEPENDENCE OF THE JUDICIARY: FROM THE RIGHT TO AN INDEPENDENT COURT ESTABLISHED BY LAW TO "THE RIGHT TO A ROGUE JUDGE"?

Helena Majić, MSc, Legal Adviser*
The Constitutional Court of the Republic of Croatia
Trg svetog Marka 4, 10000 Zagreb
helenamajic@yahoo.com; helena_majic@usud.hr

ABSTRACT

The paper first analyses recent legislative restructuring of higher courts in Croatia that has limited access to the said courts and their procedural powers. The initiatives for divesting appellate courts and the Supreme Court of their case-law harmonisation powers have been discussed, as well as the character of section meeting opinions that are legally binding on judges of the section concerned, which allegedly raise questions as to the incompatibility with the right to an independent court established by law. This discussion includes the views of AG Pikamäe expressed in the pending case C-554/21 et al. (HANN-INVEST). The paper also reviews legislative interventions in the procedure for appointment of the President of the Supreme Court and a failed attempt to introduce periodic security vetting of all judges with special quasi-disciplinary chamber of the Supreme Court. These processes are then explained by law and economics models of de iure and de facto judicial independence and constitutional arrangements, applied to the case-law of the ECtHR, the CJEU and the Croatian Constitutional Court. The paper concludes that the Croatian legislature has undermined de iure and de facto judicial independence of Croatia's higher courts. On the other hand, the Croatian Constitutional Court has been observing both formal and informal factors of judicial independence and has thus established that: 1. no constitutional or legal check against the executive's interference with independence of the judiciary should be dismantled or construed narrowly, no matter how hypothetical de iure independence of judges may appear; 2. no abstract aspect of the principle of judicial independence may run counter practical and effective enjoyment of individual right to a non-arbitrary judge or the principles of lawfulness and proper administration of justice. It has been inferred from the law and economics model that the Supreme Court has become the

* The views expressed in this paper are those of the author and do not represent nor do they bind the Constitutional Court.

most important institutional actor of judicial independence in Croatia and therefore legislative restructuring of the said court should be put to an end.

Keywords: *CJEU, constitutional arrangements, de iure judicial independence, law and economics, supreme courts*

1. INTRODUCTION: CROATIAN AND EUROPEAN SUPERIOR COURTS, NATIONAL JUDICIARY COUNCILS AND CRISIS OF JUDICIAL INDEPENDENCE

Since the establishment of the Republic of Croatia, the safeguards against interference of the executive with judicial independence have not been observed consistently as essential tenets of new democratic system, as argued by Uzelac, who had labelled the transition from socialist to democratic courts, from 1991 to 2001, as an anti-reform period of cosmetic reforms, lame-duck appointments, and de iure independent State Judicial Council (hereinafter: SJC) that was de facto politically dependent body.[1] In the period from 2002 to 2013, marked by the accession to the EU, some (constitutional and legislative) reforms had addressed the executive's interventions in the judicial system: a decision-making majority of members of the SJC would now be elected by judges themselves; judges would now hold life tenure; and the power to appoint court presidents would be delegated from the Minister of Justice to de iure independent the SJC.[2] In 2014, some time after the accession to the EU, Dallara will portray this accession judicial reform as a success story.[3] However, six years later Čepo will ascertain democratic backsliding in Croatia following the accession, attributing it, *inter alia*, to attempts of the executive aimed at control of the judiciary.[4]

Croatian constitutional framework currently in force is de iure inspired by democratic concept of independent judiciary. The Constitution of the Republic of

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1 Uzelac, A., *Role and Status of Judges in Croatia*, in: Croatian Judiciary: Lessons and Perspectives, Zagreb, 2002, pp. 81 – 140.

2 Uzelac, A., *Reform of the Judiciary in Croatia and Its Limitations (Appointing Presidents of the Courts in the Republic of Croatia and the Outcomes)*, in: Between Authoritarianism and Democracy: Serbia, Montenegro, Croatia, 2003, pp. 303 - 329; Cerruti, T., *The Political Criteria for Accession to the EU in the Experience of Croatia*, European Public Law, Vol. 20, Issue 4, 2014, pp. 772 - 798; Dallara, C., *Ten Years of eu-Driven Judicial Reforms in Southeastern Europe: The EU Leverage and Domestic Factors at Stake*, Southeastern Europe, Vol. 40, Issue 3, 2016, pp. 385 - 414; Akšamović, D., *Regulatory reform in Croatia: an uphill battle to enhance public confidence*, in Regulating Judges, Edward Elgar Publishing, 2016, pp. 128 - 144.

3 Dallara, C.*, Democracy and judicial reforms in South-East Europe. Between the EU and the legacies of the past,* Springer International Publishing, 2014, pp. 41– 45.

4 Čepo, D., *Structural weaknesses and the role of the dominant political party: democratic backsliding in Croatia since EU accession*, Southeast European and Black Sea Studies, Vol. 20, Issue 1, 2020, pp. 141–159.

Croatia[5] (hereinafter: the Constitution) does not provide only that judges are autonomous and independent administrators of justice with life tenure and immunity. It directly regulates competences and procedures of the SJC vested with powers to decide on appointment and removal of judges and court presidents, envisaged as an independent body composed by a majority of judges and a few representatives of the legislature or the academia who have no formal influence on its decision-making process.[6] However, de iure checks on appointment, tenure, removal, composition or procedures of judicial bodies cannot be likened to their de facto independence, whereas mere existence of de iure independent national judiciary council does not *per se* guarantee judicial independence. For example, in *Olujić v. Croatia*[7] the European Court of Human Rights (hereinafter: ECtHR) found a violation of Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[8] (hereinafter: ECHR) on account of the lack of objective impartiality of members of the SJC in the procedure for removal of the President of the Supreme Court of the Republic of Croatia (hereinafter: the Supreme Court). In *Gerovska Popčevska v. FYRM*[9] the ECtHR found a violation of the right to an independent tribunal due to involvement of the Minister of Justice in disciplinary proceedings before the national judiciary council. In a number of cases concerning judicial reforms in Poland, the Court of Justice of the European Union (hereinafter: CJEU) found that national laws that enable the President of the Republic to appoint new judges of the Supreme Court, thus forming special disciplinary bodies within the said court that circumvent the competences of national judiciary council, were incompatible with the right to effective judicial protection guaranteed by Art. 19(1) of the Treaty on European Union (hereinafter: TEU) and the right of access to an independent tribunal guaranteed by Art. 47 of the Charter of Fundamental Rights of the European Union[10] (hereinafter: Charter).[11] In *Guðmundur Andri Ástráðsson v. Iceland*[12] the ECtHR found that

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5 The Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

6 *Ibid.,* Art. 118, 121 - 124 of the Constitution.

7 *Olujić v Croatia*, 22330/05, 5.2.2009.

8 *Convention for the Protection of Human Rights and Fundamental Freedoms*, Official Gazette, International agreements, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

9 *Gerovska Popčevska v. FYRM* , 48783/07, 7.1.2016.

10 *Charter of Fundamental Rights of the European Union*, 2012, OJ C 326.

11 See the following key cases: C-585/18 – (*A.K. and Others - Independence of the Disciplinary Chamber of the Supreme Court*), 19.11.2019.; C-824/18 (*A.B. and Others - Appointment of judges to the Supreme Court – Actions*), 2.3.2021.; C-791/19 (*Commission v Poland - Régime disciplinaire des juges*), 15.7.2021.; C-487/19 (*W.Ż. - Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment*), 6.10.2021.

12 *Guðmundur Andri Ástráðsson v Iceland,* GC, 26374/18, 1.12.2020.

a decision of the Minister of Justice and the Parliament to appoint a judge that was ranked lower on the list of national judiciary council, without objectively scrutinising the criteria for appointment by comparing him to the candidates that had been ranked higher by the national judiciary council, renders the court to which the judge concerned was appointed unlawful. These judicial assessments concerning national judiciary councils can be further contextualised by the EU 2023 Justice Scoreboard[13] which shows that the number of powers vested with the said bodies does not correlate with public confidence in independence of the judiciary. For example, the Bulgarian council has been vested with almost all 15 powers surveyed by the European Commission, whereas the Danish council has been vested with barely three powers, none of which includes procedures for appointment, promotion or removal of judges. Nevertheless, Bulgaria is 25th on the scoreboard of public confidence in independence of the judiciary with only 21% of respondents assessing it as good or very good, in contrast to Danish judiciary that came second in the scoreboard with 85% of respondents perceiving independence of Danish courts as fairly good or very good.[14]

With 72% of respondents perceiving independence of the judiciary as fairly bad or very bad, Croatia consistently holds the position of a Member State with the lowest confidence of general public in independence of the judiciary. The leading reason is, according to 65% of respondents, interference or pressure from the government and politicians, followed by interference or pressure from economic or other specific interests as declared by 58% of respondents.[15] In respect of efficiency, Croatian first-instance courts are antepenultimate on the scoreboard of estimated time needed to resolve litigious civil and commercial cases.[16] It could be argued that the perceived lack of judicial independence does not reflect de facto independence of the judiciary. However, a survey conducted by Vuković and Mrakovčić in 2021 among Croatian legal professionals demonstrates that even those, professionally qualified to reason their perception by objective arguments, did not hold independence of Croatian judiciary with highest regards.[17] Therefore,

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13 The EU 2023 Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2023) 309, Luxembourg: Publications Office of the European Union, 2023, digital print available at [https://commission.europa.eu/document/download/db44e228-db4e-43f5-99ce-17ca3f2f2933_en?filename=Justice%20Scoreboard%202023_0.pdf], Accessed 7 March 2024.

14 *Ibid*., pp. 41, 45.

15 *Ibid*., pp. 41–42.

16 *Ibid*., p. 11.

17 Vuković, D.; Mrakovčić, M., *Legitimacy, Independence and Impartiality: How do Serbian and Croatian Legal Professionals Assess Their Judiciaries?*, Europe-Asia Studies, Vol. 74, Issue 6, 2022, pp. 945 – 967.

it appears that the SJC institutional arrangement for independence of the judiciary in Croatia did not perform as expected.

2. LEGISLATIVE RESTRUCTURING OF CROATIAN HIGHER COURTS AND INDEPENDENCE OF THE JUDICIARY

The general dissatisfaction with Croatian courts has created opposing, or even counter-intuitive, theoretical and practical proposals for restructuring decision-making processes at higher courts, especially the Supreme Court which used to cope with a significant backlog of undecided appeals on points of law. When described as counter-intuitive, the impression derives from the assumption that a court can be de facto independent only if it maintains effective jurisdiction and procedural powers to control the executive. However, present academic and legislative initiatives do not reflect this idea. On the contrary, it seems that the lowest ever public confidence in independence of the judiciary, coupled with its inefficiency, has created a well argued trend of divesting higher courts of their powers to adjudicate cases with a view of expediting the proceedings before them. For example, in 2013, Uzelac portrayed civil law judges as „omnipotent judges" who are „the cause of procedural inefficiency and impotence".

Uzelac and Galič then argued that the Supreme Court was unable to draw a distinction between the question whether a case had been decided incorrectly by lower courts from the question whether an appeal on points of law raises questions of law that are of „general significance".[18] Uzelac and Bratković will soon label the Supreme Court as a court of second appeal, while expressing criticism on its policy of declaring inadmissible the vast majority (then 60%) of appeals on points of law.[19] The 2019 amendment of the Civil Procedure Act (hereinafter: CPA)[20] has transformed the appeal on points of law into a sort of legal remedy that could be best described as a motion for leave to apply for judicial review.[21] Bodul argues that the Supreme Court should now act as a court of precedents.[22] Therefore, from

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18 Uzelac, A.; Galič, A., *Changing Faces of Post-socialist Supreme Courts: Croatia and Slovenia Compared*, Comparative Perspectives on Law and Justice, Vol 59, 2017, pp. 1 – 22.

19 Uzelac, A.; Bratković, M., *Croatia: Supreme court between individual justice and system management*, in Supreme Courts under pressure: Controlling caseload in the administration of civil justice, Cham, Switzerland: Springer; 2021, pp. 135, 146.

20 Civil Procedure Act, Art. 67 – 85 of the Civil Procedure Amendments Act, Official Gazette no. 70/2019.

21 See more in Bratković, M., *Revizija po dopuštenju: izazovi i dvojbe*, in Novine u parničnom procesnom pravu, Zagreb: Hrvatska akademija znanosti i umjetnosti (HAZU), 2020, pp. 179 - 209; Bratković, M., *Novine u uređenju revizije u parničnom postupku*, Zakonitost, Vol. 1, Issue 4, 2019, pp. 16 – 27.

22 Bodul, D., *Rasprave o novom modelu revizije u hrvatskom procesnom pravu*, Harmonius: Journal of legal and social studies in South East Europe, Vol. 1, Issue 1, 2019., pp. 68 – 79.

September 2019 to December 2022, the Supreme Court had declared inadmissible almost 80% of those motions, thus improving significantly its clearance rate.[23]

Next in line were appellate courts, reformed by the 2022 CPA amendment[24] which prevents them from deciding an appeal on a legal basis different from the one adduced by the parties, without holding a hearing or inviting the parties to submit observations or even new evidence in respect of the intended legal reclassification. Bratković argues that the principle of *iura novit curia* cannot be construed as unlimited law-interpreting powers of the courts becuase they must exercise them in accordance with the principle of adversarial proceedings, especially when an appellate court reverses first-instance judgment.[25] However, as reported by the President of the Supreme Court in 2023, only 12% of all second-instance decisions have reversed first-instance decisions in civil law cases.[26] If appellate courts concur with either factual findings or legal reasoning of first-instance courts in 90% of all cases, there was no structural deficiency in appellate courts system (in terms of unforeseeable judicial hyper-activism) that had necessitated legislative intervention in their competences. Furthermore, there is no general ECHR standard that would require a higher court to hold a brand new hearing or administer new evidence if it finds appropriate to address only a question of law that the parties have not raised. In *Barilik v. Slovakia*[27] the ECtHR dismissed as manifestly ill-founded complaints as to the legal reclassification of a claim for unjust enrichment to compensation of damages by reaching the following conclusions: 1. „leave-to-appeal proceedings and proceedings involving only questions of law may comply with the requirements of Article 6, although the appellant was not given the opportunity of being heard in person by the appeal or cassation court", 2. „there is no indication that he was in any way restricted from pleading his case on any matter of fact or law that he might have deemed fit before the lower courts, or that the changed legal classification of the case by the Supreme Court could not have been foreseen by him as a diligent party". In the end, the duty of an appellate court to disclose the legal basis on which the chamber would prefer to decide the case, thus allowing the parties to get to know individual opinions that the judges might have formed, appears ill-fitted with common European standards on secrecy of deliberations *in*

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23 Report of the President of the Supreme Court of the Republic of Croatia to the Parliament of the Republic of Croatia, April 2023, [https://www.vsrh.hr/EasyEdit/UserFiles/izvjestaji/2023/izvjesce-predsjednika-vsrh-o-stanju-sudbene-vlasti-za-2022.pdf], Accessed 8 March 2024, p. 74.

24 Civil Procedure Act, Art. 55 of the Civil Procedure Amendments Act, Official Gazette no. 80/2022.

25 Bratković, M., *Preinačujuća presuda i presuda iznenađenja*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 72, Issue 1-2, 2022, pp. 673–705.

26 Report of the President of the Supreme Court of the Republic of Croatia to the Parliament of the Republic of Croatia, cit. supra note 23, p. 54.

27 *Barilik v Slovakia,* 28461/10, 18.2.2014.

camera and the protection that judges must be afforded against pressure exerted by the parties themselves, the court's administration or the executive.[28]

Parallel to legislative restructuring of the decision-making processes at higher courts, the High Commercial Court submitted several orders of reference to the CJEU in the case C-554/21 et al. (*HANN-INVEST*) questioning whether the instrument for securing uniform application of the law, such as binding opinions of section meetings of the said court and functioning of its registry, is compatible with the right to a fair trial and the principle of judicial independence; while corresponding proposals, concerning same powers vested in the judges sitting the sections of the Supreme Court, had been submitted to the Constitutional Court (hereinafter: the CC) in the case U-I-6950/2021. Eventually, contrary to the logic of initiatives to divest appellate courts and the Supreme Court of their procedural powers to interpret the law, the 2022 CPA amendment endorsed a new type of a motion for leave to appeal on points of law on account of alleged violations of constitutional rights and freedoms.[29] Whereas the Supreme Court has been questioned in respect of its powers to interpret the law, it appears that the legislature now aims at delegating the power to decide individual complaints on violations of the Constitution and the ECHR from exclusive jurisdiction of the CC, as prescribed by Art. 129 of the Constitution, to the jurisdiction of the Supreme Court. This could serve as an excuse for future restructuring of the CC and abolishing altogether its competence to decide on violations of human rights and fundamental freedoms in individual cases (to review the courts system).

Amidst this quest for more reserved and procedurally confined higher courts, the legislature decided to intervene in the procedure for appointment of the President of the Supreme Court by the 2018 Courts Act amendment that has limited powers conferred on the President of the Republic in this procedure, thus creating a conflict between two branches of the executive.[30] In 2022 the legislature further amended the Courts Act by introducing periodic security vetting system for all judges under the regime that could not have been observed elsewhere in Europe, which was supposed to create another *quasi*-disciplinary body within the Supreme Court, therefore creating conflict between the executive and the judiciary.[31]

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[28] See, to that effect, *Agrokompleks v Ukraine*, 23465/03, 6.11.2011.; *Parlov-Tkalčić v Croatia*, 24810/06, 22.12.2009., Muller, L. F. (2009), *Judicial Independence as a Council of Europe Standard*, 52 German Yearbook of International Law, p. 461.

[29] Art. 62 of the Civil Procedure Amendments Act; see more in Bratković, M., *Zaštita temeljnih ljudskih prava i revizija po dopuštenju*. Modernizacija parničnog procesnog prava, Zagreb: Hrvatska akademija znanosti i umjetnosti, 2023., pp. 187 – 215.

[30] Art. 31 – 32 of the Courts Act Amendments, Official Gazette no. 67/2018.

[31] Art. 15 of The Courts Act Amendments, Official Gazette no. 21/2022.

3. HOW LAW AND ECONOMICS MODEL OF *DE IURE* AND *DE FACTO* JUDICIAL INDEPENDENCE RESPONDS TO CONFLICTING CONCEPTS OF HIGHER COURTS AND JUDGES

Having noticed that the de iure independence of the judiciary, safeguarded by constitutions and national legislation, does not always correspond (correlate) with de facto judicial independence, several schools of law and economics (economic analysis of law) have attempted to determine what, if not the law, determines de facto judicial independence, and whether these two concepts could be somehow correlated.[32] It must be noted that the schools of law economics, as argued by Hayo and Voigt, have focused on research of de facto judicial independence due to incentives from financial institutions to assess the success of aid and development programs.[33] This could, therefore, in the EU context, disclose real incentives for adoption of the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, the so called Rule of Law Regulation which provides for budgetary restrictive measures against the Member States which violate the rule of law and independence of the judiciary.[34]

The law and economics model assumes that the courts would occupy more independent position towards the executive and the legislature if the government is politically weak. This scenario also develops where political competition between the rivals is the tightest.[35] Hayo and Voigt thus argue that the most important formal factor of de iure judicial independence is the ability of the courts to inflict costs on the executive when it breaches the law. If the costs inflicted by the courts are too high, the government will resort to restructuring decision-making judicial process (weakening the courts), removing some judges or abolishing the courts. In this scenario, when formal factors of de iure judicial independence cannot serve as safeguards against arbitrary interferences of the executive, the informal factors

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32 For general introduction to factors of de iure and de facto judicial independence relevant for law and economics methodology, see Lewkowicz, J.; Metelska-Szaniawska, K., *De jure and de facto institutions: implications for law and economics*, Ekonomista, Vol. 6, 2021, pp. 758 - 776; The methodology is in official use the EU and Council of Europe institutions and agencies, in that respect see more in Van Dijk, F.; Vos, G., *A Method for Assessment of the Independence and Accountability of the Judiciary*, International Journal of Court Administration, Vol. 9, Issue 3, 2018, pp. 1 – 21.

33 Hayo, B.; Voigt, S., *Explaining de facto judicial independence*, International Review of Law and Economics, Vol. 27, Issue 3, 2007, p. 273.

34 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, 2020, OJ L 433I.

35 Hanssen, F. A., *Is There a Politically Optimal Level of Judicial Independence?*, The American Economic Review, Vol. 94, Issue 3, 2004, pp. 712 – 729.

of de facto judicial independence play the most significant role: that being the confidence of the population in the legal system, the degree of democratisation (political pluralism - opposition within the legislature or within the executive) and press freedom (in other words, the costs that the media and the population may inflict on the government when it undermines judicial independence). However, if informal factors decide not to inflict costs on the government which breaches the rule of law, the low confidence in the legal system will dissuade the public from using the courts.[36] Furthermore, Hayo and Voigt suggest that informal factors will not inflict costs on the government if it violates judicial independence when they believe that corruption (state capture) prevails in a society, thus rendering the collective action of informal factors against the government powerless.[37] The collective action of informal factors is also less likely if the society is poor, as only wealthier informal actors may have interest in maintaining the judiciary independent from the executive's interferences with private property.[38]

Hayo and Voigt then tested several variables of de iure and de facto judicial independence in a statistical (parsimonious) model (using empirical data collected from various countries) and expressed the influence of the variables on de facto judicial independence with a coefficient. The results showed that formal laws which guarantee de iure judicial independence raise de facto judicial independence far significantly than any other informal factor of de facto judicial independence (coefficient higher than 0,90). In respect of the informal factors mentioned above, public confidence in the courts was the most essential informal factor for bolstering their independence (coefficient higher than 0,60), while freedom of press was less significant than initially presumed (coefficient higher than 0,20).[39] The variables of de iure judicial independence having the highest correlation with de facto judicial independence were the rules on enforcement of courts decisions and the rules on irremovability of judges, which speaks strongly in favour of the CJEU's intervention in Polish judicial system.

Interestingly, Hayo and Voigt model shows that frequent legislative amendments of legal foundations of higher courts (their jurisdiction, competences, powers,

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[36] Hayo and Voigt, cit. supra note 33, p. 275; thus because public confidence in the legal system is not generated from de iure judicial independence, but from de facto judicial independence, see Bühlmann, M.; Kunz, R., *Confidence in the judiciary: Comparing the independence and legitimacy of judicial systems*, West European Politics, Vol. 34, Issue 2, 2011, pp. 317 – 345.

[37] As to the relevance of corruption for the law and economic models of judicial independence, see Rose-Ackerman, S., *Judicial independence and corruption*, Transparency International, Global Corruption Report, 2007., pp. 15 – 24.

[38] *Ibid.,* pp. 275 – 280.

[39] *Ibid*., pp. 282 – 290.

etc.) actually prove low de facto independence of the judiciary and in the end dissuade potential users from using the courts (the use of legal remedies before the highest courts seems more uncertain). In this respect, Hayo and Voigt emphasise that de iure independence of higher courts, whether appellate, supreme or constitutional courts, is crucial as they control all other courts.[40] Therefore, in the context of Croatian judiciary with the lowest perceived independence, it seems that the above analysed legislative restructuring of higher courts, aimed at divesting them of powers to review the cases before them, as well as the above mentioned initiatives to divest them of their powers to harmonise case-law, are actually detrimental to their independence and most likely irrelevant for overall efficiency of the courts system.

Finally, Hayo and Voigt model shows that the most effective de iure guarantees of de facto judicial independence and efficiency of the courts are not legislative interventions in organization of the courts systems or procedure, but rather regulations on salaries of the judges and other material expenses of the courts. This result favours the CJEU's choice of the case C-64/16 (*Associação Sindical dos Juízes Portugueses*)[41] concerning national regulations reducing judges' salaries as an appropriate case for establishing independence of the judiciary as a general principle of EU law underlying the individual right to effective judicial protection.

However, one of the most inconclusive results of Hayo and Voigt study was related to the choice of constitutional model. They assumed that parliamentary model is more favourable to de facto judicial independence than presidential model, so they included in the study a number of veto players in those different models, but no interpretative distinction was found between them. This result could be explained by justice Šumanović's dissenting opinion in the CC's case U-II-5709/2020 (*COVID-19 Pandemic Management Measures*) where he had argued, within Croatian constitutional simple majority parliamentary model, that the government de facto controls the legislature, not *vice versa*. Therefore, he concluded that the government is able to exercise powers uncontrolled by other institutional actors such as the president of the republic or the legislature because they have no significant veto powers. Thus he advocated for wider and more effective powers to be vested in the CC in terms of its jurisdiction, procedure and enforcement of its decisions.[42]

Šumanović's observations add up to conclusions reached by Melton and Ginsburg when they revisited Hayo and Voigt model. They assume that formal checks and balances between the executive and the legislature are less relevant for de facto

40 *Ibid.*, pp. 280 – 282.

41 C-64/16 (*Associação Sindical dos Juízes Portugueses*), GC, 27.2.2018.

42 U-II-5709/2020 and U-II-5788/2020 (*COVID-19 Pandemic Management Measures*), 23.2.2021.

judicial independence as courts cannot enforce effectively these constitutional arrangements. The study thus shows that regulation of procedures for appointment and removal of judges or other formal factors of de iure judicial independence would be highly correlated with de facto judicial independence only if the regulation in question is adopted by a democratic regime (democratic country where the public has confidence in the legal system and its population or the media would mobilise to defend independence of the judiciary) with appropriate formal guarantees for the control of the executive. This study also finds that formal rules on dispersion of powers between the executive, the legislature and the judiciary in procedures for appointment of judges of supreme courts can improve de facto judicial independence provided, again, that the executive is democratic. For example, in autocratic regime or electoral democracies the model of dispersion of powers only conceals the executive's de facto control over appointment procedures.[43] These results are comparable to the EU 2023 Justice Scoreboard which indicates that the number of powers vested in national judiciary councils does not correlate with efficiency of courts systems or more favourable appearances as to their independence[44]; and thus explain why constitutional arrangements concerning de iure independent national judiciary councils do not effectively improve de facto judicial independence in some countries.[45]

The analysis provided by Melton and Ginsburg also explains why both the CJEU and the ECtHR do not oppose, as a general rule, models that involve the executive or the legislature in procedures for appointment of judges, but rather verify whether formal checks against arbitrary interferences of the executive in judicial independence exist and try to ascertain whether the executive is allowed to exercise powers discretionary and unhindered by other actors, such as the national judiciary council or the legislature. This approach can therefore give varying results. For example, in cases concerning Poland, where national regulation had enabled the President of the Republic to sideline the national judiciary council in procedures for appointment or removal of judges, the CJEU found that such involvement

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43 Melton, J.; Ginsburg, T., *Does de jure judicial independence really matter?: A reevaluation of explanations for judicial independence*, Journal of Law and Courts, Vol. 2, Issue 2, 2014, pp. 187 - 217; These results prompted further research on the relationship between democratic development and measurements of de facto judicial independence, see, for example Linzer, D. A.; Staton, J. K., *A global measure of judicial independence - 1948–2012*, Journal of Law and Courts, Vol. 3, Issue 2, 2015, pp. 223 – 256.

44 The Commission's data are further corroborated by another study which sees no correlation between judiciary councils competences in respect of disciplinary accountability of judges and courts efficiency, see Garoupa, N., Ginsburg, T. *Guarding the guardians: Judicial councils and judicial independence*, The American Journal of Comparative Law, Vol. 57, Issue 1, 2009, pp. 103 – 134.

45 See also Ríos-Figueroa, J.; Staton, J. K., *An evaluation of cross-national measures of judicial independence*, The Journal of Law, Economics, & Organization, Vol. 30, Issue 1, 2014, pp. 104 – 137.

of the President of the Republic was incompatible with the principle of judicial independence.[46] On the other hand, in C-896/19 (*Repubblika*)[47] the CJEU did not find problematic the national provisions which confer on the Prime Minister a decisive power in the process for appointing members of the judiciary because the impugned provisions had provided for the involvement of an independent body tasked, in particular, with assessing candidates for judicial office and providing an opinion to the Prime Minister. Therefore, informal factors of de facto independence such as mere appearances as to the independence of the Maltese courts and the nature of Malta's political regime (the objectives pursued by the executive when regulating the courts system) were more decisive, irrespective of the CJEU's effort to reason its ruling by formal factors of de iure judicial independence.

However, Melton and Ginsburg study still supports factual causation between formal factors of de iure judicial independence and de facto judicial independence provided that democratic control of the executive still exists. Therefore, new Voigt, Gutmann and Feld study, which now deliberately includes new variables such as access to the highest court, scope of its powers (competences) and allocation of cases within the said court, confirms again that de iure guarantees of independence of higher courts (constitutional or supreme courts) are more significant for de facto judicial independence than informal factors such as democratisation or GDP *per capita*. The inconclusive results of previous Hayo and Voigt study have also been rectified as, contrary to their earlier hypotheses regarding parliamentary model, new study shows that de facto judicial independence is best guaranteed in semi-presidential constitutional models with a wider array of formal factors of de iure independence, which draws our attention back to justice Šumanović›s criticism of Croatian constitutional arrangements.[48] The identical conclusion in respect of parliamentary model was later shared by Carruba et al. who claim that parliamentary model should not be assumed as more favourable to judicial independence because „the extent to which the governing party controls the legislature" is crucial for the latter.[49] Finally, the latest 2021 study by Hayo and Voigt

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46 See the CJEU's case law cited supra note 11.

47 C-896/19 (*Repubblika),* GC, 20.4.2021.

48 Voigt, S.; Gutmann, J.; Feld, L. P., *Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators*, European Journal of Political Economy, Vol. 38, 2015, pp. 197 – 211.

49 Carruba, C. J.*, et al.*, *When Parchment Barriers Matter: De jure judicial independence and the concentration of power*, manuscript (on file with authors), 2015, p. 19, available at [https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/parchment.pdf], Accessed 12 February 2024.

confirms that the gap between de iure and de facto judicial independence is the widest in parliamentary models with high corruption index.[50]

In conclusion, Voigt, Gutmann and Feld model indicates, same as the above mentioned European Commission data on empirical insignificance of national judiciary councils for independence and efficiency of the courts, that the most decisive are formal factors of de iure independence of superior courts (rules on access to the said courts, their jurisdiction, powers and composition), whereas constitutional arrangements on dispersion of powers between the legislature, the executive and the judiciary by involvement of some formally independent body such as national judiciary council cannot be enforced anyway without involvement of a competent superior court. In other (the plainest words) – the story is all about legal provisions regulating the Supreme Court or the CC, not the SJC, the President of the Republic, the Government or the Parliament, or checks and balances between them. These conclusions, however, question significantly the CJEU's and the ECtHR's methodology for assessment of independence of the judiciary which primarily focuses on existence of some independent judicial body that would scrutinise the powers exercised by the executive or the legislature in the procedure for appointment of judges, therefore legitimising the political character of the procedure at hand.

4. HOW CROATIAN CONSTITUTIONAL COURT APPROACHES *DE IURE* AND *DE FACTO* INDEPENDENCE OF THE JUDICIARY

4.1. Cases U-I-1039/2021 and U-I-1620/2021: Procedure for Appointment of the President of the Supreme Court

By its order of 23 March 2021 the CC dismissed the proposals to repeal Art 44.a of the Courts Act[51] which has limited powers conferred on the President of the Republic by Art 119(2) of the Constitution to propose to the Parliament a candidate for the President of the Supreme Court.[52] The impugned provision has prescribed

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50 Hayo, B.; Voigt, S., *Judicial independence: Why does de facto diverge from de jure?*, European Journal of Political Economy, Vol. 79, 2023, pp. 1 – 23.

51 As amended by Art. 31 – 32 of the Courts Act Amendments, Official Gazette no. 67/2018.

52 It must be pointed out that the CC had actually established that the impugned law does not limit the powers of the President of the Republic because he or she may refuse to nominate the candidates shortlisted by the SJC. However, at the same time the President of the Repulic cannot nominate any candidate other than the one shortlisted by the SJC. Therefore, Kostadinov argues rightly that the impugned law did introduce new limitations to the powers conferred on the President of the Republic and furthermore observes correctly that the CC has in fact establish new constitutional arrangements. However, this paper departs from the views expressed by Kostadinov as to the incentives behind the CC's institutional re-arrangement and disagrees with the thesis that the procedure at hand cannot be

that potential candidates for appointment must submit an individual application and a reasoned court management program to the SJC within the deadline determined by the said body in its public call. The applicants argued that Art. 119(2) of the Constitution did not foresee involvement of the SJC in this procedure as it was envisaged that the President of the Republic would exercise this power discretionary and propose any candidate of his or her personal choice to the Parliament (prerogatives of the head of state). Therefore they contested the compatibility of the impugned provisions with the principle of separation of powers between the executive, the legislature and the judiciary (the SJC).

The CC accepted that the ECHR and EU law do not preclude involvement of political actors in procedures for appointment of court presidents. However, due to the strong differences between the Government (that controls the Parliament by simple majority) and the President of the Republic, the CC decided to occupy more independent position (as described by the law and economics model of judicial independence) by reinterpreting the CJEU's general principles on judicial independence. The CC found that the involvement of the SJC in the procedure at hand and additional conditions provided by the impugned law have a general interest in protecting the independence of the Supreme Court. Thus because, as pointed out in cases C-619/18 (*Commission v. Poland - Independence of the Supreme Court*)[53], C-192/18 (*Commission v. Poland - Independence of ordinary courts*)[54] and C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême*)[55], formal factors such as the duty to submit a reasoned court management program and publicity of the procedure before the SJC enable the General Assembly of the Supreme Court and competent committee of the Parliament to deliver objective opinions on various individual applications. Therefore, it was concluded that constitutional character of discretionary powers vested in the President of the Republic does not prevail, as such, over the legislature's choice which, in the interest of independence of the highest court of law, provides for additional de iure checks and balances designed to scrutinise objectively the exercise of discretionary powers of all political actors involved in the procedure.

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reviewed by courts. If the CJEU and the ECtHR may review the involvement of political actors in the procedures for appointment of judges or court presidents, then the CC ought to do the same. In fact, the CC had implicitly warned that it could disapply the provisions of the Constitution which contravene the right to an independent tribunal established by law, by citing paragraph 148. of the judgment of the CJEU in case C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême*). For more details on observations provided by Kostadinov, see Kostadinov, B., *Croatia in a conflicting cohabitation (Milanović – Plenković)*, Collected Papers of Zagreb Law Faculty, Vol. 71, Issue 2, 2021, pp. 131 – 156.

53 C-619/18 (*Commission v Poland - Independence of the Supreme Court),* GC, 11.7.2019.

54 C-192/18 (*Commission v Poland - Independence of ordinary courts),* GC, 5.11.2019.

55 C-824/18 (*A.B. and Others - Nomination des juges à la Cour suprême),* GC, 2.3.2021.

The CC was, however, fully aware that the procedure at hand is still poorly regulated. For example, the law does not authorise the SJC (at least, not explicitly) to exclude from the list the candidates who do not meet minimum requirements prescribed by the law for appointment of a judge of the Supreme Court, in spite of the fact that the President of the Supreme Court appointed in this procedure can be a candidate who has never been a judge, or a judge of a lower court, who will obtain ex lege the status of a judge of the Supreme Court upon appointment by the Parliament. In fact, the law does not provide for duty of any body involved in the procedure to verify these legal requirements. As this legal void raises questions as to the lawfulness of a court composed of a judge or a president that does not meet the requirements prescribed by the law to sit the court concerned, should such candidate be appointed, the CC has added another layer of de iure checks in this procedure by determining that other candidates may submit individual complaints to the CC contesting the decision of the Parliament on appointment of the President of the Supreme Court. In his dissenting opinion, justice Šumanović further pointed out that the procedure at hand may be reviewed by the ECtHR and the CJEU as well. This shows that national courts of the Member States, unlike those in non-EU countries, rely on corrective mechanisms of supranational European courts and institutions when they find that national formal checks of de iure judicial independence are inadequate.

Therefore, the rest of the reasoning of the CC (and some dissenting opinions) had to rely heavily on the public as informal factor of de facto judicial independence. As the General Assembly of the Supreme Court and the SJC are not empowered to review lawfulness of the procedure or influence its outcome by their opinions, regardless of their involvement, the CC was satisfied by the fact that competences of individual candidates, their vision of the functioning of the Supreme Court and entire courts system and the procedure as a whole (the manner in which the executive and the legislature exercise their powers) have become more transparent and scrutinised by the public and the media. In his dissenting opinion, justice Šumanović also advised the General Assembly of the Supreme Court to reason in detail and publish its non-binding opinion on the best-fitted candidate (and other candidates as well).

4.2. Case U-I-6950/2021: Binding Opinions of Section Meetings of the Supreme Court and HANN-INVEST Case (CJEU: C-554/21 et al.)

By its order of 12 April 2022 the CC dismissed the proposal to repeal Art. 40(2) of the Courts Act[56] which provides that the section president or the President of the Supreme Court shall convene judges on a section meeting or a meeting

[56] As amended by Art. 28 of the Courts Act Amendments, Official Gazette no. 67/2018.

of all judges if a judge of the Registry of the Supreme Court finds differences in interpretation between sections, chambers or single-judges concerning questions as of law or where a chamber or a single-judge departs from the legal position previously adopted, while the opinions thus adopted shall be binding on all the chambers or judges of the Supreme Court. The applicants in this case also sought constitutional review of a certain opinion of the Civil Law Section of the Supreme Court concerning statute of limitations period applicable to restitution claims based on null contracts. They argued that the impugned provisions contravene the principle of separation of powers as they enable the Supreme Court to legislate. In their view, the judges partaking section meetings thus deliberate and decide in specific cases which, according to the law, are competent to decide only a single-judge or a chamber of the Supreme Court. However, it must be pointed out that no complaint as to the incompatibility of the impugned provisions with the principle of judicial independence had been raised. The CC had preliminary observed that sections of the Supreme Court, established by the law and further regulated by the Rules of the Supreme Court, composed of judges of the Supreme Court appointed by the SJC, cannot be discarded as „non-courts". The CC then proceeded to conclude that according to Art. 119(1) of the Constitution the impugned provisions have a legitimate aim in the constitutional role of the highest court of law vested with a duty to secure uniform application of the law in judicial proceedings, which cannot be likened to the power to legislate. The CC did, however, further observe the CJEU's positions in cases C-689/13 (*Puligienica Facility Esco SpA*)[57] and C-564/19 (*IS*)[58], in order to clarify the relationship between binding effect of section opinions and Art. 267 TFEU. It has clarified that no provision of national law or rules of court that regulate section meetings may be interpreted as precluding a single-judge or a chamber of an appellate court or the Supreme Court from activating the mechanism of judicial dialogue with the CJEU.

It is now appropriate to contextualise Art. 119(1) of the Constitution within the functioning of the Croatian legal system and European human rights protection mechanisms. Firstly, Art. 119(1) of the Constitution represents de iure guarantee for maintaining viable jurisdiction and functioning of the CC by delimiting its competences from those of other courts reviewed by the Supreme Court. It enables the CC to contain its review exclusively to violations of human rights and fundamental freedoms without having to intervene in plain errors of law that judges might have made.[59] The Supreme Court's power to rectify such errors of lower

[57] C-689/13 (*Puligienica Facility Esco SpA*), GC, 5.4.2016.

[58] C-564/19 (IS), GC, 23.11.2021.

[59] This stable position reflects the principle of subsidiarity of constitutional review in concreto; see, to that effect, among many, U-III-3230/2020 (*Matijaković*), 1.7.2021.

courts is, in any event, already limited by the law only to the errors that further generate conflicting second-instance decisions or the errors of compelling significance for application of law and equality of all. Taking into consideration the limitations on access to the Supreme Court and its 80% inadmissibility decisions rate as mentioned above, the CC has never established that the appeal on points of law is an effective legal remedy. Therefore, in cases where an appeal on points of law was declared inadmissible, the CC must oftentimes address the errors of law made by second-instance courts when their interpretation of the law, or the lack thereof, runs counter the right to a reasoned decision, the principle of non-arbitrariness or the principle of lawfulness.[60] Should judges or chambers of the Supreme Court render conflicting decisions, the cases concerned would raise serious questions as to possible violations of the right to fair trial (Art. 29 of the Constitution, Art. 6 of the ECHR) that either the CC or the ECtHR must address. It also should be noted that the CC and the ECtHR do enjoy some latitude of deference in respect of alleged violations of the right to a fair trial on account of conflicting case-law, for example, where a court departs from the settled case-law in an isolated case so there are no "profound and long-standing differences" within the courts system.[61] However, there is no such latitude of deference under no circumstances if a court, let alone the Supreme Court, departs from settled case-law where material provisions of the Constitution or the ECHR are applicable; or from predictable rules on the right of access to a court. In that case scenario, the interference with (material) human rights and freedoms or institutional guarantees of the right to a fair trial will always be in breach of the principle of lawfulness which inspires every provision of the Constitution and the ECHR and represents one of the tenets of democratic society founded on the rule of law. In a number of cases against Croatia, for example *Vrbica*[62], *Hanževački*[63], *Ljaskaj*[64] or Žic[65], the ECtHR had already found violations of the ECHR on account of unlawful divergence from settled case-law; with some cases, such as *Cindrić and Bešlić*[66], touching upon the most sensitive questions such as the right to life. The most prominent case concerning conflicting decisions of the Supreme Court must be *Vusić v. Croatia*[67] where the ECtHR explicitly stated: „Conflicting decisions in similar cases stemming from the same court which, in addition, is the court of last resort in the matter, may, in

60 See, for example, U-III-1043/2017 (*Razumić*), 7.3.2023.

61 *Nejdet* Şahin *and Perihan* Şahin *v. Turkey*, GC, 13279/05, 20.10.2011.

62 *Vrbica*, 32540/05, 1.4.2010.

63 *Hanževački,* 49439/21, 5.9.2023.

64 *Ljaskaj*, 58630/11, 20.12.2016.

65 *Žic,* 54115/15 et al., 19.5.2022.

66 *Cindrić and Bešlić,* 72152/13, 6.9.2016.

67 *Vusić v Croatia,* 48101/07, 1.7.2010., par. 44.

the absence of a mechanism which ensures consistency, breach that principle and thereby undermine public confidence in the judiciary.". Therefore, instruments for harmonisation of case-law, such as the opinion of a section of the Supreme Court, are fundamental for position that the Supreme Court and the CC occupy within national constitutional framework and European human rights system.

Parallel to the constitutional review proceedings mentioned above, the High Commercial Court sought a preliminary ruling from the CJEU in case C-554/21 et al. (*HANN-INVEST*) in respect of section opinions of the said court and the functioning of its registry, suggesting that Art. 40(2) of the Courts Act was incompatible with the principle of judicial independence.[68] However, in their opinion dissenting to the majority ruling rendered in the CC's case U-I-6950/2021, justices Abramović, Kušan and Selanec will argue in detail that binding section opinions of the Supreme Court and the functioning of its registry, coupled with involvement of a section president and/or the President of the Supreme Court, contravene, *inter alia*, the right to an independent court established by law, for various reasons then repeated by the European Commission at the Grand Chamber hearing held in *HANN-INVEST* case.[69]

In respect of the principle of judicial independence, the above mentioned dissenting opinion raised a question concerning internal dimension of independence of a competent single-judge or a chamber *vis-à-vis* the registry of the court (which deems that interpretation of the law given by a single-judge or a chamber departs from settled case-law), the section president or the president of the court (who could then convene a section meeting or meeting of all judges where disputed questions of law shall be discussed and, eventually, a binding opinion could be adopted by majority vote of all judges). This dissenting opinion was inspired by case *Parlov-Tkalčić v. Croatia*[70] where the ECtHR had reiterated that a judge must be independent not only from the outside pressure, but also from any pressure or undue influence from within the court, in particular, from the president of the court or other judges. In the latter case, however, the ECtHR found no violation of Art. 6(1) ECHR arguing that national laws guarantee numerous de iure factors

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68 It must be emphasized that the orders for reference of High Commercial Court were not, in any way, connected to the arguments adduced by the applicants in constitutional review case U-I-6950/2021 in respect of the Supreme Court and its Civil Law Section opinions, or any specific opinion thereof.

69 For written report from the hearing, see Materljan, I., *Sud EU-a odlučuje o valjanosti hrvatskog mehanizma ujednačavanja sudske prakse: prvi utisci s rasprave nisu baš ohrabrujući*, 12.6.2023., available at [https://www.iusinfo.hr/aktualno/u-sredistu/sud-europske-unije-odlucuje-o-valjanosti-hrvatskog-mehanizma-ujednacavanja-sudske-prakse-prvi-utisci-s-rasprave-nisu-bas-ohrabrujuci-55355], Accessed 14 March 2024.

70 cit. supra note 28.

of independence of judges *vis-à-vis* court presidents and other judges.[71] Similarly, in his opinion of 26 October 2023 delivered in *HANN-INVEST* case, AG Pikamäe finds that the most essential factors to be observed are: the fact that judges of the competent judical formation partake in discussion on a section meeting; whereas other judges may discuss only questions of law and adopt an opinion thereto by majority vote; while final decision on all factual and legal aspects of the case referred may be rendered only by a competent single-judge or a chamber. The most interesting aspect of his opinion was, however, the parallel pulled between section meetings and the preliminary reference procedure. AG Pikamäe compares the position of a single-judge or a chamber having a case referred to a section meeting for adoption of a binding opinion on questions of law to that of a national court seeking a preliminary ruling from the CJEU. The preliminary ruling contains a binding opinion on questions of interpretation of EU law, whereas it is for the national court to ascertain application of the given opinion in a specific case and render a final decision on the merits. Interestingly, unlike the ECtHR, AG Pikamäe did not analyse in detail all formal factors of de iure independence of judges concerned *vis-à-vis* the section president, the president of the court or judges of the registry. He deemed appropriate to observe only that none of them is the body competent to decide on binding opinion to be adopted by section judges or the body competent to render a final decision on the merits.

Latter conclusions of AG Pikamäe were more than sufficient because the questions of judicial independence that were supposedly raised in these two cases deserve over-simplification.

It should be remembered that the right to an independent tribunal established by law is first and foremost conferred upon individuals who seek justice, the accused or the parties to the dispute. It was also established in general interest of a society to maintain democracy and the rule of law because only judges independent from the executive or the legislature can protect individuals from unlawful and arbitrary interferences of the state. In law and economics wording, only an independent judge can inflict costs on the state or other private actors for violating rights of the individuals. A judge may also claim that he or she has the right to be independent from any undue pressure from the executive, the legislature or from within the court. However, that right was not construed in judge's own interest, but in general interest of a democratic society and the parties concerned. From this point of view, internal dimension of judicial independence is undeniably the most intriguing and mysterious aspect of this right because, public hearings aside,

[71] For other similar cases, see *Tadić v Croatia*, 25551/18, 28.11.2023.; and *Krykin v Russia*, 33186/08, 19.4.2011.

inner functioning of the courts is still hidden from the public behind a veil. That applies especially to higher courts where cases are deliberated in private. Therefore, behind this veil improper influences on judges could occur, the kind that parties to the proceedings could not be informed of.

However, in neither of these two cases, no one has ever argued that section presidents, court presidents or registry judges have exerted improper influence on the judges whose cases had been referred to a section meeting. Thus because opinions on disputed points of law are adopted by all section judges or all judges of the court (as noticed by AG Pikamäe in *HANN-INVEST* case, more than 20 judges had discussed the disputed questions of law), while the competent judicial formation will decide the merits of a case on its own. It is true that under the law and economics model discussed above the size of a court can be irrelevant for its independence. For example, the executive could tamper with the composition of a court by appointment of new judges to restructure the majority decision-making process within the court in its favour. Therefore, nothing can be inferred with certainty from the fact that one case has been decided by three judges, whilst other was decided by five or seven, or by all of them. Similarily, administrative bodies within the courts system such as court president can influence the composition of a judicial formation competent to decide a case. Nevertheless, nothing in these two cases, nor in national laws, indicates similar possibility that a section president or the president of the court or the registry could convene a section meeting for the purpose of deliberate restructuring of the competent court to decide the case or influence its outcome. Thus because the chain of decision-making process, from the competent judge-rapporteur to the section meeting, includes too many de facto independent actors as well as formal factors of their de iure independence, such as conditions prescribed by the law that must be met for a section to be convened and to adopt an opinion, while the judicial formation competent to decide a case stays unchanged. Therefore, the purported issue concerning internal dimension of the right to an independent court in these cases is purely theoretical because, in essence, it would imply that our constitutional traditions, the ECHR or EU law confer on a single-judge or a chamber an individual right to be independent from various opinions of 20 or more other judges and their colleagues who had been appointed to that court to interpret the law by same independent judiciary council that had appointed the competent single-judge or a chamber. On the other hand, the public could perceive this "right" as "the right of a judge to go rogue" and rule arbitrarily in disregard of consistent interpretation of the law. Even if the latter theoretical (hypothetical) "right" could be construed, it should not prevail over the right of the parties to proper administration of justice and

observance of the principle of lawfulness, nor run counter the legitimate expectations that they infer from the principle of legal certainty.

In the end, under the law and economics models discussed above, section meetings of the Supreme Court could be understood as formal factors that improve de facto independence of the said court from the executive and significant market actors. It is not only more difficult for them to manipulate larger judicial formations, but the Supreme Court had already used this mechanism to inflict costs on the government and significant market actors in a series of disputes concerning violations of individual rights.[72] Eventually, in the Member State with the lowest public confidence in courts efficiency and independence, section meetings of the Supreme Court that ensure uniform application of the law and consistency of the legal system could also help to improve public confidence in the legal system, which is the most important informal factor of de facto judicial independence.

4.3. Case U-I-2215/2021 *et al.*: Periodic Security Vetting of all Judges

By its decision of 7 February 2023 the CC repealed Art. 86.a of the Courts Act[73] which had introduced a system of periodic security vetting of all judges. The vetting process would have been carried out every five years by the National Security Agency (hereinafter: NSA) upon request of a court president forwarded to the NSA by the Minister of Justice. A refusal to submit to the vetting process would have been a disciplinary offence punishable by the SJC. The content of information to be collected about a judge, his or her family, social contacts, activities and assets would have been regulated by the Government. The law had also envisaged a special *quasi*-disciplinary chamber of the Supreme Court which was supposed to review the NSA reports and determine whether there is a security obstacle in respect of a certain judge. The special chamber of the Supreme Court was supposed to report security obstacles to the SJC which would ascertain whether they constitute a disciplinary offence or an act punishable by criminal law. In other instances, a mere existence of a security obstacle would have prejudiced promotion of the judge concerned. The reasoning of the CC as to the formal factors of de iure judicial independence may be summarised as follows:

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[72] See, for example, opinion of the Civil Law Section of the Supreme Court no. Su-IV-56/19-18 of 9 December 2019 concerning duty of the state to compensate unpaid overtime work in public health system; or opinion of the Civil Law Section of the Supreme Court no. Su-IV-33/2022-2 of 31 January 2022 concerning statute of limitations for consumer claims based on unfair consumer credit agreements concluded with several Croatian banks.

[73] As amended by Art. 15 of the Courts Act Amendments, Official Gazette no. 21/2022.

- the legislature had not foreseen any form of independent review of the vetting process carried out by the NSA;

- the notion of a security obstacle had not been regulated with sufficient clarity that would have provided guarantees against arbitrariness on part of the NSA or special chamber of the Supreme Court;

- the legislature had not foreseen any legal remedy against assessment of the said chamber;

- the special chamber of the Supreme Court would have assumed quasi-disciplinary authorities of the SJC in breach of constitutional provisions concerning jurisdiction and powers of that independent body;

- the Government could have decided autonomously the content and scope of extremely sensitive information to be collected about judges, without control of any other independent actor, whereas involvement of the Minister of Justice in the vetting process had not been clarified or regulated;

- the legislature had not foreseen precise rules on the right to access the records and protection of information thus collected.

Therefore, the CC has set a stringent standard concerning the SJC institutional arrangements by indicating that there shall be no tolerance regarding possible delegation of powers of the said body to any other institutional actor, not even within the same branch of power – the judiciary. It has thus demotivated the legislature from restructuring further the Supreme Court.

In respect of informal factors of de facto judicial independence, it must be noted that the Government attempted to justify the impugned law, unprecedented elsewhere in the EU, by low public confidence in the judiciary and alleged widespread corruption within the courts system. The executive relied on law and economics presumption that informal factors of de facto judicial independence such as the public or the media would not react to this violation of judicial independence as they perceive corruption to be widespread in a society, courts included (collective action paradox). Exactly as explained by Hayo and Voigt, no one reacted against the impugned law; instead, the parliamentary opposition decided to support it. The opposition to the impugned law came unexpectedly from within the Government as it was none other but the Minister of Justice who had requested an opinion of the European Commission of Democracy Through Law (Venice Commission) that would later help the CC to obtain competent interpretation on (in) compatibilty of the impugned law with the ECHR. However, the most interesting aspect of this case is that the CC explicitly addressed the collective action paradox

described by Hayo and Voigt: it warned the executive against practices of abusing low public confidence in judicial independence as an excuse for undermining further the independence of the judiciary.

5. CONCLUSIONS

The following conclusions may be inferred from the law and economics model of de iure and de facto judicial independence and legislative reforms or case-law analysed above:

1. The national judiciary council institutional arrangement has proven ineffective within simple majority parliamentary model, given unfavourable informal factors of de facto judicial independence such as corruption, inefficient courts and low public confidence in the legal system. Therefore the SJC should not be vested with additional powers. However, against this background, the SJC's powers must not be delegated to other institutional actors and all formal factors of its de iure independence must be maintained.

2. As informal factors do not support de facto judicial independence, the CC will not dismantle formal checks of de iure judicial independence, regardless of the alleged unconstitutionality thereof or even purely hypothetical effects on de facto judicial independence. The CC would also find permissible a law that does not reflect accurately current constitutional arrangements in respect of the executive, provided that the law concerned has a legitimate aim in strengthening judicial independence.

3. Due to inefficiency of the SJC institutional arrangement and simple majority parliamentary model controlled by the Government, the Supreme Court is the most decisive institutional actor for maintenance of judicial independence - legislative restructuring of its jurisdiction and the proceedings before the said court must cease, as the right of access to the Supreme Court has already become illusory.

4. The process of limiting the law-interpreting powers of the courts is against the essence of the role they play in a democratic society where they, as independent actors, should ensure respect for the principles of lawfulness and rule of law. There should be no further restrictions on appellate courts procedural powers to interpret the law as there is no common European standard that would require so.

5. Higher courts, especially the Supreme Court, must not lose powers to harmonise case-law at section meetings as binding opinions thus adopted enable them to occupy more independent position from the executive or significant market

actors. They also empower the Supreme Court to inflict the costs for violations of the law and thus enforce the law effectively. Harmonisation of case-law could improve public confidence in proper administration of justice and equality of all before the law, which is the most important informal factor of de facto judicial independence.

6. Purely hypothetical issues concerning independence of judges cannot prevail over individual right to a non-arbitrary judge and respect for the rule of law (principles of lawfulness and legal certainty).

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Chapter 8

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Review article

NEW CROATIAN LAW ON ADMINISTRATIVE DISPUTES

Boris Ljubanović, PhD, Full Professor
Josip Juraj Strossmayer University in Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
ljubanovic.boris@pravos.hr

Bosiljka Britvić Vetma, PhD, Full Professor
Faculty of Law, University of Split
Ulica Domovinskog rada 8, 21000 Split, Croatia
bbritvic@pravst.hr

Ivan Malenica, PhD, Professor of Professional Studies
Croatian Parliament
Trg Svetog Marka 6, 1000 Zagreb, Croatia
ivan.malenica@mpu.hr

ABSTRACT

After more than a decade of extensive reform of administrative litigation, which, despite clearly defined goals, did not yield the expected results, and after numerous requests and criticisms from practice and legal theory, a new Law on Administrative Disputes has been prepared. It contains numerous innovations primarily aimed at increasing the efficiency of administrative litigation. The paper presents and analyzes the basic novelties introduced by the new legislation.

Keywords: *administrative dispute, administrative litigation, hearing, appeal, lawsuit, pilot case*

1. INTRODUCTION

After twelve years of the application of the Law on Administrative Disputes[1] (hereinafter: LAD), the Croatian Parliament has adopted a new Law on Administrative

[1] Official Gazette , No. 20/10, 143/12, 152/14, 94/16 – Desicion USRH, 29/17 i 110/21

Disputes, which will come into force on July 1, 2024.[2] It is interesting to note that the old LAD was adopted in 2010 with its application beginning on January 1, 2012, making it the law with the longest vacatio legis. The new LAD has significantly expanded in scope, as it had 92 articles, which the old and still valid LAD currently has, and now it has grown to 172 articles. The reason for the increase in the number of provisions is that the administrative judicial procedure is now fully regulated, especially concerning issues such as the legal capacity of natural persons, validity of representation, evidence presentation, and maintaining order during the dispute, thus eliminating the subordinate application of rules from civil procedure. The aim of this paper is to present and analyze the basic novelties introduced by the new LAD.

2. THE PREVENTION OF UNNECESSARY SPECIAL LEGISLATIVE PROVISIONS

The issue of deviating from general law by prescribing different procedures through special laws is not new in Croatian procedural law.[3] Contemporary procedural theory emphasizes the general legal regulation of actions in every procedure, including administrative disputes. Procedural provisions must be general and equal for all, and the legal consequences certain for those involved.

The establishment of such a general normative framework for a certain procedure achieves, on the one hand, "relative independence from the social context in which it takes place," and, on the other hand, "the normative expectation of citizens that procedural subjects will behave in accordance with the prescribed model."[4] Some procedural law writers consider a violation of this normative framework as a violation of the right to a fair trial.[5] What has been problematic in the 12 years of implementing the ZUS is that some special laws prescribe the urgency of resolving administrative disputes or exceptionally short and unrealistic deadlines for resolving administrative disputes without any criteria to justify them. Therefore, the new ZUS, in Article 8, which regulates the principle of efficiency, adds paragraph 2, which stipulates: "In cases where a special law prescribes a deadline for resolving an administrative dispute, the proposer of the special law is obliged to provide detailed and reasonable explanations for such prescription of the deadline." This

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2 Official Gazette, No. 36/24.

3 More in: Ljubanović, B., *Posebni upravni postupci u Republici Hrvatskoj*, Hrvatska javna uprava, No. 3, 2006., pp. 5-22.

4 See: Krapac, D., *Kazeno procesno pravo*, Prva knjiga: Institucije, Zagreb, 2007.

5 See Galligan, D.J., *Due Process and Fair procedure*, A Study of Administrative Procedures, Clarendon Press, Oxford, 1996.

is intended to prevent the imposition of urgency for some administrative disputes in special laws without valid justification. The legislator must have strong reasons for doing so and provide detailed explanations if such urgency or deadline is to be prescribed.

It has also been shown that the practice of prescribing the first-instance jurisdiction of the High Administrative Court without valid justification is problematic. According to one study, the number of laws deviating from the basic rule of two-instance jurisdiction in administrative disputes has now grown to as many as 14, and the reasons for such deviation from the basic rule of division of jurisdiction between administrative courts and the High Administrative Court are not clear from the explanations of the final proposals of the laws.[6] In this context, the new LAD envisages a new provision in Article 12, paragraph 4, according to which the jurisdiction of the High Administrative Court of the Republic of Croatia may be prescribed, but the proposer of the special law is obliged to provide detailed and reasoned explanations for such resolution of the administrative dispute. The new LAD also limits the recent legislative practice of prescribing exclusive territorial jurisdiction of the Administrative Court in Zagreb, contrary to the provisions on territorial jurisdiction as prescribed by the LAD. Osijek, Rijeka, or Split). Therefore, a new provision is proposed according to which prescribing territorial jurisdiction contrary to the provisions of the LAD is not allowed. If there is a need for specialization of judges in certain administrative areas, this need should be addressed through other more appropriate means, rather than burdening judges of only one court.[7] Regarding the latter mentioned issue, we particularly emphasize, but also accept, the viewpoint of distinguished authors according to which the LAD is an organic law because it elaborates on personal and political freedoms and rights (the right to a fair trial guaranteed by Article 29 of the Constitution), thus occupying a higher legal force in the hierarchy of legal sources than "ordinary" laws. Equally important, the LAD implements the constitutional guarantee of judicial review of the legality of individual acts of administrative authorities and bodies with public authority, as guaranteed by Article 19, paragraph 2 of the Constitution. Moreover, it regulates the functioning of the state judiciary, thus falling under organic laws in that respect as well, as it regulates the scope and manner of operation of state bodies, i.e., courts when resolving administrative disputes.[8]

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6 See Đerđa, D., *Slabljenje pravne zaštite u upravnom sporu*, Zbornik radova 10. savjetovanja – Novosti u upravnom pravu i upravnosudskoj praksi, Zagreb, Organizator, 2022, pp. 35 – 68.

7 More in: Ljubanović, B., *Upravno sudovanje u Republici Hrvatskoj – QuoVadis?*, Hrvatska akademija znanosti i umjetnosti, Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, Zagreb, Modernizacija prava – knjiga 39, Zagreb, 2018.

8 See: Britivć Vetma, B.; Ofak L.; Staničić F., *Što donosi nacrt prijadloga Zakona o upravnim sporovima*, Informator, br. 6813.

3. EVIDENTARY PROCEDURE

One of the major innovations is the complete regulation of the evidentiary procedure by the new Administrative Disputes Act, abandoning the concept of subsidiary application of the Civil Procedure Act in administrative disputes. This is the reason why the number of articles in the Administrative Disputes Act has increased from 92 to 172 because now the administrative judicial procedure is governed by it, eliminating any doubts that arose due to the subsidiary application of the Civil Procedure Act regarding the presentation of evidence and determination of material truth.

For the acceptance and implementation of the principle of seeking material truth, the most important procedural rules are those addressing the issue of authority (rights) to collect procedural material. Specifically, whether the procedural body has the authority, independently of the parties' proposals, to gather procedural material, which is known as the investigatory or inquisitorial principle, or whether this authority lies solely with the parties themselves, acting independently and on their own initiative, in which case it involves the adversarial principle. In proceedings where the investigatory principle predominates, with an active role of the procedural body in collecting evidence and determining facts, there are conditions for accurately (correctly) establishing the factual situation, and therefore for realizing the principle of seeking material truth. Conversely, in proceedings built on the consistent application of the adversarial principle, where the procedural body is mainly a neutral arbiter of the parties' arguments, these conditions do not exist. Unlike administrative proceedings, where the investigatory principle predominates, in civil proceedings primarily concerned with protecting private, party interests, the adversarial principle prevails. In these proceedings, parties are obligated to present facts and propose evidence on which they base their claims or refute the allegations and evidence of the opponent, no later than at the preparatory hearing. The court is empowered to establish facts not presented by the parties and to produce evidence not proposed by the parties only if it suspects that the parties are attempting to assert claims they cannot substantiate, unless otherwise provided by law (Article 7, paragraphs 1 and 2, Article 219, paragraph 1, Article 299, paragraph 1 of the Civil Procedure Act)[9]. The court may, until the conclusion of the preparatory proceedings, when it deems it expedient for the proper resolution of the dispute, remind the parties of their duty to present facts and propose evidence on which they base their claims or refute the opponent's allegations and

[9] The abbreviation "CPA" stands for the Civil Procedure Act, Službeni list SFRJ, 4/1977., 36/1977., 6/1980., 36/1980., 69/1982., 43/1982., 58/1984., 74/1987., 57/1989., 20/1990., 27/1990., 35/1991. Narodne novine, 53/1991., 91/1992., 112/1999., 129/2000., 88/2001., 117/2003., 88/2005., 2/2007., 96/2008., 84/2008., 123/2008., 57/2011., 25/2013., 89/2014.

evidence, especially the need to present decisive facts and propose specific evidence, and state the reasons why it considers it necessary (Article 219, paragraph 2 of the Civil Procedure Act). The court's obligation, generally, to adhere to the will of the parties regarding the facts it is permitted to establish and the evidence it may produce restricts the principle of seeking material truth. But also other rules of civil procedural law deviate from the search for the truth:

- In civil proceedings, the court decides within the scope of the claims presented therein (Article 2, paragraph 1, of the Civil Procedure Act)[10]

- Parties are free to dispose of the claims brought in the proceedings: the plaintiff can waive their claim, the defendant can admit the claim, and they can also settle (Article 3, paragraph 1 and 2, of the Civil Procedure Act).[11],[12]

- The court will refrain from presenting evidence if the party that proposed it does not deposit the amount necessary to cover the costs of its presentation within the deadline set by the court (Article 153, paragraph 3, of the Civil Procedure Act).

- Facts that a party has admitted before the court during the lawsuit proceedings do not need to be proven[13], nor do facts whose existence the law presumes[14](Article 221, paragraph 1 and 3, of the Civil Procedure Act).

- The court will determine the amount of a certain sum or the quantity of an item according to its free assessment if they cannot be determined or could only be determined with disproportionate difficulty (Article 223, paragraph 1, of the Civil Procedure Act).

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10 The court is not authorized to award the plaintiff beyond the scope of the claim, even if based on the proceedings it concludes that the plaintiff is entitled to more than what was requested or something different from what was requested. Exceeding the claim is an absolutely essential violation of the civil procedure, which the appellate court examines ex officio. Art. 354. par. 2. point 12.,art. 365. par. 2. CPA).

11 The court will not accept only those agreements of the parties that are contrary to mandatory regulations and rules of morality (Article 3, paragraph 3, of the Civil Procedure Act).

12 Those are elements of the principle of party disposition. According to this principle, the initiation of litigation, its further maintenance during proceedings, appellate proceedings, revision proceedings, and proceedings concerning motions to reopen the proceedings all depend on the initiative and will of the parties.

13 Exceptionally, the court may order that such facts be proven if it considers that the party's admission implies that they have a claim they cannot dispose of (Article 3, paragraph 3) (Article 221, paragraph 1 of the Civil Procedure Code).

14 It can be proven that such facts do not exist if otherwise provided by law (Article 221, paragraph 3 of the Civil Procedure Code).

- The court may, at its discretion, decide on the existence of important facts in disputes where the value of the subject matter in proceedings before municipal courts does not exceed HRK 10,000.00, and in proceedings before commercial courts does not exceed HRK 50,000.00, if it deems that establishing those facts could be associated with disproportionate difficulties and costs, taking into account the documents submitted by the parties and their statements if the court has taken evidence by hearing the parties (Article 223.a of the Civil Procedure Act).

- If, based on the circumstances, it can be assumed that certain evidence cannot be presented or that it cannot be presented within a reasonable time, or if the evidence needs to be presented abroad, the court will set a deadline by which the evidence will be awaited. If this deadline passes unsuccessfully, the hearing will proceed regardless of the fact that the evidence was not presented (Article 226 of the Civil Procedure Act)

If this condition isn't met, the court will not consider the newly presented facts and evidence. (Article 299, paragraphs 3 and 4, LCP).

- In the appeal, new facts cannot be presented or new evidence proposed, except if they relate to significant violations of provisions of civil procedure law for which the appeal can be filed (Article 352, paragraph 1 of the Civil Procedure Code).

- A judgment rendered by default and a judgment rendered due to the defendant's failure to respond cannot be appealed due to incorrectly or incompletely established facts or due to the incorrect application of substantive law. (Article 353, paragraph 3, CPA);[15]

- The appellate court cannot overturn a judgment to the detriment of the appealing party if only that party has filed an appeal. (Article 374, CPA).

- The procedure conclusively ended with a judgment based on admission, waiver, default, or absence cannot be repeated because the court's decision is based on another decision of the court or another body that has become final, overturned, or annulled, if the competent authority subsequently conclusively resolved the previous issue on which the court's decision is based, and if the party becomes aware of new facts or new evidence on the basis of which a more favorable decision could have been made for the party if those facts or evidence had been used in the previous proceedings. (Article 421, paragraph 2, CPA).

[15] However, if the judgment is challenged because the acknowledgment or waiver was given under material error, coercion, or deception, new facts may be presented in the appeal and new evidence proposed concerning these defects in consent (Article 353, paragraphs 3 and 4 of the Civil Procedure Code).

- In a motion for a retrial, new facts and new evidence can be presented and proposed only if the submitter of the motion, due to their own fault, could not have presented them before the previous proceedings were conclusively concluded. (Article 422, paragraph 2, CPA

- In small claims disputes, a judgment or decision cannot be challenged due to incorrectly or incompletely established factual circumstances (Article 467, paragraph 1, CPA).

Overall, numerous rules of civil procedural law restrict the principle of seeking material truth. They can generally be classified into three groups. The first group comprises rules whereby the court is usually bound by the will of the parties regarding the facts it may establish and the evidence it may admit (Article 7, paragraph 1 and 2, Article 219, paragraph 1, Article 299, paragraph 1 of the Civil Procedure Act - CPA). The second group includes rules under which parties do not have the right to introduce new facts and propose new evidence: a) in appeals, unless they relate to significant violations of procedural provisions that allow for an appeal, b) in revisions, except for those under Article 382, paragraph 1, and only if they relate to significant violations of procedural provisions that allow for a revision, c) in motions for retrial, unless the applicant, without their fault, could not have presented them before the previous procedure was finalized (Article 252, paragraph 1, Article 387, Article 422, paragraph 2 of the CPA). The third group consists of rules whereby judgments due to default or absence, and generally even judgments based on acknowledgment or waiver, cannot be appealed due to incorrectly or incompletely established factual circumstances (Article 353, paragraphs 2-4, Article 467, paragraph 1 of the CPA).

Civil procedural law also contains rules that uphold the principle of seeking material truth. Particularly significant among these rules are the following:

- The court is obligated to provide each party with the opportunity to comment on the claims and allegations of the opposing party (Article 5, paragraph 1 of the CPA).

- The determination of which facts are considered proven is decided by the court based on its conviction through conscientious and diligent assessment of each piece of evidence separately and all evidence together, as well as based on the results of the entire proceeding (Article 8 of the CPA).

- Parties and interveners are obliged to speak the truth before the court and conscientiously exercise the rights granted to them by this law (Article 9 of the CPA).

- A single judge or presiding judge leads the main hearing, examines the parties, and presents evidence (Article 311, paragraph 1 of the CPA).

- It is the duty of the single judge or presiding judge to ensure comprehensive discussion of the subject matter of the dispute (Article 311, paragraph 2 of the CPA).

- A judgment can be appealed due to either incorrectly or incompletely established factual circumstances (Article 353, paragraph 1 of the CPA).

From the above, it is evident that numerous rules of civil procedural law, by their content, significantly limit the principle of seeking substantive truth, especially those arising from the dominance of the adversarial principle as a consequence of the principle of party disposition, surpassing the rules of this law by which that principle is realized. Taking this into account, we can conclude that the principle of seeking substantive truth in civil proceedings, unlike administrative proceedings, is fundamentally restricted.[16]

4. FULL JURISDICTION DISPUTE AND COURT PROCEEDINGS ON THE COMPLAINS

As has been extensively discussed in numerous works and presentations, when Croatia reformed its administrative judiciary in 2010, one of the fundamental goals of that reform was to introduce full jurisdiction dispute resolution. The purpose of the new regulatory framework was for first-instance administrative courts to generally render judgments on rights, legal interests, and obligations of the parties, while exceptionally annulling decisions of public bodies and remanding the case for further proceedings. However, in practice, this did not happen as anticipated.

In full jurisdiction disputes, the court acts both in a cassatory and a substantive manner, meaning that the court can resolve administrative matters.[17] The jurisdiction of the courts in full jurisdiction disputes is regulated by an enumerative meth-

[16] Therefore, Triva rightfully stated that "in civil proceedings, the truth, even when understood in a relative sense, cannot always be established.": Triva, S.; Dika, M.; *Građansko parnično procesno pravo*, VII. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2004., pp. 164.

[17] In French law, there exists a general full jurisdiction dispute and several special full jurisdiction disputes, hence it should be referred to in the plural, namely, full jurisdiction disputes. A full jurisdiction dispute is initiated by a specific lawsuit (recours de pleine juridiction), while a dispute over the legality of an administrative act is initiated by another lawsuit (recours pour exès pouvoir). The party must choose in advance the type of dispute to be conducted. Unlike French law, in German law, a full jurisdiction dispute is quite rare. It is initiated by a constitutive lawsuit (Gestaltungsklage), which requests the court to decide on the merits. The situation is significantly different in Austrian law. A full jurisdiction dispute only exists in cases of "administrative silence." The court can resolve the administrative

od, which means that it is excluded for such disputes to be conducted in matters not provided for by law. The provisions of the current Administrative Disputes Act allow the court to resolve a dispute by deciding on the matter that was the subject of the administrative procedure, provided that the nature of the matter allows for it and that the procedural records provide a reliable basis for it. These are known as liquid issues. In practice, there were many more liquid issues than the number of disputes resolved through full jurisdiction disputes. The Administrative Court did not utilize all the opportunities offered to resolve the matter substantively and to replace the administrative act with a judgment in its entirety.

When determining the total number of full jurisdiction disputes, the political question plays a very significant role: whether it is beneficial and why it is necessary to grant such extensive powers to the courts. This is because a full jurisdiction dispute (especially when combined with substantive decision-making) ultimately means that the court begins to replace the administrative authority itself. Perhaps this circumstance, with its practical and political consequences, does not stand out so prominently in cases where the administrative body is equally bound by the principle of legality as the court. However, it becomes much more pronounced in cases where discretionary judgment is applied, which administrative courts can exercise in such disputes essentially as much as administrative bodies.[18]

In an attempt to achieve what was also the original goal of the administrative judiciary reform in 2010, namely that administrative courts resolve as many cases as possible through full jurisdiction disputes, statistical indicators have shown that this has not been achieved in a significant number of cases. Unlike the previous law, the new Administrative Dispute Act (ZUS) stipulates that the court may substantively resolve the matter even when the plaintiff has not explicitly requested it, as prescribed in Article 47(2). The previous LAD did not have this provision, and the administrative court could resolve a full jurisdiction dispute only if explicitly requested by the plaintiff in the complaint.

5. APPEAL

In terms of the appellate procedure, the previous LAD provided that an appeal could be lodged against decisions in cases prescribed by law. For example, it was stipulated that an appeal could be lodged against a decision on the determination of interim measures and suspension of proceedings, while, for instance, an appeal

matter instead of the administrative body only when the competent administrative authority remains silent in executing a court judgment.

[18] See: Ivančević, V., *Upravni spor pune jurisdikcije s naročitim obzirom na član 40./3. Zakona o upravnim sporovima*, Zbornik radova Pravnog fakulteta u Zagrebu, Zagreb, 1953., p. 81.

against a decision on the deferral of the effect of the lawsuit was not permitted, meaning that the appeal was not allowed. It should be noted that this regulatory framework regarding the right to appeal decisions in administrative disputes also appears to be questionable.

This is especially questionable because it allows a party to appeal a decision on the determination of interim measures but not a decision on the deferral of the effect of the lawsuit. Such a provision prevented the High Administrative Court of Republic of Croatia from verifying, controlling, and adopting legal interpretations in cases where first-instance administrative courts determine the deferral of the effect of the lawsuit in administrative disputes.

With the new LAD, it is provided that an appeal can also be filed against a decision on the deferral of the effect of the lawsuit. This will enable the High Administrative Court of Republic of Croatia to harmonize judicial practice through the appellate procedure regarding when and under what conditions and in which cases a decision on the deferral of the effect of the lawsuit can be made in administrative disputes.

With this new LAD, additional provisions are made in the appellate procedure to ensure better protection of the parties' rights. The new Law on Administrative Disputes distinguishes between significant violations of administrative procedure that have affected or could have affected the making of a lawful and correct decision, and significant violations of administrative procedure that, due to their severity, always influence decision-making.

In the new LAD, such violations are explicitly listed and exhaustively enumerated in paragraph 3 of Article 126. Additionally, Article 127 of the ZUS regulates that an appeal against a judgment is not allowed when an individual decision of a public authority is annulled and the case is remanded for a new procedure. However, an appeal against this judgment is allowed exceptionally if the reasoning of the judgment orders the issuance of a specific decision.

Furthermore, regarding the powers of the High Administrative Court of the Republic of Croatia in deciding on appeals, a significant novelty is also provided, namely, the possibility for the High Administrative Court of the Republic of Croatia to annul the first-instance judgment and remand the case to the first-instance administrative court for retrial if it finds that the administrative court has committed a substantial violation of the provisions of administrative dispute from the aforementioned paragraph 3 of Article 126 of the new LAD, or if the first-instance administrative court has incorrectly determined a decisive fact or has not determined it. The High Administrative Court of the Republic of Croatia can annul

the first-instance judgment and remand the case for retrial only once, which is in line with the regulatory framework of civil and criminal proceedings (the possibility of annulment and remand to the first-instance court only once = prohibition of double annulment).

We believe that this further strengthens the role of the High Administrative Court of the Republic of Croatia as an appellate court and enables it to harmonize judicial practice, thus influencing the efficiency and cost-effectiveness of administrative disputes.

6. REQUEST FOR EXTRAORDINARY REVIEW OF THE LAWFULNESS OF A FINAL DECISION

The regulatory framework of the Extraordinary Legal Remedy - Request for Extraordinary Review of the Lawfulness of a Final Decision has been subjected to numerous criticisms from the scientific and professional community, particularly regarding its under-regulation, the monopoly of the State Attorney's Office for its submission, and the lack of provisions ensuring legal equality of the parties.[19]

The new LAD that the request for extraordinary review of the lawfulness of a final decision can be submitted by the opposing party if the State Attorney's Office of the Republic of Croatia was a party to the administrative dispute or represented the defendant in the administrative dispute. Additionally, the opposing party can submit the request in cases where the State Attorney's Office of the Republic of Croatia determines that there are no grounds for submitting the request for extraordinary review of lawfulness and fails to inform the party of this determination within three months from the date of submission of the proposal.

The composition of the panel deciding on the request allows for decision-making by an expanded panel of thirteen judges of the Supreme Court of the Republic of Croatia if the panel of five judges considers that its decision would deviate from established practice or decisions of the expanded panel of the Supreme Court, or if the practice of the Supreme Court regarding the legal issue under consideration is not uniform. When it comes to deciding on the request, the Supreme Court will reject a request as untimely, submitted by an unauthorized person, or lacking all required information. This includes a request lacking detailed reasons for its submission, which should relate to a particularly serious material or procedural violation of the law that calls into question the uniform application of the law and equality of all in its application. If the Supreme Court does not reject the request,

[19] See Šikić, M., *Primjena zahtjeva za izvanredno preispitivanje zakonitosti pravomoćne presude*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 54, No. 1, 2017., pp. 179 - 201.

it will forward it to the opposing party, which may submit a response within 30 days. The Supreme Court decides on the request in a non-public session, examining the contested decision only in the part contested by the request and within the limits of the reasons stated in the request. It will dismiss the request if it finds it unfounded, but if it identifies a particularly serious violation of the law calling into question the uniform application of the law and equality of all in its application, it will grant the request by judgment, annul the contested decision, and remand the case for reconsideration, or modify it.

7. CONCLUSION

The new LAD has prescribed a proactive approach in the execution of administrative court decisions and has eliminated the substandard regulation regarding the execution process. In order to better protect the rights of the parties, the precondition of the existence of an individual decision of the public authority for filing a request or initiating proceedings for the assessment of the legality of a general act has been abolished.

The aim of the LAD is to eliminate all substandard regulations that have been evident in practice and, on one hand, to better protect the rights of the parties, while on the other hand, ensuring procedural discipline. The proposed norms encourage a more proactive approach by the court in resolving cases (especially in terms of conducting full jurisdiction disputes) and address any doubts regarding the subsidiary application of the Civil Procedure Act.

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DEMOCRACY AND ITS ABUSE - MALIGNANT INFLUENCES ON SERBIA'S FOREIGN POLICY AND SECURITY ORIENTATION*

Miroslav Mitrović, PhD, Associate Professor
Faculty of Law, Security and Management "Konstantin the Great"
Visoka 29a, Belgrade, Serbia
miroslav.mitrovic@konstantinveliki.edu.rs

Nikola Lunić, MSci
Council for Strategic Policy
Karadjordjeva 14, Zemun, Belgrade, Serbia
nikola.lunic@gmail.com

ABSTRACT

The marginal areas of Europe can threaten the legal, economic, and democratic achievements of the European Union. Conflicts, crises, and extreme political options affect political and democratic trends in Europe. The Western Balkans' approach to European and Euro-Atlantic integration affects the EU's stability and democracy. Russia maintains the Western Balkans as a potential hotbed of crises that drain democratic resources and relativize the political achievements of the EU. A paper analyzes Russia's hybrid forms of action towards the countries of the Western Balkans. Russia seeks to expand its area of influence through Serbia's media, energy, and political influence. Russia encourages Serbia's frustrations to stop its European integration and distance it from cooperation with NATO. These findings should generate a broader horizon of the national interest of transforming the Balkans into a region of stability and prosperity, which would achieve the strengthening of the general values, political and democratic achievements of the EU.

Keywords*: Balkans, CSDP, EU, hybrid warfare, Russia, Serbia*

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1. GENERAL GEOPOLITICAL FRAMEWORK

Determining the geopolitical framework of the Republic of Serbia may seem like a straightforward task. However, defining the concept of geopolitics itself can pose a challenge. Some researchers follow the interpretation by political geographers Van der Wusten and Dijkink, who define geopolitics in three ways: as an analytical approach that considers a country's international position in light of its geographical characteristics, a set of rules for managing the state based on this analysis, and a discourse that describes and evaluates the country's position in the world, using such analyses and rules.[1] Geopolitical analyses that consider both geographical and political factors are essential for understanding the state of a country or region. Zbigniew Brzezinski, a well-known political scientist and geostrategist, explains the influence of geography on politics and its role in shaping the geopolitical landscape.[2]

In the 21st century, alternative postmodern geopolitics is challenging traditional geopolitical approaches. Sophisticated models of systemic geopolitics focus on the imbalance of international relations to predict peaceful collaboration between nations. Trilaterism envisions democratic and autocratic entities coexisting sustainably for a multilateral world. Richard Haas proposes a non-polar world based on the global structure and multinational organizations.[3] Haas argued that the multipolar world failed due to the clash of liberalism, communism, and fascism. The bipolar world ended with the "Cold War," and we are now experiencing a brief unipolar moment that will be replaced by a non-polar world, where non-state actors hold power. Haas emphasizes the need for multilateral cooperation among these actors, promoting a networked structure of coordinated non-polarity over the traditional nation-state system.[4]

The world adapts quickly to changes essential for the evolution of civilization. The EU's foreign and security policy must adapt to geopolitical reality without imposing a rigid order. Unfortunately, peripheral European areas create crises that threaten the EU's legal, economic, and democratic achievements. Conflicts in Ukraine, Syria, and the Caucasus, along with humanitarian crises, illegal migration, hybrid democratic regimes, and extreme politics, affect EU political and

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1 Van der Wusten, H.; G. Dijkink, *German, British and French Geopolitics: The Enduring Differences*, Geopolitics, Vol. 7, No. 3, 2002, pp. 19-38.

2 Brzezinski, Z., *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives*, Basic Books, New York, 1997.

3 Haass, R. N., *The Age of Nonpolarity: What Will Follow U.S. Dominance*, Foreign Affairs, Vol. 87, No. 3, 2008, pp. 44–56.

4 *Ibid.*

democratic trends. Peace in Europe and the global perspective of civilization are threatened as never before.

The US election raised concerns about NATO's principles. EU values its relationship with the US but understands the importance of self-sufficiency. Europe recognizes the threats posed by Russia and China and is committed to investing in defense collaboratively. It cannot rely solely on the US for security.

A peaceful solution to the war in Ukraine seems unlikely due to Russia's inflexible war goals. Russia seeks to boost its military capabilities, which could be achieved through a "frozen conflict" agreement. However, it is essential to note that the term "frozen conflict" may be exploited for political gain. Therefore, the European Union must ensure that Ukraine emerges victorious in war and peace.

The EU must support Ukraine while addressing internal cohesion challenges. Modern conflicts are not limited by distance. The consensus principle of agreement obstructs quick responses to security threats. Southeastern Europe is integral to the continent. The Western Balkans' inconsistent approach affects the region's democracy and stability. Political elites promote outdated populist ideas, encouraging internal conflicts.

1.1. Characteristics of contemporary conflicts and hotspots

Europe faces a critical moment in a changing global environment with no clear path to peace, stability, and prosperity. Recent conflicts have disrupted traditional geopolitical order and challenged long-standing security principles. Russia's aggression against Ukraine exposed the weaknesses of the European security architecture.[5] The EU needs a swift review of its security policy to become a strong deterrent and respond effectively to modern threats. Victory in future conflicts relies on alliances shaped by technology, politics, and the economy. Concerns over conflicts between major powers are valid, leading to increased military spending and changes in warfare.[6] Commitment is expected to increase, and new bilateral and multilateral relationships will be established. These relationships will first identify common security interests and strengthen and improve support. The war

[5] Borrell, J., *The war against Ukraine and European security*, 2024, [https://www.eeas.europa.eu/eeas/war-against-ukraine-and-european-security_en], Accessed 18 March 2024.; Tocci, N., *How Russia's Full-Scale Invasion of Ukraine Transformed Europe*. 2023, [https://www.socialeurope.eu/how-the-war-in-ukraine-has-transformed-the-eu], Accessed 10 March 2024.

[6] Fang, S., *et al.*, To Concede or to Resist? The Restraining Effect of Military Alliances, International Organization, Vol. 68, No. 4 2014, pp. 775–809; Leeds, B. A., Do Alliances Deter Aggression? The Influence of Military Alliances on the Initiation of Militarized Interstate Disputes, American Journal of Political Science, Vol. 47, No. 3, 2003, pp. 427–439.

in Ukraine reminds us how devastating wars between state entities can be and highlights the real threat posed by authoritarian regimes' imperial ambitions.

The rise of unmanned weapon systems defines the war in Ukraine. These systems are becoming more precise with affordable components. However, both sides face challenges due to the rapid depletion of supplies and inadequate production capabilities, which hinder their ability to meet the demands of the battlefield.[7] During the war, it became clear that the world, especially the EU, was unprepared. Recently, the US introduced a National Defense Industrial Strategy to tackle its lack of capacity, responsiveness, and resilience—the first strategy in history.[8] At the same time, the European Union adopted the Agreement on increasing production capacity to respond to the impossibility of delivering the required amount of ammunition to Ukraine.[9] Meanwhile, the Russian economy became reliant on the war effort, with 3.5 million employees in the defense industry and importing ammunition from Iran and North Korea.[10] Russia's military-industrial resilience points to the weaknesses of the international sanctions regime, which should be designed in a more efficient and functional way.[11]

Both Ukraine and Russia are worn out from the war, with heavy losses and supply issues rendering their offensives ineffective. However, Ukraine has managed to prevent Russian offensives, strike the Black Sea Fleet, improve air defense, and

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7 Gressel, G., *Beyond the counter-offensive: Attrition, stalemate, and the future of the war in Ukraine*. Council of the EU and the European Council, 2024, [https://www.consilium.europa.eu/en/documents-publications/library/library-blog/posts/think-tank-reports-on-the-invasion-of-ukraine/], Accessed 15 March 2024.

8 Clark, J., *DOD Releases First Defense Industrial Strategy*, 2024: National Defense Industrial Strategy 2023, Department of Defense, [https://www.defense.gov/News/News-Stories/Article/Article/3644527/dod-releases-first-defense-industrial-strategy/], Accessed 10 March 2024.

9 The Act in Support of Ammunition Production (ASAP) at a glance, European Commission, 2024, [https://defence-industry-space.ec.europa.eu/eu-defence-industry/asap-boosting-defence-production_en], Accessed 10 March 2024.

10 Lillis, K. *et al.*, *Exclusive: Russia producing three times more artillery shells than US and Europe for Ukraine*, CNN, 2024, [https://ktvz.com/politics/cnn-us-politics/2024/03/11/exclusive-russia-producing-three-times-more-artillery-shells-than-us-and-europe-for-ukraine-2/], Accessed 11 March 2024; Bermudez Jr. J., Cha, V. and Jun, J., *Major Munitions Transfers from North Korea to Russia*, CSIS, 2024, [https://beyondparallel.csis.org/major-munitions-transfers-from-north-korea-to-russia/], Accessed 10 March 2024.

11 Russian Military Performance and Outlook, Congressional Research Service, 2024, [https://crsreports.congress.gov/product/pdf/IF/IF12606], Accessed 11 March 2024.; Stewart, B., *Russia is facing more than 16,000 sanctions — so why hasn't its economy buckled?* CBC News, 2024. [https://www.cbc.ca/lite/story/1.7141305], Accessed 12 March 2024.

integrate long-range missiles into their operations.[12] Although it did not achieve territorial gains, provide non-Western support, or deliver the necessary ammunition supplies, it failed to halt Russian defense production.[13] It is reasonable to predict that in 2024, Russia and Ukraine will have achieved technological and tactical parity, resulting in defense operations without any operational or strategic successes on either side.

War is complex because it involves difficult decisions and can lead to devastating consequences. Sadly, the number of armed conflicts in the world is only increasing, particularly those involving non-state parties.[14] An example of the current conflict between Israel and Hamas illustrates the drastic asymmetry in military capabilities, which has led to the development of new means and methods to fight the enemy.[15] Civilian populations are often at the forefront of modern conflicts, as governments and armed groups require their support to maintain legitimacy. Unfortunately, civilians are also the most vulnerable group in these conflicts, and neither side tends to prioritize their well-being or protection.

In addition, in the last two decades, an increasing number of parties have become involved in armed conflicts, making them more complex and difficult to resolve.[16] Modern warfare has evolved from traditional confrontation between two states to a situation where multiple actors fight in the same space. That is evident in civil wars like those in Syria, Yemen, and Libya. State actors often use mediators to carry out combat operations on the conflict's territory to further their goals and interests.[17]

The proliferation of armed groups and the increasing number of states willing to intervene in foreign conflicts contribute to modern warfare's complex and multifaceted nature. While the West's attention has been primarily focused on the

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12 Dickinson, P., *Ukraine's Black Sea success exposes folly of West's "don't escalate" mantra,* Atlantic Council, 2024, [https://www.atlanticcouncil.org/blogs/ukrainealert/ukraines-black-sea-success-provides-a-blueprint-for-victory-over-putin/], Accessed 5 March 2024.

13 Watling, J.; Reynolds, N., *Russian Military Objectives and Capacity in Ukraine Through 2024*, RUSI, 2024.

14 Herre, B.; Rodés-Guirao, L.; Roser, M.; Hasell, J.; Macdonald, B., *War and Peace*, 2023, [OurWorldInData.org].

15 Cronin, A. K., *Hamas's Asymmetric Advantage What Does It Mean to Defeat a Terrorist Group?* Foreign Affairs, 2023, [https://www.foreignaffairs.com/israel/hamas-asymmetric-advantage-gaza-cronin], Accessed 13 March 2024.

16 Complex conflict characteristics, ICRC, 2024, [https://sri.icrc.org/risks-opportunities/complex-conflicts/complex-conflict-characteristics], Accessed 12 March 2024.

17 Mitrović, M.; Nikolić, N., *Hibridni rat*. Medija centar 'Odbrana', Beograd, 2022.

conflict in Ukraine, the reality is that the nature of warfare has evolved beyond the traditional state-to-state confrontations to include multiple actors fighting within the same operational space. That is evident in the ongoing civil wars in countries like Syria, Yemen, and Libya, where the number of armed groups involved is complex to ascertain, along with the involvement of foreign nations either directly or indirectly. State actors often use intermediaries to carry out military operations in these conflicts to achieve their goals and interests.[18] The things mentioned above have significant implications for prolonging the conflict and for post-conflict rehabilitation after the conflict ends. As a result, support relationships are expected to remain relevant in the years to come.

The factors that shape modern warfare include the significant impact of advanced combat techniques on operational strategies, the evolving role of space in the battlefield and the utilization of space technology and artificial intelligence, the growing significance of long-range and high-altitude operations, the increased deployment of special forces, and the professionalization of armed forces.[19] In modern times, the chance of an unexpected attack has decreased. However, propaganda and information activities have become crucial in supporting war efforts. The rapid technological revolution and its effect on the defense industry have made it necessary to train soldiers in a way that matches the development of combat systems.[20]

The technological revolution calls for the integration of the private sector in the war. The private sector will represent a complementary sixth domain in addition to the five domains of warfare. This integration will be realized through contractual arrangements with top cybersecurity providers and communication companies. Training and exercises will be included in the national defense budgets. An excellent example is SpaceX, which operates the Starlink satellite internet constellation, proven critical on the battlefield in Ukraine.[21]

1.2. The impact of contemorary conflicts on the EU

Conflicts can originate locally but quickly escalate and cause widespread national, regional, and global consequences due to external interests. The EU countries'

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18 Watts, S. *et al.*, *Proxy Warfare in Strategic Competition: State Motivations and Future Trends*. RAND, Santa Monica, 2023.

19 Rațiu, A.; Roșu, O., *The impact of some emerging technologies in modern military actions*, Scientific Bulletin Vol. XXVI, No. 2(52), 2021, pp. 188-194.

20 Cohen, R. *et al.*, *The Future of Warfare in 2030: Project Overview and Conclusions*, RAND, Santa Monica, 2020

21 Kramer, F., *The sixth domain: The role of the private sector in warfare*, Atlantic Council, Scowcroft Center for Strategy and Security, 2023.

growing reliance on multinational corporations with advanced technological domains, such as the United States of America and China, suggests higher convergence and homogeneity. However, symmetrical shocks like the 2008 financial crisis, the COVID-19 pandemic, and the abandonment of industrial policy for export competitiveness have led to systemic divergence and polarization, not only between member states but also within them. The war in Ukraine has highlighted the need for the European Union to re-examine its internal organization and view of the world. That is necessary to address the challenges of collective security and democratic values.[22]

The recent European conflict is the most significant since the Second World War. Unfortunately, it is likely to negatively impact the economic growth of the European Union countries.[23] The increased lack of certainty will negatively affect both consumption and investment. The sanctions imposed on Russia will also lead to rising energy prices and inflation. The European Union's economy has displayed vulnerability due to a high dependence on Russian energy and certain crucial raw materials and semi-products such as iron, grains, and artificial fertilizers. The automotive sector has experienced a significant slowdown due to disruptions in the supply of palladium and nickel.[24] The European Union has recently agreed to take steps towards strengthening its economic resilience by significantly reducing its dependence on energy imports from Russia. In addition to this, the EU has also committed to systematically improving its defense capabilities. This decision reflects Brussels' recognition of the strategic importance of positioning itself well in light of the inevitable changes in the global geopolitical order.

In 2022, Vladimir Putin's attack on Ukraine backfired. The Ukrainian army resisted, and the West united against Russia. The Russian economy suffered, with the ruble losing value and inflation increasing.[25] Many multinational companies have already left or are in the process of leaving Russia. At the same time, Russia's military spending has been increasing significantly. Although the Russian economy

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22 Håkansson, C., *The Ukraine war and the emergence of the European commission as a geopolitical actor*, Journal of European Integration, 46:1, 2024, pp. 25-45.

23 Tocci, N., *How the war in Ukraine has transformed the EU*. Social Europe, 2023, [https://www.iwm.at/europes-futures/publication/how-russias-full-scale-invasion-of-ukraine-transformed-europe], Accessed 18 March 2024.

24 Hache, E., *Russian metals: another headache for manufacturers*, Polytechnique Insights, 2022, [https://www.polytechnique-insights.com/en/braincamps/geopolitics/industry-autonomy-scarcity-the-ripples-of-war-in-ukraine/russian-metals-another-headache-for-manufacturers/], Accessed 18 March 2024.

25 Marrow, A., *Russian rouble set for steady decline back past 100 vs dollar in 2024*, Reuters, 2023, [https://www.reuters.com/markets/currencies/russian-rouble-set-steady-decline-back-past-100-vs-dollar-2024-2023-11-03/], Accessed 16 March 2024.

is predicted to decline in 2024, the country's gross domestic product is expected to grow between 1.5% and 2.6% due to the rise in oil prices and the increase in military-industrial production.[26] High military spending will certainly help Russia in the short term, but the long-term outlook for the Russian economy, which has come to depend on war, is bleak.

The European Union has agreed to bear the cost of ending the war on European soil, as the future of European security and democracy depends on it. All EU member countries have realized the need to increase their defense spending, not just in quantity but also in terms of integration and coordination, thereby enhancing the quality of their defense capabilities.[27]

Europe is committed to improving security and defense capabilities in an increasingly unstable world. However, irresponsible statements made during the US election campaign have called into question the postulates of Euro-Atlantic values and collective security. That has led the European Union to reinvigorate the idea of greater European military integration through the European Defense Union. Although this initiative would rely on NATO's capabilities, it would not require the principle of consensus in decision-making.[28] The Alliance may elect a new NATO Secretary General from the eastern wing of EU. EU may establish a commissioner for security and defense to increase defense industry production capacities. EU is allocating more resources towards defense, with Germany contributing the most[29], and Estonia in relative terms with 2.62% of gross national income[30]. Denmark donated all artillery capabilities and ammunition to Ukraine, along with 2.31% of its gross national income as aid.[31]

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26 At a Glance (Russia). International Monetary Fund, 2024, [https://www.imf.org/en/Countries/RUS], Accessed 19 March 2024.

27 Borrell, J., *Investing more together in Europe's defence*, EEAS EU, 2022, [https://www.eeas.europa.eu/eeas/investing-more-together-europe%E2%80%99s-defence_en], Accessed 19 March 2024.

28 Jones, M., *'Reckless': Trump's threat to NATO allies sparks fierce backlash in Europe*, Euronews, 2024, [https://www.euronews.com/my-europe/2024/02/12/reckless-trumps-threat-to-nato-allies-sparks-fierce-backlash-in-europe], Accessed 20 March 2024.

29 Mölling, C.; Schütz, T., *Germany's Defense Budget 2024 - The Planned Increase Is Not Yet Enough*, German Council on Foreign Relations, 2023. 1, [https://dgap.org/en/research/publications/germanys-defense-budget-2024], Accessed 20 March 2024.

30 Psychogiou, V., *A historical record: Estonia's 2022 defence budget increases to 2.3% of the GDP*, Finabel, 2022, [https://finabel.org/a-historical-record-estonias-2022-defence-budget-increases-to-2-3-of-the-gdp/], Accessed 20 March 2024.

31 Ostiller, N., *Denmark announces new military aid package for Ukraine worth $336 million,* The Kyiv Independent, 2024,

Germany has abandoned its traditional pacifist position and is responsible for European defense. The new German Defense Policy Guidelines, presented in November 2023, have defined Russia as the greatest threat to Germany's security, and the Bundeswehr has been given a new central task - warfare.[32] Germany is focusing on improving military cooperation with Indo-Pacific nations like India, Singapore, Indonesia, Australia, and Japan. This shift could make Germany the world's third military power and aligns with its global interests, supported by alliances within the Euro-Atlantic Alliance and its economic power.[33]

1.3. The transfer of conflicts to Southeast Europe and the destabilizing potential of the EU

The Ukraine war caused Southeast European countries to increase military spending and focus on security. The Middle Eastern crisis decreased arms and military equipment deliveries to Ukraine, highlighting potential Russian influence in the Western Balkans and affecting the involvement of the West. Russian influence in the Western Balkans is aimed at preventing European integration and any rapprochement with the European Union.[34] Putin responded to Ukraine's move towards closer European integration with a full-scale invasion. Serbia's dependence on Russian gas complicates the situation. Despite recognizing Ukraine's territorial integrity, Serbia heavily relies on Russia's support in the UN Security Council regarding Kosovo's final status, preventing them from joining Western sanctions against Moscow.

Since Russia invaded Ukraine on February 24, 2022, Serbia has seen a sharp increase in the number of Russian citizens and companies operating in the country. That has led to a rise in real estate rental and consumer prices. During this period, 1,612 companies and 7,511 entrepreneurs from the Russian Federation were registered with the Agency for Business Registers, compared to only 58 companies and 71 entrepreneurs from Ukraine.[35] Serbia is becoming a popular destination for

[https://kyivindependent.com/denmark-announces-new-military-aid-package-for-ukraine-worth-336-million/], Accessed 20 March 2024.

32 Schreer, B. *Germany's new defence-policy guidelines*, IISS, 2023, [https://www.iiss.org/online-analysis/online-analysis/2023/11/germanys-new-defence-policy-guidelines/], Accessed 3 March 2024.

33 Milenović, N. *et al.*, *Serbia and Germany-from Suspicion to Trust*, Friedrich Ebert Stiftung, 2015.

34 Russia and the Western Balkans Geopolitical confrontation, economic influence and political interference. European Parliamentary Research Service, 2022, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747096/EPRS_BRI(2023)747096_EN.pdf], Accessed 5 March 2024.

35 APR, 2024, [https://apr.gov.rs/pocetna.1898.html], Accessed 5 March 2024.

Russians due to the absence of visa requirements and low tax rates. The country also provides easy access to the European Union market. Despite media portrayals, the majority of the Russian community in Serbia does not support Putin's policies. Serbia aims to join the EU and has made progress in economic integration, but some politicians prioritize relations with Russia over vital interests. The only unresolved issue related to EU integration is Serbia's alignment with the CSDP and sanctions against Russia.

2. RUSSIA'S INFLUENCE VECTORS IN PREVIOUS CONFLICTS

Vladimir Putin called the fall of the Soviet Union the worst geopolitical disaster of the 20th century. The color revolutions - Rose, Orange, Tulip, and Velvet - showed that Russia might lose its sphere of influence, forcing Kremlin to consider soft power combined with hybrid warfare. Russia aims to increase its influence through soft power and traditional diplomacy. Nye says soft power relies on culture, political values, and foreign policy.[36] Hybrid warfare is a military strategy that combines conventional warfare with unconventional tools, such as using paramilitary groups, implementing economic sanctions, spreading propaganda and fake news, influencing a nation's morale, and conducting cyber operations against the opposition.[37]

The fear of Western soft power has led to Russia's destructive use of soft power, which aims to manipulate public opinion through funding cultural and minority rights projects abroad. This subversive use of soft power poses a security threat to the European Union and countries in the Russian zone of interest.

The conflict in Ukraine highlights the use of aggressive tactics in soft power and hybrid warfare. Russia relied on cyberspace and social media networks to impact morale on both sides.[38] Russia's aggressive intelligence activities, obstruction of energy diversification, and digital authoritarianism are threatening Southeast Europe. In addition to these, the implementation of Russian compatriot policy, marketing of fragmented history about fraternal relations, and imposition of a narrative about Russia's economic dominance are also part of the malignant influence of Russia in the region. Lack of adequate resistance in the region makes it partly a victim of Russian foreign policy.

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36 Nye, J., *Power and foreign policy*, Journal of Political Power, No. 4:1, 2011, pp. 9-24.

37 Mitrović, M.; Nikolić, N., *op. cit.*, pp. 145-150.

38 Duguin, S.; Pavlova, P., *The role of cyber in the Russian war against Ukraine: Its impact and the consequences for the future of armed conflict*, European Union, 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/702594/EXPO_BRI(2023)702594_EN.pdf], Accessed 5 March 2024.

3. ABUSE OF DEMOCRACY - SERBIA UNDER RUSSIA'S "HARSH" POWER ATTACK

Research supports the conclusion that Serbia, like the entire Balkans, is a training ground for hybrid warfare.[39] We aim to analyze Russia's hybrid action toward Serbia by examining the environment, strategic determinations, motives, models of action, instruments, and entities involved in exerting influence. Additionally, we will summarize the observed goals and evaluate the achieved results.

3.1. Frame

Russia's actions towards Serbia's national security goals[40] mainly target two key issues - EU integration (a foreign policy concern) and the status and relationship with Kosovo (a security, internal political, and foreign policy concern).

3.1.1. EU integration

Serbia achieved only a moderate level of preparedness in foreign relations by 2023, and no progress was recorded overall. As of August 2023, its compliance with the EU's Common Foreign and Security Policy was only 51%. This was due to disagreements on restrictive measures against Russia and statements regarding Russia and Ukraine. Serbia also disagreed with statements on human resources and EU restrictive measures against Russia, China, Belarus, and Iran.[41]

From the point of view of Russia and EU integration, it should be emphasized that Russia does not place either the Western Balkans region or Serbia in the focus of its foreign policy activities or the achievement of its future strategic goals.[42] Russian foreign policy places Western Balkans, including Serbia, outside its priority focus. That suggests this region is not a priority for Russian foreign policy engagement. However, Russian scientists studying the current situation and Russian foreign policy's declared priorities suggest that the Western Balkans approach can be altered. They propose transitioning from bilateral to multilateral cooperation, creating and supporting pro-Russian political forces in countries like Serbia, Slo-

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39 Mitrović, M., *The Balkans and non-military security threats – quality comparative analyses of resilience capabilities regarding hybrid threats,* Security and Defence Quarterly, Vol. 5, No. 22, 2018, pp. 20-45.

40 National Security Strategy of the Republic of Serbia, Službeni glasnik RS, broj 94, 27 December 2019

41 Republika Srbija Izveštaj za 2023. godinu, Evropska komisija, 2023 [https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izvestaj_ek_23.pdf], Accessed 21 March 2024.

42 Foreign Policy Concept of the Russian Federation [Концепция внешней политики Российской Федерации], February 20, 2013

venia, Croatia, and Albania, expanding the presence of Russian media in the Balkans, continuing economic investments in regional industrial and energy projects, intensifying educational, trade, and cultural cooperation, adopting a constructive approach to religious issues, and developing multilateral cooperation platforms in which Russia actively participates and attracts Western Balkan countries to participate as well.[43]

Serbian-Russian friendship is often romanticized by nationalist groups in both countries and used by opportunistic leaders for political gain. Both countries prioritize their interests, while political elites effectively employ shared historical and emotional narratives to maintain power. The Russian-Ukrainian conflict has also shown the practical side of Moscow-Belgrade relations.[44] Moreover, if it does not openly advocate against Serbian EU integration, Russia, through its proxy agents, is doing everything to create an anti-European mood in Serbia.

The Western Balkans may not be an area of primary interest to Russia, but it still considers the region a vital place to implement its foreign policy tactics. These tactics primarily involve advocating against NATO and EU integration, as well as the independence of Kosovo. Russia aims to encourage instability and anti-Western sentiment while strengthening its position as a great power. To achieve its goals, Russia uses Serbia as a base. Serbia's support in resolving the issue of Kosovo is essential for Russia's strategic interests in the Western Balkans.

A closer examination of Russian-Serbian relations reveals that the two countries prioritize their interests and use each other to achieve foreign policy goals rather than providing unconditional support, as commonly believed in public discourse and media narratives. While Russia and Serbia maintain good political and economic ties, the political elites of both countries approach bilateral relations opportunistically to strengthen their position and power.

3.1.2. Relations with Kosovo

Russia favors Serbia in the OUN and has taken a position to support any agreement that Serbia adopts. Russian officials also tend to highlight the example of Albanians in Kosovo as a positive practice of the people's right to secession when-

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43 Entina, E.; Pivovarenko, A., *Russia in the Balkans*, RIAC report, 13 January 2019.

44 Miholjcic-Ivkovic, N., *Russia-Serbia Relations: True Friends or Pragmatic Players?* Geopolitical Monitor, 2024, [https://www.geopoliticalmonitor.com/russia-serbia-relations-true-friends-or-pragmatic-players/], Accessed 22 March 2024.

ever they defend Russia and the Russian people regarding various forms of independence, autonomy, and even succession.[45]

Russia has often referred to the NATO bombing of the Federal Republic of Yugoslavia in 1999 and the Western recognition and support of Kosovo as a justification for its policy. Following the Russian war against Georgia, Putin used the "precedent of Kosovo" to justify recognizing the independence of Abkhazia and South Ossetia.[46] Later, Putin did the same with Crimea, the self-proclaimed 'Donetsk People's Republic' and the 'Luhansk People's Republic' in eastern Ukraine.[47] Russia's foreign policy positions and its desire to achieve its imperial goals of the "Russian world" suggest that it uses Serbia's internal political relations and emotions for its benefit. Despite Russia's stated support for Serbia in the OUN regarding the normalization of relations with Kosovo, Russia exploits the "Kosovo precedent" to justify its aggressive policy. That shows a lack of principles and duplicity, as Russia is acting in its interests rather than in the interests of Serbia's national security. Serbia's declared goals are the normalization of relations in the Balkans and the peaceful resolution of the Kosovo issue.

3.2. Action motives

Russia aims to regain its status as a global power and has been pursuing an expansionist foreign policy based on the idea of "Great Russia." This policy is focused on restoring Russia's former glory as an imperial and respected power globally and is driven by irredentist claims. As a result, smaller countries, particularly those outside Russia's immediate neighborhood, are considered peripheral areas for the country's influence to expand and are not considered worthy of strategic planning.[48]

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45 Barlovac, B., *Putin Says Kosovo Precedent Justifis Crimea Secession*, BalkanInsight, 18 March 2014, [https://balkaninsight.com/2014/03/18/crimea-secession-just-like-kosovo-putin/], Accessed 22 March 2024.

46 Samorukov, M., *Novyj Kosovskij Precedent. Kak Rossija Otreagiruet na Soglashenie Belgrada i Prishtiny* ['A new Kosovo precedent. How Russia will react to the agreement between Belgrade and Pristina], Carnegie Endowment for International Peace, 4 April, 2019, [https://carnegiemoscow.org/commentary/78173], Accessed 5 March 2024.

47 Stojanovic, D., *Explainer: Putin's Balkan narrative argument for Ukraine War*, AP News, March 5, 2022, [https://apnews.com/article/russia-ukraine-vladimir-putin-racial-injustice-serbia-kosovo-756fa71c7ab417115ee3521a95791ca7], Accessed 23 March 2024; Gabrielyan, G., *'Russia's Second Front. How the Kremlin's "sagging" in the Balkans* [*Второй фронт России. Как "проседает" влияние Кремля на Балканах*], RadioFreeEurope, March 15, 2022, [https://www.svoboda.org/a/vtoroy-front-rossii-kak-prosedaet-vliyanie-kremlya-na-balkanah/31848184.html], Accessed 15 March 2024.

48 Miholjcic-Ivkovic, N., *op. cit.*, note 44.

3.3. Action models

In its attempt to exert influence on Serbia's foreign policy, Russia uses several developed models of influence.

3.3.1. Russia's soft power towards Serbia

Each country assesses soft power differently because its sources vary. In contemporary research, the term "hard" power is increasingly used in addition to hard and soft power. This term refers to the ability of authoritarian regimes to penetrate, infiltrate, and manipulate the information environment in democratic liberal societies. Hard power is described as part of a new global competition to lead, influence, or coerce action through political means.[49] Serbian citizens generally travel to EU countries for better living conditions, despite their expressed sympathies towards Russia and Putin. That suggests that the social values of the West take priority as they strive to integrate into developed democracies while simultaneously glorifying the authoritarian and undemocratic Russian state system.

Soft power involves voluntarily accepting the party's values that offer power without coercion or conditioning. However, Russia's soft power towards Serbia does not appear to result in acceptance and identification but rather a constructed and romanticized narrative of an alleged indissoluble and always positive historical connection between the two countries. This narrative does not align with the truth, considering the various contradictory interests that both states have had throughout history.

Russia's soft power in Serbia often uses distorted interpretations of historical events, perpetuating the myth of "century-old friendship," "Slavic and Orthodox brotherhood," and "traditional historical ties" between the Serbian and Russian people. The myth that Russia is the "protector" of the Serbs and that Russia's "sacrifice" for Serbia is historically verified is widespread. That contrasts rational and critical historical science, which has a different perspective. In reality, Russia is an empire that, like other great powers in the Balkans, has achieved its imperial intentions. This policy has remained essentially unchanged for over two centuries.[50] Russia is using its soft power means, such as energy and political support, to manipulate public opinion in Serbia. This manipulation is based on President

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[49] Mitrović, M., *The criticism of the universal expression of soft power from the point of view of a small state*, Vojno Delo, 5/2022, 2022, pp. II/15- II/28.

[50] Bešlin, M. *Serbian–Russian relations 19th to the 21st century: Myths, Misconceptions, and Stereotypes against the rational knowledge of the past and present*. In CEAS, Eyes Wide Shut - Strengthening of Russian Soft Power in Serbia, CEAS, Belgrade, 2016.

Putin's authoritarian regime. It is a one-sided approach, without reciprocity and exploiting the weaknesses of an immature democracy. This type of manipulation is known as "sharp" power. Public diplomacy is a valuable tool for influencing the position of a nation or state and is an instrument of soft power. It involves acting strategically toward a foreign audience and differs from traditional, institutional diplomacy.[51]

Probably the most active subject of Russian public diplomacy in Serbia is the Russian House in Belgrade, the official representative office of Rosotrudnichestva, the agency for cooperation with the diaspora. It is a state organization under the control of the Ministry of Foreign Affairs of Russia. The main activity focuses on a kind of "positive propaganda," using cultural and historical stereotypes to strengthen political influence. The website of the Russian House is dominated by announcements related to the war in Ukraine, but also many publications dedicated to the war in Yugoslavia from the nineties, about the bombing of Belgrade, as well as numerous announcements and events of a religious nature, but related exclusively to Orthodoxy. The training ground for the appearance of pro-Russian so-called war commentators who deal with the establishment of political and security vectors of Russia towards Serbia and other countries in the region is the "Balkanist" website, which operates under the auspices of the Russian House in Belgrade. The key messages of the posts on this site are inciting hatred and constantly fueling negative narratives based on the consequences, victims, and tragedies of the wars of the 1990s and the abuse of the NATO-FRY conflict in 1999. The editors of "Balkanista" use the tragic epoch in the history of modern Serbia to play with the feelings of people in whose hearts the memories of the war are still fresh, bringing back memories of the conflict between Serbia and NATO, which the Russian side did not have no connection; A negative and accusatory narrative towards the EU suggesting that the European Union is blackmailing Serbia because of its relations with Russia. Features of posts that refer to "statements" from reliable EU sources do not have links to the sources available, but neither do the names of the authors of the statements.[52]

With the help of the Russian House, Russian propagandists openly organize anti-American and anti-European manifestations where they openly express their aggressive attitude towards NATO and the European Union, encourage Serbs not to

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51 Mitrović, M., *Javna diplomatija u paradigmi hibridnog koncepta sukoba*, Vojno delo, No 2/18, 2018, pp. 309-325.

52 Smirnov, M., *Ruski uticaj u Srbiji: Od negovanja kulturnih veza do otvorene propaganda*, NIN, 2023, [https://www.nin.rs/drustvo/vesti/42869/ruski-uticaj-u-srbiji-od-negovanja-kulturnih-veza-do-otvorene-propagande], Accessed 25 March 2024.

cooperate with others, fuel their memories of past conflicts, and ask them to refuse cooperation in the future.[53]

3.3.2. Economy/energy

In the field of economy, the primary relations between Serbia and Russia are related to the particular export status of Serbian agricultural products to Russia. However, Russia's economic contributions to Serbia are less substantial than the pro-Russian media often presents them to be. Despite having a robust economic relationship, Russia has not made any significant exceptions or support for Serbia, except in agriculture. Russia still needs to show support for Serbia's industrial import niches.[54] Russia owns all of Serbia's oil and gas energy capacities, making it an utterly energy-dependent country. That is part of Russia's "energy offensive" in Southeastern Europe, where it has very dominant and economically significant interests. Gazprom, a Russian national company under the control of state institutions, owns a majority stake of 51% in Serbia gas. Lukoil, another Russian company, acquired the capacity and infrastructure of Serbia's Beopetrol in 2003 for 117 million euros. In 2008, Gazprom purchased Naftna Industrija Srbije - NIS for 400 million euros, creating a new joint venture called Serbia Gas that Russia completely controls. The dominance of Russian interests in Serbia's oil and gas sector indicates a solidly packed intensive perception management campaign in the country's economic approach analyses of Russian-Serbian relations.[55]

3.4. Instruments

3.4.1. Information warfare

The Russian Federation approaches strategic communication thoroughly, comprehensively, and planned. They prepare strategic documents and develop organizational units with long-term projections of their interests.[56] Modern media, particularly the Internet, have been identified as a significant threat to Russia's internal information security. The use of information tools in Serbia, mainly aimed at managing perception, has been recognized in the actions of Russian cultural

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53 *Ibid.*

54 *Srpski izvoz u Rusiju porastao za 17,9 odsto*, Beta, 2016, [http://www.blic.rs/vesti/ekonomija/srpski-izvoz-u-rusiju-porastao-za-179-odsto/j76kxqj], Accessed 9 March 2024.

55 Lakićević, M., *Russian market – a chance for Serbia or myth*. In CEAS, Eyes wide shut - Strengthening of Russian soft power in Serbia: Goals, instruments, and effects, 2016, pp. 74-81.

56 Mitrovic, M., *Russian strategic communication - endless information warfare*, Security science journal, Vol. 3, No 2, 2022, pp. 28-54.

associations, media, and manipulations. These manipulations exploit the pre-existing cultural closeness between the two peoples, the Orthodox Church, political parties, and sponsored civil movements.[57]

The media; Two primary sources influence the media in Serbia. First, it is hard to identify sponsored media because of the need for more transparency in Serbian media and the absence of legal regulation. Second, there is the direct influence of the media center Sputnik Serbia and Russia Today. Sputnik is a powerful tool for creating and spreading Russian disinformation and manipulation in Serbia. Most of the largest national publishing agencies, such as Večernje Novosti, Politika, Pink, Studio, B, Informer, Pečat, NSPM, Standard, Novi Standard, and Pravda, directly share news and comments from Sputnik.

Internet platforms; The Russian Cultural Center in Belgrade is affiliated with various cultural and informational centers. The online platform "About Serbia in Russian" is crucial in enhancing the understanding of Russian-Serbian relations. It also contributes significantly to fulfilling the "borderless" information dissemination goal to the Serbian audience.

The social network; Many active Facebook groups with thousands of members are highly supportive of Putin. These groups typically have a narrative that involves praising Putin personally while also insulting, hating, and humiliating anyone who can be recognized as an opponent, whether it be an individual, a political movement, or a political party.[58]

3.4.2. Subversive activities

Although there have been suspicions of Russian secret service activity in Serbia, there is no confirmed information about recent intelligence operations. However, doubts about the existence of such operations have been fueled by a spy affair in 2019, which exposed the operations of the Russian military intelligence service. The media also reported on recorded subversive actions by Russian intelligence officials, which were confirmed as authentic by Serbian experts. Despite this, the spy affair was largely overlooked, with little detail given, and it was noted that many

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57 *Ibid.*

58 The most active profiles on social networks are: For brotherhood with Russian brothers (srb. За братство са браћом Русима), All of us who are for Putin and Russia (srb.Сви ми који смо за Путина и Русију), Vladimir Putin – Serbia (srb. Владимир Путин – Србија), Serbia Russia (srb. Srbija Rusija), Vladimir Putin Fun Club Serbia (srb. Владимир Путин фан клуб Србија), Russians news (srb. Руске вести), Russian Friendship Association (srb. Друштво пријатеља Русије), Euro – Asia Union (srb./ru. Евроазијска Унија-Евразийский союз), Glory to Russia (srb. Slava Rusiji), Serbian Russian movement – wolfs (srb. Srpski Ruski pokret vukovi)

foreign intelligence services are working towards their goals in Serbia, not just Russia. While the Russian side did not deny their involvement, they attempted to present the situation as a provocation by an unnamed third party.[59]

Recruitment for warfare on the Russian side: The successful results of actions in creating the awareness of Serbian citizens based on propaganda and manipulation of information is the recruitment and inclusion of extremists from Serbia on the side of pro-Russian forces in Ukraine. There is no reliable data on their number, and estimates range from a few dozen to 300.[60] However, Serbian officials condemn such groups and distance themselves from them. The Criminal Code of Serbia prohibits its citizens from getting involved in such conflicts. As a result, only 28 court verdicts have been issued against those who participated in the conflicts in Ukraine.[61] In addition to the public critical attitude of Serbian officials, there is public and unhindered action on recruiting Serbian citizens to participate in the war in Ukraine on the Russian side, especially by the Wagner Group, until the middle of 2023. Thus, the Russian mercenary group Wagner broadcast videos in the Serbian language to encourage recruitment for the war.[62]

Paramilitary camps; In 2018, a youth camp named "Youth Patriotic Camp Zlatibor 2018" was organized on a famous mountain in Serbia. Russian instructors were invited to train children and young people aged 14 to 23 in martial and military arts. The camp was organized with the modern presence of representatives from the embassies of Russia. However, soon after its opening, the Serbian police closed the camp. President Aleksandar Vučić emphasized that the state will not tolerate such forms of training where children in uniform are taught military skills. Subsequently, research showed that 30 children from Serbia had traveled to Russia for the International War Patriotic Youth Camp earlier in the same year. The camp was organized under the patronage of the Russian government and led by the ultra-nationalist group ENOT Corp. The news of the camp's closure was

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59 Petrović, I., *Spy affir in Serbia: a lot of noise, little details*, DW, 22 November 2019, [https://www.dw.com/hr/špijunska-afera-u-srbiji-mnogo-buke-malodetalja/a-51362388], Accessed 2 March 2024.

60 Karšić, Z., *Serbian volunteers and mercenaries in Ukraine and Syria*, Oslobodnjenje, 13 October 2017, [https://www.oslobodjenje.ba/vijesti/svijet/srpskidobrovoljci-i-placenici-u-ukrajini-i-siriji], Accessed 12 March 2024.

61 Djurdjević, M. *Volunteers from Serbia under investigation by the Ukrainian Prosecutor's*, Radio Free Europe27 July 2018, [https://www.slobodnaevropa.org/a/dobrovoljci-ukrajina-tuzilastvo-istraga-rat/29321680.html], Accessed 5 March 2024.

62 Delauney, G., *Ukraine war: Serbia uproar over Wagner mercenaries recruiting for Russia*. BBC, 2023, [https://www.bbc.com/news/world-europe-64329371], Accessed 8 March 2024.

published soon after, but it was reopened in 2019 without military features but as 'sports, recreational, and educational activities'.[63]

3.5. Subjects of Russian action

3.5.1. Russian compatriot organization in Serbia

Various Russian compatriot organizations in Serbia are characterized by non-transparency and closedness of activities, clan organization, intense loyalty to Russia and Putin, and pro-militant orientation.[64] Besides being listed on the organization Russian Home's website, its web pages are unavailable, and there are no official records of its membership or activities.

3.5.2. Political parties

According to data updated by CEAS research in 2016, there are 14 active pro-Kremlin political groups in Serbia. Among these, seven are registered political parties, five are citizens' associations in the Agency for Economic Registers, and two movements are not registered at all. The following pro-Russian political parties have resigned from their operations in Serbia: Serbian Radical Party, Democratic Party of Serbia, Zavetnici, Dveri, Serbian People's Party, Third Serbia, Russian Party, Party of Russians in Serbia, Serbian Russian Movement, Time for Action - Serbian League, Serbian League - New Serbian right-wing movement, "Svetozar Miletić" Movement, State Movement, Serbian Fatherland Front, and United Russian Party.

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63 Djurdjević, M. *Youth Camp 'Zlatibor 2019' under the radar* [Kamp za mlade 'Zlatibor 2019' ispod radara], Radio Free Europe, 24 July 2019, [https://www.slobodnaevropa.org/a/omladinsko-patriotskikamp-zlatibor-2019-ispod-radara-/30073335.html], Accessed 1 March 2024.

64 Registered Russian compatriotex organizations in Serbia: Sveslavica mainly acting through direct contacts, local media and Youtube; General Cadet Association of Russian Cadet Corps Abroad (ru. Общекадетское Объединение Русских Кадетских Корпусов за рубежом при Русском Доме в Белграде); Russian Imperial Movement (srb. Руски империјални покрет); Association of Donbas Volunteers (srb. Савез добровољаца Донбаса), Association of Russian Compatriots „Luč" (ru. Общество российских соотечественников „Луч"); Association of Compatriots and Friends of Russia (ru. Общество соотечественников и друзей России "Россия"); Association of Serbian–Russian Friendship Colonel Rajevski (ru. Общество сербско-русской дружбы "Полковник Раевский"); The Serbian–Russian Association Bela Crkva (ru. Сербско-русское общество "Белая Церковь"); Russian Wave (ru. Русская волна), Society for the Preservation of the Memory of Russians in Serbia (ru. Общество сохранения памяти о русских в Сербии), Association Homeland (ru. Общество "Домовина").

3.5.3. Associations of citizens

According to data, 51 pro-Russian associations have been operating in Serbia since 2017, as reported by CEAS in 2016. Euroskepticism characterizes these associations. Some of the most influential ones include "Образ Свети Сава," Serbian national movement "Ours" (srb. Српски народни покрет "Наши"), and Serbian national movement 1389 (срб. Српски народни покрет 1389). These three movements are active in cyberspace, with over 40 profiles and thousands of members. CEAS research shows that Serbia's most intensive Russian influence was between 2005 and 2015. During this period, 109 organizations were formed that promoted different aspects of Serbian-Russian relations.[65] Two Russian NGOs, the Russian World Foundation and the Gorchakov Fund, are prominent in shaping Russia's image in Serbia.

3.6. The results and the set goals relations

The asymmetry of foreign policy interests influences the relationship between Russia and Serbia. Russia's efforts in achieving its secondary goals, which aim to destabilize the European space, are minimal and are carried out through Serbia as its proxy of influence. On the other hand, Serbia is focused on rationalizing its foreign policy to promote critical development and long-term stability. That indicates an imbalance in goals and results, where Russia has no strategic goals in Serbia. However, Serbia has strategic interests in EU integration and developing closer relations within the framework of the Euro-Atlantic partnership. Considering Russia's declared imperial goals and strategic documents, it is clear that there is a set of goals for Serbia:

- Creating favorable conditions for the realization of the Russian policy towards compatriots in Serbia.

- Rewriting history and promoting a narrative of traditionally strong Russian-Serbian relations throughout history.

- Utilizing propaganda and taking advantage of media freedom to promote pro-Russian sentiment.

- Establishing and supporting organizations and individuals who advocate for various aspects of Serbian-Russian relations.

- Emphasizing similarities in identity and political views.

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[65] CEAS, *Eyes wide shut Strengthening of Russian soft power in Serbia: Goals, instruments, and effects,* CEAS, Belgrade, 2016.

- Strengthening the relationship between the Serbian Orthodox Church and the Russian Orthodox Church.

- Imposing a contrived narrative of Russia as Serbia's primary economic partner.

Based on the progress made so far, Serbia's foreign policy performance and public opinion regarding its relationship with Russia, the EU, and NATO can be analyzed.

- There is an ongoing effort to slow down or completely halt Serbia's integration with the EU. That is fueled by a negative campaign, which aims to create a perception of the EU's imminent disintegration. The slow pace of European integration and the requirement of Serbia to recognize Kosovo has contributed to the rise of Euroscepticism in Serbia. According to the DEMOSTAT survey conducted in mid-2023, 22% of residents believe Serbia should prioritize its relationship with Russia (20% with the EU). Additionally, 42% think maintaining good relations with Russia is more important than continuing negotiations with the EU. The survey also revealed that the Serbian public is divided regarding EU membership, with same, 33% in favor and against.[66]

- Serbia's cooperation with NATO in defense and security has been minimized due to constant, indiscriminate, and unrealistic criticism from civil groups, initiatives, and pro-Russian parties. Moreover, the negative experience of the armed conflict in 1999 is constantly highlighted, with a focus on the role of the USA. That has caused a deterioration in relations and created a negative public opinion towards NATO and the USA in Serbia.

- Serbia is being strongly influenced by pro-Russian organizations that tie the country to Russia in every aspect of social life, economy, energy, security, defense, and international relations. These organizations have an unquestionable and unconditional support for Russia and a negative attitude towards the USA, which is putting pressure on Serbia to execute Russian interests.

3. CONCLUSION

Based on Russia's influence in the region so far, we can conclude that the primary goals of Russian foreign policy are the destabilization of the Western Balkans, the demonization of cooperation with NATO and Euro-Atlantic integration, the delegitimization of the European Union and the process of European integra-

[66] Javno mnenje građana Srbije, DEMOSTAT, 2023, [https://demostat.rs/upload/prezentacija.pdf], Accessed 3 March 2024.

tion, as well as the obstruction of negotiations on the normalization of relations between Belgrade and Pristina. The secondary goal is undoubtedly the stopping of democratic processes, the compromising of the concept of non-violent regime changes, and the relativization of transitional justice.

At this moment, when the global recomposition of geopolitical power is taking place, the political West is deluded by the declaratively expressed commitment to the processes of European integration in the Western Balkans region, which struggles with every step towards a democratically organized political system with long-term economic, social and political stability in a peaceful environment. Dedication to its security and the projection of influence, the West neglects the potential of an escalation of the conflict in the Western Balkans, which in a hypothetical context would have only one winner, which would undoubtedly be Vladimir Putin. That is why the European Union must remain consistent with its principles and promises regarding enlargement, precisely because of the geopolitical situation and vulnerability of the Western Balkans region. In this context, Serbia is particularly exposed and essentially represents the biggest victim of Russia's malignant influence in the region. Despite this, the Ukrainian army "magically" receives significant deliveries of arms and military equipment produced in Serbia, and this indicates that despite all Russian pressures, Serbia remains committed to the peace and stability of the region, as well as to the lofty universal ideal of freedom.

For Russia, Serbia is a part of the Western Balkans, a training ground for indirect influence, primarily for undermining the political dominance of EU and US influence in this part of Europe. For this purpose, Russia is using Serbia's support in resolving the Kosovo issue, favoring its strategic interests in the Western Balkans region and using Serbia as a base for exerting influence. Informational manipulation and psychological operation through agitation, the influence of social networks, the supported organization works, and the current problem in the relations between Serbia and Russia is also evident. Russia primarily projects its influence in Serbia through diplomatic, energy, and strategic communications. They strongly influence Serbian public opinion, develop animosity towards the USA and NATO, and create an environment for slowing down EU integration. Russia successfully implements its strategic communication through the combined appearance of propaganda through the media, social networks, sponsored organizations, and influential figures.

Following Russia's aspirations to establish multipolarity and control its spheres of interest, information warfare, and security development can be expected. In areas of Russian interest, it is possible to expect intensive action by sponsored organizations and political parties, which will affirm disinformation, conspiracy

theories, and other instruments of influence on public opinion supported by the media and social networks. For full effect, this performance is synchronized with the intense activity of public diplomacy, with pronounced Russian influence in the environment in which it operates. Turning public opinion towards Russian interests makes it possible to achieve the effect that the treated public will accept any critical action towards Russia as a negative effect on the Serbian public itself.

In the modern era, Russia has taken an offensive stance towards Serbia, with the aim of jeopardizing the position of the USA and the EU in the consciousness and mood of the Serbian population. However, Russia is not seeking to achieve direct control over Serbia due to its geographical and security-political positions, including the current war in Ukraine and the emotional distance between NATO and Serbia. Russia hopes to maintain its destabilizing potential and increase its strategic influence in the region.

Russia's stated goals do not involve gaining a strategic advantage. However, Russia believes that by weakening the institutions, general security, and political cohesion of the EU on the European continent, it can find new weak points to achieve its imperial goals. As a result, Russia aims to undermine the EU's institutions, general security, and political cohesion. By doing so, it hopes to find new vulnerabilities within the European continent to achieve its objectives.

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Review article

HOW TO ENSURE FREE AND FAIR ELECTIONS IN THE EU AND BEYOND: A NEED FOR RULE OF LAW, DEMOCRACY AND HUMAN RIGHTS PRINCIPLES TO STAND TOGETHER

Vesna Ćorić, PhD, Senior Research Fellow
Institute of Comparative Law
Terazije 41, 11000 Belgrade, Serbia
vesnacoric@yahoo.com

Aleksandra Rabrenović, PhD, Senior Research Fellow
Institute of Comparative Law
Terazije 41, 11000 Belgrade, Serbia
arabrenovic@gmail.com

ABSTRACT

The objective of the paper is to examine the available mechanisms of the EU institutions to ensure a free and fair national and local election process in the EU Member States in the EU acceding countries. Over the past few decades, the EU institutions designed several mechanisms to protect the principle of the rule of law, that, however, have not been used in the election context. A need for securing free and fair elections has instead been recently emphasized through the European Democracy Action Plan adopted in 2020. Moreover, the right to political participation which contains explicit requirements regarding elections is also reflected in supranational human rights instruments, including the Charter of Fundamental Rights of the EU and the ECtHR, and as such justiciable before both supranational courts. The ECtHR case law in particular offers helpful insights into the level of protection of citizens voting rights.

For the acceding countries, elections come under the EU radar primarily through the annual Commissions reports, but could also become the subject of discussion earlier, depending on the EU institutions' views. In line with the 2020 Revised enlargement methodology, elections have been identified as one of the key sub-areas of the Fundamentals (Cluster 1), as part of the assessment of the Functioning of Democratic Institutions, without a clear link to the rule of law principle.

The authors argue in order to ensure fair and free elections, especially in countries which have lower level of democratic tradition, the rule of law principle and human rights protection also need to be put at the forefront and all three mentioned values treated as a "holy" trinity. The authors posit that the existing EU mechanisms are not sufficiently clear and mutually coherent to provide needed guarantees against the violation of free and fair election processes within both Member States and accession countries. Their identified shortcomings may lead to a possibility that the EU institutions "turn a blind eye" in particular cases, e.g. the Serbian 2023 elections, which are still awaiting the official EU Commission's reaction. In order to address these challenges, the authors attempt to propose how to develop a more comprehensive legal and methodological framework for ensuring fair and free elections, especially for acceding countries, but also within the EU realm.

***Keywords**: democracy, EU, free and fair elections, human rights, rule of law, Serbia*

1. INTRODUCTION

There is a global autocracy crisis.[1] The World Justice Project (WJP) Rule of Law Index 2023 shows that authoritarian trends are present around the world, with over 6 billion people living in countries where the rule of law is declining.[2] However, the autocracy crisis is not just about the rule of law, it relates also to the fundamental value of democracy. In that light, the 2024 Varieties of Democracy project report (2024 VoD report) rightly links the dominant trend of growing autocratization and democracy in decline across the world.[3]

Freedom, fairness, and integrity of elections constitute the very core aspects of democracy. Unfortunately, the quality of elections also appears to be worsening across the world, along with a notable increase in the number of electoral autocracies worldwide.[4] The issue of the quality of electoral justice has gained particular prominence in 2024, with approximately 30 percent of all countries in the world holding national elections this year. Elections are considered "critical events", as

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1 Manners, I., *The External Dimensions of the European Union's Autocracy Crisis*, in: Södersten, A.; Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 50.

2 World Justice Project, *Rule of Law Index 2023*, p. 8 [https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf], Accessed 15 March 2024.

3 V-Dem Institute, Department of Political Science of the University of Gothenburg, *Democracy Report 2024, Democracy Winning and Losing at the Ballot,* pp. 5-9, [https://v-dem.net/documents/44/v-dem_dr2024_highres.pdf], Accessed 27 March 2024.

4 The Clean Elections Index aims to measure the extent to which elections are free and fair, the freedom, fairness, and integrity of elections. Based on its collected and processed data it appears that in 2023 the quality of elections is worsening in 23 countries and improving in 12. See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit.,* note 3, p. 15.

they influence the level of democracy across the world, and consequently their quality is currently an issue of key global relevance.[5]

The issue of free and fair elections is also a relevant topic for the European Union (EU), considering that it has been widely argued in the literature that the EU is facing an autocracy crisis.[6] Certain EU Member States and candidate countries have been labelled "electoral autocracies" or even "illiberal democracies".[7] There is a well-documented concern based on the findings of the international observers of the elections performed in Member States that manipulations of elections through media capture occur in various EU Member States.[8] The 2023 Serbian elections may serve as a case of elections held in an EU candidate country allegedly marred by intimidations against opposition candidates and electoral fraud.[9]

Against this background, the authors aim to contribute to the ongoing academic discussion on the position of the right to free and fair elections within the triangular relationship of democracy, the rule of law, and respect for human rights, and critically examine the available EU mechanisms for ensuring the above right. For the purposes of this paper, the concept of free and fair elections in Member States and acceding countries is understood as being limited to local and national elections, while excluding elections for the European Parliament (EP) even though they are also governed by the EU *acquis*. The chosen approach can be justified by

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5 More specifically, according to the 2024 V-Dem report, 60 countries will hold elections in 2024. Please note that V-Dem report does not take into account the election for the European Parliament, therefore the countries holding only those supranational elections are excluded. In addition, countries holding elections in 2024 make up almost a half of the world's population (45%) since they include seven of the world's ten most populous countries. See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit., note* 3, pp. 39-41.

6 Kelemen, R. D., *The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools*, Journal of European Integration, Vol. 45, No. 2, 2023, p. 223; Manners, I., *op. cit.,* note 1, p. 49.

7 Although the term "illiberal democracy" was introduced by scholar Fareed Zakaria, almost three decades ago, it attracted particular attraction two decades later when its essence was understood as providing a basis for decoupling democracy, as the majority rule, from human rights and the rule of law. See Zakaria, F. *The Rise of Illiberal Democracy*, Foreign Affairs, Vol. 76, No. 6, 1997, pp. 23-43; Müller, J. W, *Should the EU protect democracy and the rule of law inside Member States*, European Law Journal, Vol. 21, No. 2, 2015, p. 141; Weiler, J.H.H., *Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance*, in: von Bogdandy, A. *et al.* (eds.), Defending Checks and Balances in EU Member States, Springer, 2021, pp. 5-6.

8 Meijers Committee, *Policy Brief on Free and Fair Elections in The Eu*, CM2302, March 2023, p. 1, [https://www.commissie-meijers.nl/wp-content/uploads/2023/03/CM2302-policy-brief-on-free-and-fair-elections-in-the-EU.pdf], Accessed 22 March 2024.

9 See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit.,* note 3, p. 25.

the fact that the EP elections constitute *sui generis* elections held only in Member States, and as such, they cannot be subject to a systematic comparison between accession and post-acceding countries.

The paper is structured into four key parts. The authors will first examine the concept of free and fair elections through the prism of three EU foundational principles. In the second part, the authors analyze the limitations of the existing EU mechanisms to address violations of the election process in EU Member States and acceding countries with due regard to other existing supranational standards and mechanisms. The third part examines the case of the 2023 Serbian elections through the prism of the EU foundational principles and the EU accession mechanisms. In the concluding section of the paper, the authors attempt to propose ways to develop a more comprehensive legal and methodological framework for ensuring fair and free elections, especially for acceding countries. The authors will use a normative-legal method combined with a sociological method to analyze the implementation of the theoretical and legal concepts of the EU core values in practice.

2. CONCEPT OF FREE AND FAIR ELECTIONS EXAMINED THROUGH THE PRISM OF THREE EU FOUNDATIONAL VALUES

The values of democracy, human rights, and the rule of law have been understood as the "three complementary and indivisible principles" within various Council of Europe (CoE) and EU legal acts.[10] The intrinsic link between these principles has been illustratively explained by Weiler:

> "Majority governance without the constraints of human rights and the rule of law is but a tyranny of the majority. Human rights without effective

[10] That appears from the official CoE acts (i.e., preambles of the Statute of the Council of Europe and the ECHR) as well as from the case law of the European Court of Human Rights (ECtHR). Their interconnection is also evident in the EU acquis such as in Article 2 TEU, the Preamble of the Charter, and the Rule of Law Conditionality Regulation (recital 6). See more on this: Project Group of the Council of Europe: Human Rights and Genuine Democracy, Committee of Ministers '*Draft Declaration on Genuine Democracy*', *Final Activity Report of Project Group on Human Rights and Genuine Democracy*, Strasbourg, 19 January 1996, p. 5; [https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f0da5], Accessed 10 March 2024; Steiner, S., *The Rule of Law in the Jurisprudence of the European Court of Human Rights,* in: Schroeder, W. (ed.), Strengthening the Rule of Law in Europe, Hart Publishing, 2016, p. 140; Rosas, A., *Democracy and Human Rights: Some Conceptual Observations*, in: Södersten, A.;Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, Vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 80.

> rule of law are but slogans. The rule of law outside a democracy is simply the most effective instrument of authoritarianism and worse.[11]

The EU has constitutionalized these values through the provisions of the Treaty on European Union (TEU) applicable to EU Member States and acceding countries.[12] The relevance of these three EU foundational values has increased in the meanwhile, especially since the recent Court of Justice of the European Union (CJEU) clarification that these values do not constitute a mere political statement and rather have a legally binding quality.[13] Given their significance, this paper will examine the conceptual contribution of these values to ensuring free and fair elections at the national and local levels in both Member States and acceding countries.

Firstly, the principle of democracy is key to ensuring free and fair elections. Democracy in its very essence is defined as a form of government in which the supreme power is vested in the citizens and is exercised by them through a system of representation usually involving periodically held free elections.[14] There is no dispute in the academic discussions that democracy, which has been identified as one of the foundational values by Article 2 TEU, is further operationalized in the 'Provisions on Democratic Principles', which are included in Title II TEU and two EU directives setting down the detailed rules for the exercise of electoral rights in the EP elections and municipal elections.[15]

Two main lines of reasoning have emerged in the academic literature with respect to the question of whether the interpretation of the TEU provisions (Articles 10, 11 and 12) giving concrete expression to the Article 2 value of democracy can result in imposing essential democratic requirements on Member States concerning the so-called domestic dimension of democracy, or they should be limited to the

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11 Weiler, J.H.H., *op. cit., note* 7, pp. 3-13.

12 These are TEU provisions governing *inter alia* the EU values, Charter of Fundamental Rights, external actions, the conditions for membership, and the EU commitment to accede to the ECHR. See. Manners, I., *op. cit.,* note 1, p. 50.

13 See Case C-157/21 *Poland v European Parliament and Council* [2022] EU:C:2022:98, par. 264.

14 Oxford Dictionary of Law, Oxford University Press, 2019 as cited in: European Parliament: European Parliamentary Research Center, *EU mechanism on democracy, the rule of law and fundamental rights,* Annex 1 PE 579.328, April 2016, p. 12, [https://www.europarl.europa.eu/EPRS/EPRS_STUD_579328_annexI_EU_Mechanism_MILIEU.pdf], Accessed 15 March 2024; On different definitions of democracy within the EU framework see, *inter alia,* Schütze, R., *Democracy in Europe: Some Preliminary Thoughts*, European Law Review, Vol. 47, 2022, p. 24.

15 Rosas, A., *op. cit.,* note 10, p. 81; Rosas, A.; Armati, L., *EU Constitutional Law: An Introduction*, Hart Publishing, Oxford, 3rd edition, 2018, pp. 124-140; Lungova, M., *Electoral Rights of Non-National EU Citizens with a Focus on Elections in Brno*, Masarykova Univerzit a Faculty of Law, Brno, Master Thesis, 2020, pp. 33-36; Meijers Committee, *op. cit.,* note 8, p. 9.

"European" dimensions of democracy in Member States, such as elections to the European Parliament.[16]

While some authors claim that the EU does not have the explicit competence to regulate "national democracies", including the national and local electoral systems and processes,[17] others posit that the EU influences the conditions in which these structures operate, and that it should also try to regulate more closely the electoral processes at the national and local level.[18] For the supporters of the first approach, it would require a lot of imagination to derive from these TEU provisions clear standards and concrete obligations for Member States regarding "national democracy", including the fairness of national elections. In addition, they state that no parallelism can be made with the standards developed by the CJEU concerning judicial independence at the national level, since there is much more to draw on the EU law and the European Convention on Human Rights (ECHR) law, and the common traditions of Member States in the area of judicial independence than it is the case with the national election standards.[19] On the other hand, the supporters of the second line of reasoning claim that "national democracy" is not entirely out of the reach of the EU, and that the EU has recently become more attentive to democracy in the EU, considering that its protection and strengthening have been identified as one of the six priorities of the current EC.[20] Such increased interest and anticipated engagement of the EU give rise to the expectations of further extension of the EU competencies in the national democracy field.

The first steps in the anticipated extension of the EU competencies in the national democracy field have already started to emerge. In recent years, several new policy initiatives to promote democracy in the EU including the EC European Democ-

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16 Claes, M., *Safeguarding the European Union's Values Beyond the Rule of Law,* in: Södersten, A.; Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, Vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, pp. 69-70; Geiger, R, *Article 10, Principles of Democracy*, in: Geiger, R.; Khan, D.E.; Kotzur, M. (eds.), European Union Treaties: A Commentary, 2015, C.H. Beck- Hart, pp. 65-70; Platon, S., *The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union,* in: N. Cambien; D.V. Kochenov,; E. Muir (eds.), European Citizenship under Stress: Social Justice, Brexit and Other Challenges, Brill Nijhoff, Leiden and Boston, 2020, pp. 1245-1264; Cotter, J., *To Everything There is a Season: Instrumentalizing Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council*, European Law Review, Vol. 47, No. 1, 2022, pp. 69-78; Spieker, L. D., *Beyond the Rule of Law How the Court of Justice can Protect Conditions for Democratic Change in the Member States*, in: Södersten, A., Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, Vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p 77.

17 Geiger, R., *op. cit.,* note 16, pp. 65-70; Platon, S., *op. cit.,* note 16, pp. 364-386.

18 Cotter, J., *op. cit.*, note 16., pp. 69-78; Spieker, L. D. *op. cit.*, note 16, p. 77.

19 Geiger, R., *op. cit.*, note 16, pp. 65-70; Platon, S., *op. cit.,* note 16, pp. 364-386.

20 Claes, M., *op cit.*, note 16, pp. 69-70.

racy Action Plan and the EC Recommendation on Inclusive and Resilient Electoral Processes in the Union were adopted.[21] The European Democracy Action Plan (EDAP) is particularly relevant as it promotes free and fair elections and upholds the electoral rights of the EU citizens.[22] At the same time, the EDAP is not limited to the "European" dimension of democracy, and recognizes the national, regional and local dimensions of democracy as well.[23] It is expected that the EU hard law instruments, such as the relevant founding treaties provisions and the relevant secondary legislation pieces will be interpreted taking into account the recent and progressive soft law instruments. The aforementioned EC Recommendation on Inclusive and Resilient Electoral Processes in the Union is fairly important as it underlines the need for complying with the Code of Good Practice in electoral matters, adopted by the CoE Commission for Democracy through Law (Venice Commission), stipulating that the fundamental elements of national electoral law should not be open to amendments in the period of less than one year before an election.[24]

Furthermore, the Directive 94/80/EC as amended in 2013 on the right to vote and to stand as a candidate in municipal elections, which is applicable for the EU citizens, also shows an impact on the national democracy and election processes.[25] The Commission's 2018 Report on the implementation of the Directive refers to Luxembourg as the only Member State that applied the derogation set out by the given Directive according to which the right to vote is given to mobile EU citizens who have had their legal domicile in Luxembourg and have resided there at least 5 years before registration. Such a derogation was permitted in compliance with the Directive since it provided that a Member State where the proportion of mobile EU citizens of voting age exceeds 20% of the total electorate may require both

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21 The official name of the said document is: Communication from the Commission To The European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions on the *European Democracy Action Plan*, Brussels, 3.12.2020 COM(2020) 790 final, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790], Accessed 16 March 2024 (European Democracy Action Plan); EC Recommendation 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament. Brussels [7 March 2024] (EC's Recommendation on Inclusive and Resilient Electoral Processes in the Union).

22 Claes, M, *op. cit*., note 16, p. 70.

23 See European Democracy Action Plan, as cited in Rosas, A, *op. cit*., note 10, p. 81.

24 See EC's Recommendation on Inclusive and Resilient Electoral Processes in the Union [2024], par. 10, p. 2.

25 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] (OJ L 368 p. 38), consolidated text (Directive 94/80/EC on the exercise of the right to vote and to stand as a candidate in municipal elections); Lungova, M., *op. cit.,* note 15, pp. 35-36.

the voters and candidates to set/have a minimum period of residence.[26] It seems that the possibility to derogate from the above Directive is well balanced and adequately reflects the national democracy needs.

The arguments in favor of the broader interpretation of the EU competences in the field of national and local elections do not stem solely from the mere text of the analyzed EU soft and hard law instruments. There is another wider conceptual argument for a broader interpretation of the TEU provisions on democracy and their application to the national and local elections processes in Member States. As von Bogdandy rightly explains: "democracy at the EU level and that at the national level are essentially intertwined" since Article 10 TEU which, *prima facie*, mainly governs democracy at the EU level, cannot function if democratic decision-making in Member States falters. Put differently, it does not make sense to hold a government democratically accountable at the European level if it governs autocratically at home.[27]

That link primarily appears from Article 10(2) TEU, which specifies that Member States must be "democratically accountable either to their national parliaments or to their citizens". In other words, the democratic legitimacy at the EU level depends to a significant extent on the situation in Member States, since the Member State governments represented in the Council derive their legitimacy from the national level.[28]

Moreover, as further illustration of the interconnectivity between democracy at the EU and the national level, Spieker rightly observes that it is clear from the applicable *acquis* that elections to the European Parliament are to some extent regulated by national law, and as such occur within "each domestic public sphere".[29]

Finally, some authors call for a more proactive role of the CJEU in protecting domestic democratic processes, including elections. This stance has a strong theoretical basis, although such an intervention might be understood by its opponents as

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[26] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections, 25 January 2018, COM(2018) 44 final, p. 9, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0044], Accessed 19 March 2024.

[27] von Bogdandy, A., *The Emergence and Democratization of European Society, A Hegelian and Anti-Schmittian Approach,* Oxford University Press, Oxford, 2023, as cited in Spieker, L.D, *op. cit.,* note 16, p. 77.

[28] *Ibid.*

[29] Article 8 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5 as cited in: Spieker, L.D., *op. cit.,* note 16, p. 77.

"yet another power grab" by the CJEU.[30] There is a prevailing view in the literature that constitutional courts and the CJEU should play a crucial role in ensuring the functioning of democratic decision-making. This stance could be supported by the argument that constitutional courts already play such a role in many fragile democracies, and that if the CJEU also followed that approach, it would discharge a mandate assumed by many courts.[31] The proposed judicial activism on the side of CJEU can give benefits for the protection of national election processes not only through recourse to democracy as a value, but also by invoking other values such as the rule of law and respect for human rights.

Respect for human rights as one of EU foundational principles in the sense of Article 2 TEU should also be carefully taken into account when examining the concept of fair and free elections. Respect for human rights as a value can be achieved in ensuring free and fair (national and local) elections through the relevant human rights envisaged by the Charter of Fundamental Rights of the EU (Charter) and other applicable international human rights instruments. For instance, Article 11 of the Charter protecting freedom of expression seems fairly relevant for ensuring fair and free elections, since "the functioning of democratic debate and pluralist societies" can be protected through the given provision.[32] On the other hand, Article 39(2) of the Charter reads that members of the EP shall be elected by direct universal suffrage in a free and secret ballot. However, it is of limited importance as it relates solely to the election of members of the EP, while the same guarantees are not provided in Article 40 relating to municipal elections.[33]

It is noteworthy that even where a specific human right contained in the Charter seems applicable to the national and local elections, such as the case of freedom of expression, there is an inherent limitation to the overall scope of the Charter, as it applies at the national level only to the situations where the implementation of the EU law is at stake.[34] Hence, the Charter is not applicable to guarantees

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30 On the notion of "power grab" see: Kochenov, D, *De Facto Power Grab in Context*, XL Polish Yearbook of International Law, 2021, p. 197.

31 Spieker, L. D., *op. cit.*, note 16, p. 75; Issacharoff, S, *Fragile democracies. Contested power in the era of constitutional courts*, Cambridge University Press, Cambridge, 2015, p. 241; On constitutional courts' jurisprudence regarding e-voting and achievement of democracy as a value in Europe see Marković, V., E-*Voting – Trojan Horse or Deus ex Machina in Contemporary Democracies*, Strani pravni život, Vol. 67, No. 3, 2023, pp. 427-446.

32 Claes, M, *op. cit*., note 16, p. 70.

33 Compare Articles 39 and 40 of the Charter of Fundamental Rights in the EU, [2012] OJ C 326.

34 Von Bogdandy A. *et al., A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine*, in: Von Bogdandy, A.; Sonnevend, P. (eds.), Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania, Hart Publishing, Oxford, 2015, pp. 248–267.

against violations of free and fair elections as long as the implementation of the EU law is not involved as it is determined by Article 51 (1) of the Charter. This matter is further complicated by the fact that the EU fundamental rights could not be considered generally applicable in Member States since Article 52 (1) of the Charter adds limitations to the application of the Charter according to which the value of "respect for human rights" in the sense of Article 2 TEU can relate only to the "essence" of the fundamental rights as referred to in Article 52(1) of the Charter.[35] Such restrictive criteria cause delimitation problems and create legal insecurity, which could be overcome to some extent by interpreting the Article 2 TEU value of respect for human rights as a triggering rule in the sense of Article 51(1) Charter, meaning that whenever the violation of the Article 2 value is at stake, the Charter would become applicable at least as far as the "essence" of its fundamental rights is at stake.[36]

In that light, the CJEU has already extended its so-called combined approach beyond the connection between judicial independence and the rule of law as the Article 2 value, which was initially established in the *Portuguese Judges* case.[37] The CJEU started to apply such a combined approach as to interlink specific Charter rights such as freedom of expression with the "respect for human rights" as the Article 2 value. More specifically, the CJEU underlined in *La Quadrature du Net and Privacy International*, that "freedom of expression [...] is one of the values on which, under Article 2 TEU, the Union is founded."[38] It remains to be seen whether the CJEU will continue to apply the so-called "Article 2-Charter nexus"[39] to give a "concrete expression" to the respect for human rights as the Article 2 value through the Charter provisions for the sake of ensuring the fairness of local and national elections.

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35 Spieker, L. D., *op. cit.,* note 16, p. 76.

36 The recourse to Article 2 as a triggering rule mostly reflects a proposal brought by Jakab. See Jakab, A., Kirchmair, L., *Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Re-interpretation of Article 51 of the EU Charter of Fundamental Rights*, Cambridge Yearbook of European Legal Studies, Vol. 24, 2022, p. 239.

37 In the *Portuguese Judges* case, the link between the EU version of the rule of law and the concrete requirement of effective judicial protection in Article 10 became clear. See Reichel, J., *The Rule of Law in the European Composite Administration: in Need of a New Approach*?, in: Södersten, A.; Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, pp. 84-85; Cotter, J., *op. cit.,* note, p. 10; Case C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP)* [2018] EU:C:2018:117.

38 More specifically, the CJEU, for instance, underlined in *La Quadrature du Net and Privacy International*, that "freedom of expression [...] is one of the values on which, under Article 2 TEU, the EU is founded". See Joined Cases C-511/18, 512/18, and 520/18 *La Quadrature du Net* [2020] EU:C:2020:791, par. 114.

39 This term "Article 2-Charter nexus" was coined by Spiker, see Spiker, L.D, *op. cit.,* note p. 76.

When it comes to the concretization of the foundational value of respect for human rights from the standpoint of ensuring free and fair elections through other applicable international human rights instruments, the right to free elections at the national level, which is guaranteed by Article 3 of the first Protocol to the ECHR, is of key importance.[40] Even though it is limited in scope to the election of the "legislature", and as such does not afford an unlimited right, the protection of the right to free elections under the ECHR seems broader compared to the protection under the Charter as it concerns national elections and is not limited to supranational elections. In principle, the scope of Article 3 of Protocol No. 1 does not cover local elections, whether municipal or regional. However, recently, in the case *Miniscalco v Italy*,[41] the ECtHR deviated from such an approach and found that Article 3 of Protocol No. 1 applied to local elections to provincial councils in Italy. That stance can be explained by the fact that the Italian regions were granted very broad legislative powers by the 2001 constitutional reform, and thus the provincial councils were to be considered as part of the "legislature".[42]

It has been claimed in the literature that the accomplishment of the EU's accession to the ECHR should be given the top priority to bridge the gap that may discredit the relevance of the ECHR law within the EU.[43] However, even in its absence, the authority of the ECHR law, including its right to free elections within the EU, is undisputable since Article 6 TEU explicitly refers to the ECHR when determining the content of the guaranteed EU fundamental rights.

Other supranational and universal human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also envisage the right to political participation. As the TEU only refers to the ECHR and not to other universal human rights instruments when specifying the content of the fundamental rights in the sense of its Article 6, the

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40 More precisely Article 3 of the first Protocol to the ECHR states "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." See Press Unit of the European Court of Human Rights, *Factsheet – Right to vote*, 2023, p. 1, [www.echr.coe.int/documents/d/echr/fs_vote_eng], Accessed 21 March 2024.

41 *Judgment*, *Miniscalco v. Italy,* Application No. 55093/13, 19 June 2021; See also the case *Decision*, *Repetto Visentini v Italy*, 2021, Application No. 42081/10, 9 March 2021.

42 Registry of the European Court of Human Rights, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections*, updated on 31 August 2022, p. 5. [https://www.echr.coe.int/documents/d/echr/Guide_Art_3_Protocol_1_ENG], Accessed 19 March 2024.

43 On the background and developments on the EU accession to the ECHR see: Ćorić, V., Knežević Bojović, A., *Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights Before European Supranational Courts, Strani pravni život,* No. 4, 2020, pp. 27-40; Rosas, A, *op. cit.*, note 10, p. 83.

aforementioned universal human rights instruments will not be further examined here.

Finally, the substance of the rule of law concept as one of the foundational values in the sense of Article 2 TEU has remained fluid for a rather long time. Neither the documents related to the Rule of Law Mechanism nor those related to the EU accession provide a closer definition or a more precise understanding of what the rule of law implies.[44] However, in 2020, the EU has defined the rule of law in the Rule of Law Conditionality Regulation. The Regulation envisages that the rule of law includes: the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. It appears from this definition that the free and fair election guarantees constitute its indispensable part since its organization and performance mainly require a prohibition of arbitrariness of the executive powers and effective judicial protection, including access to justice concerning electoral fraud and abuse in place, which are in the very essence of the concept of the rule of law.[45]

The extensive ECtHR case law also proves the relevance of the rule of law concept for election processes as it shows that independent and impartial judicial control is needed for ensuring fair and free elections at the national level. Yet, the ECtHR grants states through its jurisprudence a fairly wide margin of appreciation concerning various issues on national electoral systems.[46]

3. EU MECHANISMS FOR ENSURING FREE AND FAIR ELECTIONS IN THE ACCESSION AND POST-ACCESSION CONTEXT

The analysis of the position of the concept of free and fair elections within the triangular relationship of democracy, the rule of law, and the fundamental rights

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44 Knežević Bojović, A.; Ćorić, V., *Challenges of Rule of Law Conditionality in EU Accession*, Bratislava Law Review, Vol. 7, No. 1, p. 52.

45 Article 2 of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, [2-2-] *OJ L 433I, pp. 1–10* (Rule of Law Conditionality Regulation).

46 Rosas, A., *Democracy and the Rule of Law: Odd Bedfellows or Siamese Twins?*, in Rosas, A.; Raitio, J., Pohjankoski, P. (eds.), The Rule of Law's Anatomy in the EU: Foundations and Protections, Hart Publishing 2023, p. 11.

shows their interconnection and interdependence.[47] Those three EU foundational principles are rightly described as dynamic concepts seemingly relatively unclear boundaries, further resulting in their partial overlaps.[48] The blurring boundaries and the existing overlaps between these three Article 2 values are further reflected in the insufficiently integrated and unsystematic approach taken by the EU when it comes to developing their monitoring mechanisms for ensuring free and fair election processes in the EU and beyond.[49]

The authors have identified three main problems hindering the consistency and effectiveness of the existing EU mechanisms for ensuring free and fair national and local elections, which will be examined below. These include: lack of comprehensive mechanisms protecting the three Article 2 values, lack of a more coherent approach between the external and internal monitoring mechanisms for upholding and promoting the free and fair electoral process, and insufficiently effective compliance mechanisms.

3.1. Lack of comprehensive EU mechanisms for upholding and promoting three Article 2 values

The EU has not developed any specific mechanisms for ensuring the right to free and fair elections in Member States and candidate countries. While the EP elections have not been internationally observed since 2009, both the EP and the European Commission (EC) have failed to routinely observe and evaluate the national parliamentary and presidential elections in both Member States and candidate countries, even though their outcomes can have serious implications for the functioning of the EU, as elaborated earlier in the paper. Such a notable lack of state-specific observation missions conducted by the EU to both national and local elections in Member States and in acceding countries is in stark contrast with the EU's longstanding tradition of sending election observation missions to third

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47 The term "triangular relationship" in the sense of determining the relationship between the three Article 2 values was introduced in the study published by the EP in 2013. See European Parliament, Directorate General for Internal Policies, *The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism*, 2013, p. 59. However, there is some unnecessary debate among the stakeholders in practice regarding which of these three values should be considered as the most important. See European Parliament: European Parliamentary Research Center, *op. cit.*, note 14, pp. 22-23.

48 European Parliament: European Parliamentary Research Center, *op. cit.,* note 14, p. 22; Rosas, A., *op. cit.*, note 46, pp. 16–19.

49 Pech, L., The *EU as a global rule of law promoter: the consistency and effectiveness challenges*, Asia Europe Journal, Vol. 14, No. 1, 2016, pp. 7-24; Democracy Reporting International, *Proposals for new tools to protect EU values: an overview*, Briefing Paper 43, November 2013.

countries outside Europe.[50] In addition, Member States and candidate countries do not have an explicit obligation to provide the EU with detailed inputs and contributions relating to their respective election processes, as will be explained later in the paper. In the absence of the EU election observation missions and specific mechanisms for monitoring compliance with the free and fair election standards, other EU activities toward ensuring free and fair elections mostly fall under the ambit of the specific existing mechanisms for monitoring compliance with one of the three Article 2 values.

Although these existing broader scope mechanisms have appeared to be useful, they can be considered as "fragmented in nature", since neither of them is focused on protecting all the three above Article 2 values.[51] For instance, the Rule of Law Framework applicable to EU Member States has been widely criticized for not explicitly covering democracy and the respect for fundamental rights as the two fundamental values enshrined in Article 2 TEU.[52] In a similar vein, the EC Annual Report on the Application of the Charter of Fundamental Rights, which monitors progress in the areas where the EU has powers to act, shows how the Charter fundamental rights have been taken into account in actual cases without giving due regard to the concretization of the other EU foundational values such as the rule of law and democracy. As a counterargument to such a lack of comprehensiveness of this approach, it has been argued that all these values are implicitly addressed by the given mechanisms as there can be no democracy and respect for fundamental rights without the respect for the rule of law and *vice versa*.[53]

Over the last decade, the EP has repeatedly come up with proposals for setting up the most comprehensive EU mechanism to monitor democracy, the rule of law, and the fundamental rights, the so-called DRF Pact. It aims to ensure particularly that the obligation to align to the Copenhagen criteria remains after

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50 Over the last 20 years, the EU conducted more than 75 Election Observation Missions (EU EOMs) in around 75 countries outside of Europe. See Election Observation and Democracy Support, *The EU observation methodology*, [https://www.eods.eu/methodology], Accessed 27 March 2024; Meijers Committee, *op. cit*., note 8, p. 2.

51 In 't Veld, Sophie, *Input into the Commission's reflection process on the Rule of Law*, EU Monitor, 4 June 2019, [https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkz2lwi2grzs?ctx=vg09llzikht8], Accessed 15 March 2024.

52 See European Commission, *European Rule of Law mechanism*: *Methodology for the preparation of the Annual Rule of Law Report*, [https://commission.europa.eu/document/download/72ff8a72-5d69-49ba-8cb6-4300859ee175_en?-filename=63_1_52674_rol_methodology_en.pdf], Accessed 27 March 2024. European Parliament: European Parliamentary Research Center, *op. cit.,* note 14, p. 61.

53 European Parliament: European Parliamentary Research Center, *op. cit.,* note 14, pp. 22-61.

the accession to be maintained by each Member State.[54] Unfortunately, it has been considered a missed opportunity since the EC had refused to engage in setting it up. If it had been adopted, the proposed comprehensive mechanism would have been beneficial for the protection of the Article 2 values, as it was envisaged to incorporate and synthesize a wide variety of the already existing mechanisms, including some external instruments of the CoE.[55]

It is indisputable that the procedures under Article 7 are sufficiently comprehensive as they are triggered by the infringement or by the existence of a clear risk of such an infringement of any of the values guaranteed by Article 2 TEU, thus extending to the rule of law, respect for human rights, and democracy. Nevertheless, their comprehensive character is undermined by the fact that they can be applied only when there is a serious and persistent breach or a clear risk of such a breach by a Member State. The threshold is additionally strengthened as the European Council shall act by unanimity to determine "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2." Those two requirements read together make it very hard to imagine Member States achieving unanimity to sanction less violent forms of backsliding of the Article 2 values such as any reported election irregularities.[56]

3.2. Lack of a coherent approach between existing external and internal monitoring mechanisms for upholding and promoting the free and fair electoral process

In legal scholarly literature, it has been frequently argued that there is one additional layer of fragmentation in the EU internal and external policies bringing about a traditional disconnect between pre-accession and post-accession moni-

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[54] European Parliament, *Resolution on the need for a comprehensive Democracy, Rule of Law and Fundamental Rights mechanism*, 14 November 2018, PE624.231 [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0456_EN.html?redirect] Accessed 15 March 2024; European Parliament, *Report on the situation of fundamental rights in the European Union,* 2013/2078/INI), paragraph 5, [https://www.europarl.europa.eu/doceo/document/A-7-2014-0051_EN.html], Accessed 15 March 2024; European Parliament, LIBE, Legislative Train, *Establishing a EU Mechanism on Democracy, the Rule Of Law and Fundamental Rights*, March 2024, [https://www.europarl.europa.eu/legislative-train/carriage/eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights/report?sid=7901], Accessed 27 March 2024.

[55] In'tvelt, Sophie, *Further strengthening the Rule of Law within the Union: Input into the Commission's reflection process on the Rule of Law*, June 4 2019, p. 2, [https://commission.europa.eu/system/files/2019-07/stakeholder_contribution_on_rule_of_law_-_sophie_in_t_veld_mep.pdf], Accessed 27 March 2024.

[56] Kelemen, D., Article 7's *Place in the EU Rule of Law Toolkit*, in: Södersten, A.; Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 14.

toring, including in the area of elections.[57] To illustrate the lack of a convergent approach in accession and post-accession monitoring mechanisms relating to the electoral processes, a closer look will be taken into the methodologies and structure of the annual reports on candidate countries and the rule of law reports on Member States. The rule of law reports are taken as an example due to their underlying methodological approach, which is highly resemblant to that used *vis-à-vis* acceding countries.[58] However, within the "fundamentals of the accession process" cluster of the annual report on candidate countries, the examination of the rule of law is still closely linked to the fundamental rights, while within the same cluster, the functioning of democratic institutions and public administration reform are examined separately. Conversely, the rule of law reports on Member States include four pillars: justice systems, anti-corruption framework, media pluralism, and media freedom, and other institutional issues related to checks and balances.[59] The inclusion of all these pillars into the structure of the rule of law reports unambiguously shows that the EU's internal concept of the rule of law is viewed as a broader notion compared to the one accepted by the annual reports as it covers democracy as well. However, electoral matters do not have a clear position within the structure of the rule of law reports on Member States, and consequently they occasionally appear within different parts of the report. On the other hand, in the annual reports, electoral matters are structured as a separate subchapter, within the functioning of democratic institutions and public administration reform.

Furthermore, the EC in its annual reports adopts a more comprehensive approach concerning elections in relation to the position it takes in the rule of law reports. In the annual reports, the EC goes beyond the general democratic standards when reporting on elections (i.e., it examines the competitiveness, fairness, and inclusiveness of the elections, election administration procedures, constitutional and legal framework, and the electoral reform), and includes other issues such as gender balance, minority representation, one-party dominance and campaign financing. Unlike its stance towards candidate counties in the annual reports, in the rule of law reports, the EC only sporadically and scarcely examines any election-related

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57 See Knežević Bojović, A.; Ćorić, V., *op. cit.,* note 44, pp. 41-62; Editorial Comments, *Fundamental rights and EU membership: Do as I say, not as I do!*, Common Market Law Review, Vol. 49, No. 2, 2012, pp. 481–488.

58 The new accession methodology aims to further streamline the accession processes through opting for thematic clusters instead of individual chapters, and consequently the annual reports take on a rather different format, due to the introduction of such new structure.

59 While no accession-related documents refer to the relevant methodology based on which the attainment of the three foundational values is achieved in candidate countries, the internal Rule of Law reporting methodology is announced every year. See Knežević Bojović, A.; Ćorić, V., *op. cit.*, note 44, p. 53.

matters. Both the reporting processes have been criticized for not paying sufficient attention to electoral matters, although there is a notable disproportion in favor of the annual reports on candidate countries in terms of covering a much broader set of election issues.[60] In that context, in one of its recent commentaries on the European legislation, the Meijers Committee recommends that the EC should systematically review and use, where appropriate, the findings of supranational election observation missions to Member States in its annual rule of law reports. This recommendation is valuable as it seeks to address the problem of an insufficient set of election-related findings that are contained in the rule of law report on Member States. However, there is a need to follow the same respective recommendation in upgrading the structure and content of the annual reports on candidate countries and strengthening their mutual coherence.

Finally, the common limitation of both the reporting mechanisms is that they lack internal consistency[61] of reporting on relevant electoral issues, meaning that, in the perspective, a set of relevant standards has to be consistently assessed to the same extent across all country reports to provide more meaningful cross-country comparisons and eventually enable a more effective monitoring, which is currently not the case.[62]

3.3. Insufficiently Effective Compliance Mechanisms

There is a large number of supranational actors, including the EU, which have been formally mandated to supervise electoral processes in the European countries, such as the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the Parliamentary Assembly of the CoE (PACE), the Venice Commission, and the Congress of Local and Regional Authorities. Despite their extensive

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60 Subotić, S.; Pavković, M., *Identifying Inconsistencies in the 2022 European Commission's Country Reports for WB6*, Policy brief, CEP Belgrade, 2023, pp. 3-11., [https://cep.org.rs/en/publications/identifying-deficiencies-in-the-2022-european-commission-s-annual-reports-for-wb6/], Accessed 27 March 2024.

61 The internal consistency should be understood as a synonym for internal coherence. According to the prevailing view in the academic literature, the lack of "inner coherence" in terms of Article 2 TEU is attributable to divisions among Member States concerning the importance of those values, which further undermine the EU's ability to develop a common understanding and interpretation of the given values. See Zweers, W. *et al., The EU as a promoter of democracy or 'stabilitocracy' in the Western Balkans? A report by The Clingendael Institute and the Think for Europe Network (TEN*) The Hague: Clingendael Institute, 2022, p. 10, [https://www.clingendael.org/sites/default/files/2022-02/the-eu-as-a-promoter-of-democracy-or-stabilitocracy.pdf], Accessed 20 March 2024. For the purpose of this paper, the term "internal coherence" relates also to different understanding and application of foundational values across acceding countries.

62 Subotić, S.; Pavković, M., *op. cit.,* note 60, p. 10.

and to some extent synergetic involvement in election observation, it has been rightly argued in the literature that supranational election processes monitoring is mostly grounded on voluntariness and lack of effective compliance mechanisms.[63] There are several reasons that substantiate these claims.

Firstly, all the above supranational actors use their mechanisms for compliance with the international free and fair election standards, and by doing so, they bring added value to the existing EU mechanisms. For instance, the ODIHR reports on election observation missions are based on a better and more comprehensive methodology than the EC evaluation reports. As is the case with ODIHR, observation missions deployed by PACE also relate to parliamentary and presidential elections. They are of particular importance considering that PACE is the only supranational actor that provides a mandatory compliance mechanism attaching consequences to a state's lack of cooperation, such as challenging the credentials of the concerned national delegation, freezing the application procedure in respect of candidate countries, or the withdrawal of special guest status or partner for democracy status. In so doing, PACE was the first institution to introduce democratic conditionality by linking membership of the CoE to the respect for the free and fair election principles. On the other hand, local elections are the only sort of elections where an observation mission cannot be imposed without the consent of the respective country. Instead, local elections can be observed only by ODIHR or Congress of Local and Regional Authorities, since any Member State or candidate country may refuse to invite an observation mission for local elections without bearing any consequences of such a decision.[64]

Secondly, although both the European supranational courts play an important role in protecting the individual right to free and fair elections, so far they have failed to address more general democratic backsliding tendencies, including governmental manipulations of the electoral process and other forms of electoral injustice.[65] Their limited contribution is to some extent attributable to the fact that the electoral rights protected by the Charter and the ECHR respectively are limited in scope, as elaborated earlier in the paper. Thus far, the CJEU case law has not developed extensive jurisprudence on sensitive electoral issues, such as manipulation of election campaigns or media capture, and the franchise as to determine the individuals entitled to vote within the limits of the EU law. Most of the CJEU case law on the franchise relates to the rights for the EU citizens to participate in the

63 Meijers Committee, *op. cit.*, note 8, pp. 5-12.

64 *Ibid.*

65 *Ibid.*, pp. 1-2.

EP elections,[66] while the ECtHR case law on the matter of voting rights for non-residents leaves a wide margin of appreciation to states in this area.[67]

The EC's key supervisory activities in the electoral matters relate to the implementation of the EU directives setting down the detailed rules for the exercise of electoral rights in the EP elections in the Member States of residence and municipal elections, respectively.[68] Directive 94/80/EC as amended in 2013 is of particular importance as it sets down the detailed rules for the exercise of electoral rights in municipal and local elections. The EC's supervisory activity is triggered primarily by citizens' complaints and the obligation to report periodically.[69] This supervisory mechanism cannot be considered of crucial importance mainly due to quite long reporting intervals, and therefore it cannot be considered an effective compliance mechanism.

It is also important to mention the Rule of Law Conditionality Regulation as a pertinent piece of the hard *acquis* aimed to address the rule of law backsliding. It imposes measures for the protection of the EU budget in the case where breaches of the principles of the rule of law in a Member State affect or seriously risks affecting sound financial management. In other words, the above Regulation envisages clear mandatory consequences for the rule of law violations. The employed definition of the rule of law in the sense of the above Regulation implicitly gives room for the application of the Regulation to breaches of the electoral processes since it includes *inter alia* prohibition of arbitrariness of the executive powers, and effective judicial protection, including access to justice.[70]

Finally, Article 7 TEU, which specifies the procedure for the protection of the Article 2 values, seems at first sight as the most powerful mechanism for the protection of all the three values.[71] While the comprehensive character of its procedures

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66 On the CJEU jurisprudence in this area see e.g.: Platon S.*, op. cit.*, note 16, pp. 364-386.

67 On the ECtHR case law in this field see Registry of the European Court of Human Rights, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections*, *op. cit.,* note 42, pp. 11-12.

68 In 2020, the European Commission declared its intention to further amend these two directives as to upgrade the electoral rights of mobile EU citizens. These are: Directive 94/80/EC on the exercise of the right to vote and to stand as a candidate in municipal elections, and Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] (OJ L 329, p. 34) as amended by Council Directive 2013/1/EU of 20 December 2012 (Directive 93/109/EC on the exercise of the right to vote and stand as a candidate in elections to the European Parliament).

69 Meijers Committee, *op. cit.*, note 8, pp. 9-10.

70 Rule of Law Conditionality Regulation, Article 2.

71 Kelemen, D., *op. cit.,* note 56, p. 13.

is promising, Sadurski rightly points out that Article 7 is impotent "by design". In that context, he explains that the effectiveness and applicability of the Article 7 procedures turned out to be rather limited due to requiring a unanimity threshold for the imposition of sanctions and diminishing the roles of the EU and CJEU.[72] Until recently, the EU refrained from invoking Article 7 TEU against Member States. In recent years, a notable change has taken place with Article 7 activation concerning Poland and Hungary.[73] However, so far it has not been applied in the specific context of the principle of free and fair elections.

It has been rightly pointed out in the literature that strengthening the effectiveness of the EU mechanisms for ensuring the electoral process requires prior amendments to the Rule of Law Conditionality Regulation. Those amendments should envisage that any finding by the observation missions that national elections in a Member State were overall unfair or unfree constitutes a breach of the rule of law principles in the sense of the said Regulation. In a similar vein, such a finding on the unfairness of elections should be regarded as a clear risk of a serious breach by a Member State of the EU values in the meaning of Article 7 TEU triggering the above mechanism.[74]

Overall, creating a stronger link between the EU mechanisms and other presented supranational mechanisms would improve the effective protection of the right to free and fair elections. In that light, the EU should apply the PACE principle of democratic conditionality by consistently linking EU membership with a more strict respect for the principles of free and fair elections. To that end, the findings of election observation missions conducted in individual Member States or acceding countries should be particularly reviewed and used in the annual rule of law reports on Member States and in the annual reports on acceding countries, respectively.[75] In particular, effective electoral justice would be more achieved if any refusal of a Member State or accession country to invite supranational observation missions for national or local elections had consequences at the EU level either through available accession or post-accession instruments.

So far, the sanctioning mechanisms have been used only sparsely in the accession process, although they can be applied in the case of violation of election processes

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72 Sadurski, W., *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, Columbia Journal of European Law, Vol. 16, No. 3, 2010, pp. 385-426.

73 Nergelius, J., The *Rule of Law Crisis in 2023: More of the Same or Changes to Come*?, in: Södersten, A.; Hercock, E. (eds.), The Rule of Law in the EU: Crisis and Solutions, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 91.

74 Meijers Committee, *op. cit.,* note 8, p. 13.

75 *Ibid.*

as long as they constitute a serious and persistent breach of the values on which the EU is founded by the respective candidate country or where there is significant democratic backsliding.[76]

4. CASE OF THE 2023 SERBIAN ELECTIONS EXAMINED THROUGH THE PRISM OF THREE EU FOUNDATIONAL VALUES

On 17 December 2023, Serbia held early parliamentary, provincial, and partial local elections, monitored by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), which deployed a special Election Observation Mission for this purpose.[77] Before getting into the assessment of the extent to which the approach taken by the Resolution complies with the three Article 2 foundational values and contributes to strengthening the effectiveness of the mechanisms aimed at ensuring the right to free and fair elections, the authors will first provide a bird's eye on the background and challenges that occurred during the 2023 Serbian election process.

Early elections were held for the members of the National Assembly of the Republic of Serbia, the Assembly of the Autonomous Province of Vojvodina, members of the Belgrade City Assembly, and around one third of local administrations of cities and municipalities (66 out of 174).[78] Local elections for other cities and municipalities were postponed tentatively for June 2024. The decision to hold local elections at different times was unprecedented in previous election practice, and was not followed by any explanations,[79] but at the time did not raise any serious concerns with the public.

One of the key contentious issues of the December 2023 elections was the untransparent unified voter register. Although the voter lists were made available for online scrutiny and were available at local authority premises, the data provided

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76 See Knežević Bojović, A.; Ćorić, V., *op. cit.,* note 44, p. 50.

77 The role of the Election Observation Mission was to assess the compliance of the electoral process with the OSCE and international instruments and standards for carrying out democratic elections. See OSCE Office for Democratic Institutions and Human Rights, Republic of Serbia, Early Parliamentary Elections 17 December 2023, ODIHR Election Observation Mission Final Report, Warsaw, 28 February 2024 [https://www.osce.org/files/f/documents/1/3/563505_0.pdf], Accessed 27 March 2024.

78 CRTA, Preliminary Statement on ORGANIZED VOTER MIGRATION ahead of the December 17, 2023 Elections in Serbia, Belgrade, December 22, 2023, [https://crta.rs/wp-content/uploads/2023/12/CRTA-Preliminary-Statement-on-Organized-Voter-Migration-2023.pdf], Accessed 27 March 2024.

79 CRTA, *op. cit.,* note 78, p. 2.

was inadequate for a comprehensive verification.[80] This was due to the fact that the lists contained only the voters' names in alphabetical order, without any further identification as required by the Law on Unified Voter Register.[81] Before the elections, the ODIHR had recommended on several occasions an audit of the United Voters Register, but this recommendation was not implemented by the Serbian Government, on the grounds of legal restrictions related to personal data privacy.[82]

Several days after the elections, a local civil society organization, Center for Transparency, Research and Accountability (CRTA), issued a report raising serious concerns about the election irregularities, relating primarily to organized voter migration.[83] The report presents qualitative and quantitative evidence of alleged organized voter migration before the 17 December elections, pointing to the irregularities in the Unified Voters Register, fraud voter transportation and supervised voting practices.[84]

Organized voter migration constitutes a serious breach of the citizens' electoral will and allegedly involves two key actors – the Ministry of the Interior, responsible for the issuance of permanent residence permits to citizens, as a basis for entrance into the voter register, and the Ministry of Public Administration and Local Self-Government (MPALSG), responsible for maintaining the Unified Voter Register. Although the new Law on Election of Members of Parliament, adopted in 2022,[85] no longer prescribes permanent residence as a prerequisite for the right to vote, the Law on Unified Voter Register has retained a requirement of permanent address for inclusion in the Register.[86] In September 2023, the MPALSG and the Ministry of the Interior issued a clarification that voters without a permanent address

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80 OSCE Office for Democratic Institutions and Human Rights, *op. cit.,* note 77, p. 2.

81 Article 7 of the Law on Unified Voter Register (Zakon o jedinstvenom biračkom spisku), Official Gazette of the Republic of Serbia, Nos. 104/2009 and 99/2011.

82 OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77 p. 2; See more on the Serbian legal framework governing personal data privacy: Law on Personal Data Protection (Zakon o zaštiti podataka o ličnosti), Official Gazette of the Republic of Serbia, No. 87/2018; On the limitations to access to information due to personal data privacy in Serbia see: Knežević Bojović, A.; Reljanović, M., *Free Access to Information An Analysis of the Regulatory Frameworks in selected Western Balkan countries,* Institute of Comparative Law, 2022, pp. 49-55.

83 Allegations of organized voter migrations have featured in several neighboring countries: Hungary, North Macedonia and Montenegro in order to secure safe votes and electoral victories, see: CRTA, *op. cit.,* note 78, p. 5.

84 OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 10.

85 Law on Election of Members of Parliament (Zakon o izboru narodnih poslanika), Official Gazette of the Republic of Serbia, No. 14/2022.

86 OSCE Office for Democratic Institutions and Human Rights*, op. cit.,* note 77, p. 10.

would remain included in the voter list based on their last registered address,[87] while previously these voters had been automatically removed from the list.

The analysis presented in the CRTA report showed instances of suspected unlawful changes in the Unified Voter Register before the December elections where voters from other Serbian municipalities in which elections were not held were given permanent addresses in the City of Belgrade, thus providing them a basis to be entered into the Unified Voting Register and vote in Belgrade to secure the victory of the ruling party at the Belgrade City Assembly elections. The analysis further identified the polling stations in Belgrade with a high probability of being a destination for organized voter migration.[88] Additional evidence was also collected to demonstrate alleged organized voter migrations from other regions in Serbia and from abroad. CRTA observers also recorded several logistical centers from where the voters were allegedly sent to the polling stations across Belgrade.[89]

In the aftermath of the elections, a number of appeals were brought to the Republican Electoral Committee and the Local Electoral Committees, and only a small number of those were adopted. The voting results were annulled in 35 polling stations, where a repeat voting took place on 30 December.[90] The Administrative Court received 47 appeals, dismissed 20 of them on procedural grounds, and upheld the Republican Electoral Committee's decisions in all cases reviewed on merit.[91] The Belgrade City Electoral Commission rejected all the opposition petitions.[92]

Two requests for a partial or full annulment of the elections were also brought to the Constitutional Court, which has the legal authority to determine whether irregularities significantly influenced the election result and can annul the electoral process partially or in whole.[93] However, the Constitutional Court is not bound to resolve electoral disputes by a specific deadline, which affects significantly the

87 *Ibid.*

88 CRTA, *op. cit.,* note 78, pp. 7-14.

89 *Ibid.*

90 Most of the appeals brought to the Republican Election Committee were rejected, frequently as a result of the majority of REC members present abstaining from voting on the appeal. OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 27.

91 *Ibid*. 28.

92 Battle for Belgrade came to the Constitutional Court, [https://www.slobodnaevropa.org/a/beograd-izbori-ustavni-sud-srbija/32782357.html], Accessed 2 April 2024.

93 Article 77 of the Law on Constitutional Court, Official Gazette of the RS, Nos. 109/2007, 99/2011, 18/2013 – Constitutional Court Decision, 103/2015, 40/2015 – separate law, 10/2023 and 92/2023.

timeliness of this remedy. The Constitutional court has not made a ruling upon the request for election annulment by the time of writing of this paper, April 2024.

In February 2024, the EP adopted its Resolution on the situation in Serbia following the elections,[94] acknowledging serious allegations of the Serbian authorities' involvement in electoral manipulations and abuse, and confirming that some of the election irregularities represented potential breaches of the Serbian law and Constitution.

It appears that the EP Resolution on the situation in Serbia following the elections mostly reflects the integrated approach according to which all three Article 2 values should shape the concept of free and fair elections in acceding countries. Specifically, it explicitly acknowledges the contribution of democracy and the rule of law as the EU foundational values to ensuring free and fair elections in the Republic of Serbia, while it is more implicit when it comes to explicitly recognizing the relevance of the third foundational value of respect for human rights. Although the above Resolution did not go explicitly into details about classifying specific breaches as stemming from one of the three foundational values, such a classification appears to exist. Specifically, the excessive use of the executive power, shown by the alleged changes of the permanent residence and the Unified Voters List and the inactivity of the Constitutional Court and the Serbian authorities to investigate, prosecute, and bring to justice those responsible for the criminal offenses during the elections fall under the rule of law realm. Furthermore, the practice of amending fundamental elements of the national electoral law less than one year before an election may serve as a clear example of a violation of the value of democracy. Finally, the EP Resolution on the situation in Serbia following the elections notes that the election irregularities constitute potential breaches of the Serbian law and Constitution, further clarifying that the violations of the right to vote, other electoral rights, and media freedoms should be addressed by the Serbian authorities. These violations fall under the realm of the respect for human rights as a foundational value.[95]

Although it implicitly highlights all these three values, the European Parliament Resolution does not appear to be an adequate instrument to specify the violated pieces of the EU *acquis* and international acts along with the available supra-

[94] European Parliament, Joint Motion for a Resolution pursuant to Rule 132(2) and (4) of the Rules of Procedure replacing the following motions: B9-0106/2024 (The Left) B9-0108/2024 (S&D) B9-0131/2024 (Verts/ALE) B9-0132/2024 (PPE) B9-0133/2024 (Renew) B9-0134/2024 (ECR) on the situation in Serbia following the elections (2024/2521(RSP)) [7.2.2024] (EP Resolution on the situation in Serbia following the elections).

[95] EP Resolution on the situation in Serbia following the elections, paras. 6 and 10.

national human rights mechanisms for addressing the alleged violations of the election-related rights and freedoms. It would have been more appropriate if the Commission took an official stance on the identified breaches of the election rules and implemented more concrete measures related to Serbia's EU accession process.

Nevertheless, the authors believe that the above Resolution may contribute to the effective protection of the right to free and fair elections in Serbia as it proposes sanctions for the Serbian authorities if they fail to fully implement the recommendations of the OSCE/ODIHR and Venice Commission, reiterating the EP's position that the accession negotiations with Serbia should not advance in that case. In a similar vein, the EP "calls for the suspension of EU funding on the basis of severe breaches of the rule of law in connection with Serbia's elections" if the Serbian authorities are unwilling to implement the key election recommendations or if the findings of this investigation indicate that they were directly involved in the voter fraud. The EP in its Resolution further calls on the EC and the Council to "apply strict conditionality" under the given circumstances, which should contribute to the improvement of the overall effectiveness of election oversight mechanisms and embedding of the democratic conditionality in the EU's rule of law framework by linking the respect for the free and fair election principles with full benefits stemming from the candidate status.[96]

Finally, the wording of the EP Resolution reflects the approach supported in this paper according to which the effective protection of the right to free and fair elections could be achieved by creating a stronger link between the EU mechanisms and other available supranational mechanisms. In that light, the EP in its Resolution calls on the Serbian authorities to fully and substantially cooperate with the ODIHR, and urges them to implement the key recommendations of the OSCE/ODIHR and the Venice Commission.[97] Such a synergetic involvement of different supranational actors in the election observation process would bring added value to the existing EU mechanisms, as it would take advantage of the benefits of different mechanisms.

However, all the efforts by the EP in its Resolution to overcome the voluntary character of the election-related mechanisms and strengthen the effective protection of electoral rights did not have tangible results. Specifically, two months after the adoption of the EP Resolution on the situation in Serbia following the elections, the envisaged initiative to send an expert mission to Serbia to assess the situation as regards the recent elections and post-election developments has still

[96] EP Resolution on the situation in Serbia following the elections, para. 27.

[97] EP Resolution on the situation in Serbia following the elections, para. 13.

not been launched by the EC, even though the EP had urged them to take such a step.[98]

5. CONCLUSION

Elections are considered "critical events" as they strongly influence the level of democracy across the world. In the light of the ongoing autocracy crisis among EU Member States and candidate countries, which appears to be spreading across the planet, the concept of free and fair elections is gaining new momentum. Consequently, the authors have analyzed in depth the election fairness concept from the standpoint of the EU regulatory framework and the examples of the alleged election irregularities reported in some EU Member States, and most recently in Serbia as a candidate country.

Although elections are considered critical for the quality of democracy as a value, this analysis shows that ensuring fair and free elections, especially in countries with lower levels of democratic tradition, requires that the three EU fundamental values are put at the forefront and that they are all treated as a "holy trinity". In other words, in order to achieve its full potential, the concept of free and fair elections needs to be placed in the center of the triangular relationship of democracy, the rule of law, and the fundamental rights to maintain an intrinsic link and interdependence with all the three Article 2 values. The EP Resolution on the situation in Serbia following the elections mostly reflects such an integrated approach according to which all the three Article 2 TEU values should contribute to the full achievement of the concept of free and fair elections in acceding countries.

The analysis has further proven that the principle of democracy as one of the Article 2 foundational values is key for ensuring free and fair elections in both EU Member States and candidate countries. The authors are therefore of the view that the principle of democracy and its operationalization by the relevant TEU provisions and EU directives governing elections do have an influence on "national democracies", including the national and local electoral systems and processes showing that so-called domestic dimension of democracy, and that it is not entirely out of the reach of the EU. The detailed analysis of the EU treaties makes it clear that the outcomes of national elections have a direct bearing on the composition and functioning of the EU institutions, hence free and fair elections should be taken very seriously by the EU. Moreover, the EU has recently become more attentive to democracy in the EU, considering that its protection and strengthening have been identified as one of the six priorities of the current EC.

[98] EP Resolution on the situation in Serbia following the elections, para. 5.

The above discussion has also demonstrated that respect for human rights as one of the EU foundational principles in the sense of Article 2 TEU is also intrinsically linked with the concept of fair and free elections. Respect for human rights in the election context should be achieved through relevant human rights provisions envisaged by the Charter and other applicable international human rights instruments. However, the scope of the Charter is limited, and consequently, even where the specific human right contained in the Charter seems applicable to the national and local elections, such as in the case of freedom of expression, there is an inherent limitation to the overall scope of the Charter, as it applies at the national level only to situations where the implementation of the EU law is at stake.

Therefore, the interpretation of the Charter rights has to be in line with the restrictive scope of application of the Charter when examining whether free and fair elections have been ensured in the specific Member State. Such a restrictive criterion can be to some extent overcome by interpreting the Article 2 TEU value of respect for human rights as a triggering rule in the sense of Article 51(1) Charter, meaning that whenever the violation of the Article 2 value is at stake, the Charter might become applicable. The CJEU started to apply its so-called combined approach to interlink the specific Charter rights, such as freedom of expression, with the "respect for human rights" as the Article 2 value. So far, the given "Article 2-Charter nexus" approach has not been applied in the context of national or local election irregularities. However, the second limitation of the Charter is that it merely envisages the right to vote and to stand as a candidate at municipal elections without providing within the same article any further guarantees against the violation of the right to free and fair municipal elections.

The protection of free and fair elections under the ECHR is also limited in scope, as it applies only to the election of the "legislature" and as such does not afford protection in case of local elections, whether municipal or regional. Given the alleged election irregularities reported regarding the 2023 Serbian local elections, it is noteworthy that the ECtHR has recently deviated from such an approach having found that Article 3 of Protocol No. 1 of the ECHR applies also to local elections to provincial councils in Italy. However, that stance can be applied only to situations where the concerned regional or local authority has been granted very broad legislative powers and as such can be qualified as part of the "legislature".

The discussion above has also demonstrated that the Article 2 rule of law foundational value is inseparably linked to the right of free and fair elections, and has identified a need for more consistency in its application in both EU and candidate states to ensure its coherent and effective protection. The definition of the rule of law offered by the Rule of Law Conditionality Regulation seems useful as

it includes the prohibition of arbitrariness of the executive powers and effective judicial protection, which are pertinent for the full achievement of the right of free and fair elections. However, as the above Regulation is not applicable to candidate countries, some challenges remain, such as that the rule of law reports on Member States and the annual reports on candidate countries provide incoherent criteria for reporting and monitoring election fairness. Furthermore, the common limitation of both the reporting mechanisms is that they lack consistent internal reporting on relevant electoral issues, meaning that a set of relevant standards is not consistently assessed to the same extent across all country reports. This methodological approach needs to be changed to facilitate more precise and meaningful cross-country comparisons and eventually enable a more effective monitoring, which is currently not the case.

It appears there is a need for reducing fragmentation and developing comprehensive EU monitoring mechanisms for ensuring free and fair election processes in the EU and beyond. As argued earlier in this paper, the EU has not developed its tailor-made mechanisms for ensuring the right to free and fair elections in Member States and candidate countries. In the absence of EU-specific mechanisms for monitoring compliance with the free and fair election standards in Member States and candidate countries, the EU relies on the findings of election observation missions of other supranational organizations, without having the capacity to fully indorse them. All the supranational election monitoring activities in Europe are mostly grounded on voluntariness and lack of effective compliance mechanisms, with the exception of the PACE election oversight. Therefore, the synergetic involvement of different supranational actors in the election observation process is commendable as it will bring added value to the existing EU mechanisms, since it will take advantage of the benefits of different mechanisms, such as advanced ODIHR methodology.

One of the possible ways forward in this respect would be to amend the Rule of Law Conditionality Regulation to include the documented breaches of the election process rules as a basis for imposing sanctions for the rule of law violations. These amendments should envisage that any finding by observation missions that national elections in a Member State were overall unfair or unfree constitutes a breach of the principles of the rule of law in the sense of the Rule of Law Conditionality Regulation. In a similar vein, such a finding on the unfairness of elections should be regarded as a clear risk of a serious breach by a Member State of the EU values in the meaning of Article 7 TEU triggering the above mechanism.[99]

[99] Meijers Committee, *op. cit.*, note 8, p. 13.

Overall, creating a stronger link between the EU mechanisms and other presented supranational mechanisms would improve the effective protection of the right to free and fair elections. To that end, the findings of election observation missions conducted in Member States or accession countries by some of the existing supranational mechanisms should be particularly reviewed and used in the annual rule of law report on Member States and annual reports on acceding countries, respectively. In particular, effective electoral justice would be further achieved if any refusal by a Member State or accession country to invite supranational observation missions for national or local elections had consequences at the EU level either through available accession or post-accession instruments. In addition, further efforts are expected to bridge the existing gaps in the area of local election oversight. For the time being, local elections in Member States and candidate countries are the only sort of elections where an observation mission cannot be imposed without the consent of the respective country. Finally, the wording of the EP Resolution on the situation in Serbia following the elections reflects the view advocated in this paper according to which the effective protection of the right to free and fair elections would be achieved if a stronger link was created between the EU mechanisms and other available supranational mechanisms.

There also appears to be a need for introducing effective and coherent sanctioning mechanisms for violations of the election process in the EU and beyond. So far, sanctioning mechanisms were only sparsely used in the accession process, even though they should be applied in the case of violation of election processes as long as they constitute a serious and persistent breach of the values on which the EU is founded by the respective candidate country, or where there is significant democratic backsliding. In such cases, the EU should more intensively recourse to provisions stipulating that the negotiations can be put on hold in certain areas, or overall suspended, or that the scope and intensity of EU funding downward can be adjusted. The recently adopted EP Resolution on the situation in Serbia following the elections contributes to the effective protection of the right to free and fair elections in acceding countries as it introduces a sort of sanctions for the Serbian authorities should they fail to fully implement the recommendations of the OSCE/ODIHR and Venice Commission reiterating the EP's position that accession negotiations with Serbia, in that case, should not advance.[100] Moreover, the EP in its Resolution calls for "the suspension of EU funding on the basis of severe breaches of the rule of law in connection with Serbia's elections" and calls on the EC and the Council to "apply strict conditionality" if Serbian authorities are unwilling to implement key election recommendations or if the findings of this investigation indicate that they were directly involved in the voter fraud.

[100] EP Resolution on the situation in Serbia following the elections, para. 27.

However, all the efforts made by the EP in its Resolution to overcome the mostly voluntary character of election-related mechanisms and to strengthen the effective protection of electoral rights, so far have not brought about tangible results, as two months after the adoption of the EP Resolution, the envisaged initiative to send an expert mission to Serbia to assess the situation as regards the recent elections and post-election developments has still not been launched by the EC.

In a nutshell, the authors believe that the improvement of the overall effectiveness of election oversight requires the EU to follow more strongly the PACE principle of democratic conditionality by linking the EU membership to the respect of the principle of free and fair elections. Following such an approach by the EU would particularly strengthen the position of democratic conditionality in the EU's rule of law framework. In addition, further efforts are needed to bridge the existing gaps and overcome the limitations in the area of mechanisms for monitoring compliance of national and local elections with the supranational standards identified in this paper.

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THE ROLE OF SUB-MUNICIPAL SELF-GOVERNMENT IN STRENGTHENING DEMOCRACY

Danijela Romić, PhD, Senior Lecturer
University of Applied Sciences "Lavoslav Ružička" in Vukovar
Blage Zadre 2, Vukovar, Croatia
dromic@vevu.hr

ABSTRACT

The basis of every democratic legal order is the involvement of citizens in decision-making. The Member States of the European Union have established such a legal framework that encourages democracy, especially the involvement of citizens, openness and transparency, the principle of subsidiarity and other principles expressed in the corresponding legal documents. Numerous scientific studies have proven that the Europeans expect much more from democracy than the minimum. The model of liberal democracy rests on achieving the widest possible consensus when making decisions. Nevertheless, citizen involvement in making political decisions has its shortcomings, which are often overemphasized, all with the aim of excluding citizens from the decision-making process on public policies. The biggest opponents of true citizen involvement are politicians whose "power" is limited by citizen involvement models. One of the key arguments against citizen involvement is the inability and reluctance of "ordinary" citizens to make quality decisions. Inclusion and participation models are very diverse. This paper puts an emphasis on realizing the principle of subsidiarity through citizen participation in decision-making at local levels through sub-municipal self-government form.

This paper presents the results of research aimed at gaining insight into the attitudes and opinions of local politicians (chiefs/mayors, presidents of representative bodies of local self-government units and council members of sub-municipal committees) in Osijek-Baranja and Vukovar-Srijem counties on the need for and opportunities for citizen participation through sub-municipal self-government form. For the purposes of the research, a questionnaire was prepared and sent to the respondents via e-mail. The starting hypothesis of the paper is H1: Local politicians do not support sub-municipal decentralization. Descriptive statistics and appropriate statistical analyses were used to analyse the research results (Kruskal-Wallis H test with Bonferroni test as a post-hoc test, Mann Whitney U test, Kendall's Tau-b correlation coefficient (τb), Cramer's V (φc) and Ordinal Regression PLUM analysis). The results show statistically significant differences in the responses between individual categories of respondents.

In addition to the introductory part, the paper consists of a theoretical part that argues the importance of citizen participation in decision-making as a key element of democracy, a descrip-

tion of the methodology of the conducted research, research results, and finally the conclusion. The paper's contribution to administrative science is reflected in a comprehensive theoretical analysis and original research results that can serve as a basis for empowering citizens and their true involvement in decision-making.

***Keywords**: citizen participation, democracy, principle of subsidiarity, sub-municipal self-government*

1. INTRODUCTION

Reflecting on democracy, its sense, principles and its actual implementation can often lead to a philosophical debate. Is democracy such a system in which all the citizens participate in decision-making or is it only an auxiliary method for the purposes of decision-making? To which extent should citizens be allowed to influence the decision-making process? Is the so-called aggregative model of democracy (decisions are made by rule of majority) a valid guarantee of just, legal and legitimate decisions or is it necessary to accept integrative democracy that tries to reach a consensus between as many stakeholders as possible?[1] The human-citizen is only free when it is possible for him to follow the eternal laws of nature and order, only when he achieves self-realisation through his citizen participation in public life.[2] It is therefore justified to claim that the integral part of the definition of democracy is involvement of citizens in relevant decision-making.[3] Citizen participation in decision-making processes for all relevant issues of public politics is an integral part of multilevel governance, a new form of governance formed as a response to increasing complexity of relationships between people, individual levels of government within the country and among countries. The decision-making in multilevel governance allows the involvement of transnational and global institutions (up-scaling) and sub-national levels (down-scaling).[4] The sub-national levels are precisely the ones this paper is focusing on, especially the structures belonging to the lowest, the sub-municipal level. Sub-municipal communities are deeply rooted in the tradition of local governance due to their role in ensuring specific needs of citizens, in preserving

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1 The division to aggregative and integrative democracy is stated by Loughlin, J.; Hendriks, F.; Lidstrom, A., *Subnational democracy in Europe: Changing Backgrounds and Theoretical Models*, in: Loughlin, J.; Hendriks, F.; Lidstrom, A. (eds.), Local and Regional Democracy in Europe, Oxford University Press, New York, 2011, pp. 14-16.

2 Kovačić S., *Etičnost politike u Aristotela*, Filozofska istraživanja, Vol.. 26, No. 2, 2006, pp. 469; Lalović, D., *Nedovršena država? Suvremena država u svjetlu Rousseauove teorije općenite volje*, Politička misao, Vol. XXXIX, No. 2, 2002, pp. 65.

3 Lauc, Z., *Oblikovanje hrvatske lokalne samouprave u svjetlu ratifikacije Europske povelje o lokalnoj samoupravi*, in: Brunčić, D.; Friederich, F.; Jurić, D.; Lauc, Z. (eds.), Europska povelja o lokalnoj samoupravi i lokalna samouprava u Republici Hrvatskoj, Osječko-baranjska županija, Pravni fakultet Sveučilišta J. J. Strossmayera u Osijeku i Veleposlanstvo lokalne demokracije Slavonije, Osijek, 1998, pp. 11.

4 Lowndes, V., Sullivan, H., *How Low You Can Go? Rationales and Challenges for neighbourhood Governance*, Public Administration, Vol. 86, No. 1, 2008, pp. 54.

the socio-cultural identities and maintaining the local sense of community.[5] Sub-municipal units have special importance in the governance of large cities where they can serve to strengthen democracy, but they can also lead to the disintegration of city management.[6] The sub-municipal levels in Croatia are presented by sub-municipal self-government (sub-municipal committees and town districts), structures that can be established within a district or in one part of the district as instances of immediate citizen participation in decision-making regarding local affairs which on daily basis directly influence the life and work of citizens.[7,8] In accordance with legal definitions, the competence of sub-municipal self-government forms is almost insignificant and based mainly on its advisory character. The legislator has allowed complete freedom to units of local government in deciding whether to establish sub-municipal self-government or not, along with the scope of their competence. Local political officials, who can determine the outcome of the initiative for establishing sub-municipal self-government are the ones with the most influence.

In addition to the introductory part, the paper consists of a theoretical part that researches the importance of citizen participation in decision-making as a key element of democracy, a description of the methodology of the conducted research, research results, and finally the conclusion.

2. INVOLVEMENT OF CITIZENS AND THE PRINCIPLE OF SUBSIDIARITY

Involvement of citizens in decision-making rests on the democratic ideal of public and argumentative discussion resulting in decisions that support public preferences and are acceptable for the community.[9] The process has to necessarily be followed

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5 Hlepas, N.K.; Kerstig, N.; Kuhlmann, S.; Swianiewicz, P.; Teles, F., *Decentralization Beyond the Municipal Tier,* In: Hlepas, N.K.; Kerstig, N.; Kuhlmann, S.; Swianiewicz, P.; Teles, F. (eds.), Sub-Municipal Governance in Europe: Decentralization Beyond the Municipal Tier, Palgrave Macmillan, 2018, pp. 1.

6 Đulabić, V., *Lokalna samouprava i decentralizacija u Hrvatskoj*, Friedrich Ebert Stiftung, Zagreb, 2018, pp. 4; Ivanišević, S., *Europska iskustva u decentralizaciji upravljanja velikim gradovima*, Hrvatska i komparativna javna uprava, Vol. 8, No. 2, 2008, pp. 420.

7 Law on Local and Regional Self-Government, Official Gazette, No. 90//2001.

8 The correctness of this legal structure is questionable since sub-municipal committees and town districts present a form of indirect decision-making. Namely, the citizens elect the councils of sub-municipal committees and town districts which then take part in the decision-making representing the citizens from that smaller area. In order for sub-municipal structures to be forms of direct involvement, they must not be representative bodies, indirect forms of citizens` involvement. More in: Rešetar, V., *Istraživanje mjesne samouprave i neposrednog sudjelovanja građana u javnim poslovima na mjesnoj razini,* Hrvatska i komparativna javna uprava, Vol. 11, No. 1, 2011, pp. 76.

9 Lee, C. W., *Do-It-Yourself Democracy: The Rise of Public Engagement Industry*, Oxford University Press, New York, 2014, pp. 34; Irvin, R. A., Stansbury, J., *Citizen Participation in Decision Making: Is It Worth the Effort?* Public Administration Review, Vol. 64, No. 1, 2004, pp. 56.

by redistribution of power, otherwise it is a frustrating and meaningless process for those without power allowing the governing bodies to use it as an alibi for apparent involvement of citizens.[10] The concept of involvement implies all the activities through which citizens are able to influence the decision-making process, and not merely involvement in political processes.[11] Through involvement of citizens, their decision-making skills are being strengthened, in addition to encouraging their rational decision-making, intensifying the legitimacy of the decision-making process, acquiring wide support for individual public politics, increasing trust in the institutions of representative democracy and lowering public expenses.[12] Involvement of citizens annuls the effects of the legitimation crisis and demographic deficit. The legitimation crisis occurs as a result of alienation of government and politicians from the electoral base whereby citizens experience the feeling of being powerless, repulsed and distrustful towards political decisions.[13] The consequence of legitimation crisis is a demographic deficit – a situation in which there is discrepancy between the ones who govern, and the ones being governed.[14] This discrepancy can be overcome by involvement of citizens, which represents an addition to representative democracy, since it bridges the gap created between the elected representatives and their voters.[15] However, do citizens even want to be involved? One of the most common arguments of those opposing involvement is the lack of will for involvement. Therefore, numerous research had been conducted, which imply that those more likely to be involved are the citizens with

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10 Arnstein, S. R., *A Ladder of Citizen Participation*, Journal of the American Planning Association, 35: 4, 1969, pp. 216.

11 Schlozman, K. L.; Verba, S.; Brady, H. E., *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy*, Princeton University Press, New York, 2012, pp. 10-13.

12 Schnaudt, C., *Political Confidence and Democracy in Europe: Antecedents and Consequences of Citizens´-Confidence in Representative and Regulative Institutions and Authorities*, Springer, Mannheim, 2019, p. 276; Kern, A., *What happens after a local referendum? The effect of direct democratic decision-making on protest intentions*, Local Government Studies, Vol. 44, No. 2, 2018, pp. 183.; Manojlović Toman, R.; Vukojičić Tomić, T., *Načelo demokracije Europske povelje o lokalnoj samoupravi i sudjelovanje građana u hrvatskoj lokalnoj samoupravi*, in: Koprić, I. (ed.), Europeizacija hrvatske lokalne samouprave, Institut za javnu upravu, Zagreb, 2018, p. 345.; Matsusaka, J. G., *Public policy and the initiative and referendum: a survey with some new evidence*, Public Choice, Vol. 174, 2018, p. 108.; Michels, A.; de Graaf, L., *Examing citizen participation: local participatory policymaking and democracy revisited*, Local Government Studies, 43:6, 2017, p. 875.

13 Stewart, J., *The Dilemmas of Engagement - The Role of Consultation in Governance*, Anu Press, Canberra, 2009, p. 67; Ferrin, M.; Kriesi, H., *How Europeans View and Evaluate Democracy*, Oxford University Press, Oxford, 2016, p. 10.

14 *Ibid.*, Stewart, J., pp. 11-13.

15 Garcia-Espin, P.; Ganuza, E.; Marco, de S., *Assemblies, Referendums or Consultations? Social Representations of Citizen Participation,* Revista Espanola de Investigaciones Sociologicas, No. 157, 2017, p. 59.; Koprić, I., *Decentralizacija i dobro upravljanje gradovima*, Hrvatska i komparativna javna uprava, Vol. 9, No. 1, 2009, p. 76.

higher socio-economic status,[16] those motivated by friends or relatives,[17] women who are greatly trusted by their partners,[18] whereas size and population density of the local unit have contradictory effects.[19] Nevertheless, various social movements and citizen initiatives appearing throughout the globe prove that citizens want to be involved due to dissatisfaction with the current government, especially if their involvement makes sense.[20] The second reason against involvement is the mistrust of officials towards the involvement of citizens because they feel threatened.[21] This in particular, because there is a notable increase in decision-making by officials which is unacceptable: decisions are made by political bodies, officials follow those decisions.[22] One of the most offensive arguments against citizens` involvement is the elitist argument questioning the intelligence and cognitive abilities of the citizens.[23] This is the argument against democracy itself,[24] one most frequently highlighted by politicians since they refuse to share the government.[25] Politicians

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16 Verba *et al.*, 1995 in Lowndes, V.; Pratchett, L.; Stoker, G., *Local Political Participation: the Imapct of rules-in-use*, Public Administration, Vol. 84, Issue 3, 2006, p. 540.; Pattie, C. J.; Seyd, P.; Whiteley, P., *Citizenship in Britain: Values, Participation and Democracy*, Cambridge University Press, 2004, pp. 92-93.; Stoker, G., *Engaging Citizens: Can Westminster coexist with meaningful citizen-centric engagement?* in: Lindquist, E. A.; Vincent, S.; Wanna, J. (eds.), Putting Citizens First, Engagement in Policy and Service Delivery for the 21st Century, Anu Press, Canberra, 2013, pp. 31-32.

17 Brady, H. E.: Schlozman, K. L., Verba, S., *Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists*, The American Political Science Review, Vol. 93, No. 1., 1999, pp. 154-155.

18 Burns, N.; Schlozman, K.L., Verba, S., *The Public Consequences of Private Inequality: Family Life and Citizen Participation*, The American Political Science Review, Vol. 91, No. 2, 1997, p 382.

19 The bigger the local unit, the lesser the involvement due to loss of social connections and reduction of psychological connection between people. On the other hand, in more densely populated units, it is possible for the citizens` involvement to increase. According to: Tavares, A. F.; Carr, J. B., *So Close, Yet so far away? The Effects of City Size, Density and Growth on Local Civic Participation*, Journal of Urban Affairs, 35(3), 2013, pp. 298-299.

20 Edelenbos, J.; Meerkerk, van I., *Three reflecting perspectives on interactive governance*, in: Edelenbos, J.; Meerkerk, van I. (eds.), Critical Reflections on Interactive Governance, Self-organization and Participation in Public Governance, Edward Elgar, Cheltengham, Northampton, 2016, pp. 1-3.; Lassen, D. D.; Serritzlew, S., *Jurisdiction Size and Local Democracy: Evidence on Internal Political Efficacy from Large-scale Municipal Reform*, American Political Science Review, Vol. 105, No. 2, 2011, p. 238.

21 Kathi, P. C.; Cooper, T. L., *Democratizing the Administrative State: Connecting Neighborhood Councils and City Agencies,* Public Administration Review, 65 (5), 2005, p. 562.

22 Bakota, B.; Ljubanović, B., *Citizen participation as a form of active control of public administration*, in: Bencsik, A.; Fulop, P. (eds.), Jogasz doktoranduszok I. Pecsi Talalkozoja, 2011, p. 15.

23 Smith, T. G., *Politicizing Digital Space: Theory, The Internet, and Renewing Democracy*, University of Westminster Press, London, 2017, p. 90.

24 Matsusaka, J. G., *Direct Democracy Works*, The Journal of Economic Perspectives, Vol. 19, No. 2, 2005, p. 198.

25 Kettl, D., *Beyond New Public Management: Will governments let citizens and communities determine policy choices and service mixes*? in: Lindquist, E., Vincent, S., Wanna, J. (eds.), Putting Citizens First: Engagement in Policy and Service Delivery for the 21st Century, ANU Press, Canberra, 2013, p. 39.

consider the voters to be capable of only voting for them, everything else is believed to be far too complicated for them.[26]

Involvement of citizens is possible on every level of governance, however, the strongest motivation for involvement appears on the lowest levels of governance since the decisions directly affect specific issues dealt with by the community. The importance of involvement of citizens and decision-making on the lowest levels of governance is promoted by the European Charter of Local Self-Government which introduces the principle of subsidiarity[27] and the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.[28] According to the principle of subsidiarity the higher authority is obligated to assist the lower authority while at the same time allowing the lower authority to be effective and act independently in accordance to their competence.[29] The principle of subsidiarity stimulates internal decentralisation of local government units which implies the transfer of responsibility to self-government territorial structures within the local government unit – a double devolution.[30] It is important to emphasize, however, that they are not autonomous, they represent an informal level of authority without formal jurisdiction which is just one of the ways of bringing authority closer to citizens.[31] The extent to which the sub-municipal units are to be involved in the decision-making processes depends on numerous factors. The most important factor is the finances and the financial means provided by the local authorities, followed by clear and well-defined jurisdiction and the level of autonomy.[32] The scope of acceptance and implementation of internal decentralization depends solely on the attitudes of local political leaders.[33] As has

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26 Bakota, B.; Ljubanović, B., *op. cit.*, note 22, p. 14.

27 European Charter of Local Self-Government, Official Gazette, International Agreements. No. 14/1997, 4/2008.

28 Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, [https://rm.coe.int/168008482a], Accessed 14 February 2023.

29 Bakota, B.; Dujmović Bocka, J., *Načelo supsidijarnosti i zaštita životinja*, in: Sudarić, Ž.; Belaj, I.; Stojanović, S. (eds.), Zbornik 12. Međunarodne konferencija Razvoj javne uprave, Veleučilište „Lavoslav Ružička" u Vukovaru, Vukovar, 2022, p. 13.

30 Pycock, G., *London governance and the politics of neighbourhood planning: a case for investigation*, Town Planning Review, Vol. 91, Issue 1, 2020, p. 1.

31 Klarić, M., *New Perspective in Development of Local Self-Government*, US-China Law Review, Vol. 17, No. 4, 2020, p. 138.

32 Haček, M., Grabner, A., *Local Sub-Decentralization and Sub-Municipal Division in Slovenia*, Hrvatska i komparativna javna uprava, Vol. 13, No. 1, 2013, pp. 217; Koprić, I.; Klarić, M., *New Developments in Local Democracy in Croatia*, Hrvatska i komparativna javna uprava, Vol. 15, No. 2, 2015, p. 401.

33 Swianiewicz, P., *Inter-Municipal Units in Urban Political Systems in Poland: Vicious Roundabout of Marginalization or Dead-End Street?* The NISPAcee Journal of Public Administration and Policy, Vol. VII, No. 2, 2014, p. 186.

already been mentioned, local politicians are not precisely keen on internal decentralization.[34]

Legislative regulation of internal decentralization of local units in Croatia is reduced to a minimum, the units of local government (hereinafter: ULGs) enjoy the freedom to regulate all the issues regarding sub-municipal self-government through their statutes. The initiative for establishing a sub-municipal self-government unit can be suggested by citizens, members of representative bodies and other bodies regulated by the statute.[35] The bodies occurring in every form of sub-municipal self-governments are the council – elected directly by the citizens and the council president elected by the members of the council. The law specifies only two authorities of the councils of sub-municipal committees: organizing citizens` assemblies and presenting their work programme. The council of sub-municipal committee can be assigned specific activities from the self-governing scope through the directives from the statute. In that case, necessary finances from the budget must be ensured for these functions. The law does not proscribe any original financial means for the work of councils of sub-municipal committees. This situation is not stimulative for sub-municipal self-government units. Sub-municipal self-government does not contribute to the legitimacy of the general order, nor does it affect the real Europeanisation process of the Croatian local government. The main reason for this situation is lack of political engagement for internal decentralization of local units.[36]

Considering that the lack of political will has repeatedly been detected as the key issue, the aim of this paper is to determine the attitude of local officials in Osijek-Baranja and Vukovar-Srijem counties regarding the sub-municipal self-government. There are totally 74 ULGs in these two counties, however, in only 19 ULGs sub-municipal self-government has been established (in comparison, in 2022 there were 127 structures of sub-municipal self-government and in 2018 there were 208).[37] This worrying trend of decrease of the numbers of sub-municipal self-government structures can also be connected to political reluctancy since executive officials and members of representative bodies are the key decision-makers responsible for their

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[34] Hlepas, N. K., *Between Identity Politics and the Politics of Scale: Sub-municipal Governance in Greece*, in: Hlepas, N.K.; Kerstig, N.; Kuhlmann, S.; Swianiewicz, P.; Teles, F. (eds.), Sub-Municipal Governance in Europe: Decentralization Beyond the Municipal Tier, Palgrave Macmillan, 2018, p. 126.; Pycock, G. *op. cit.*, note 29, p. 4.

[35] Regulation of sub-municipal self-government is defined by articles 57 to 66 of the Law on Local and Regional Self-Government, Official Gazette No. 33/2001, 60/2001, 1239/2005, 26/2009, 109/2007, 125/2008, 150/2011, 144/2012, 123/2017, 98/2019, 144/2020.

[36] Manojlović Toman, R.; Vukojičić Tomić, T.; Koprić, I., *Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. X, No. 1, 2019, pp. 199-200.

[37] The above-mentioned data are the result of independent research through overview of the web pages of the units of local self-government.

cancellations (sub-municipal self-government is abolished by a simple change of statute). Based on the analysis of the previous research, hypothesis H1 was formed - Local politicians do not support sub-municipal decentralization.

3. RESEARCH METHODOLOGY

Considering the stated aim of the paper, the target group of respondents were local political officials who play a significant role in decision-making processes regarding establishment, competence, finances and activities of sub-municipal self-government. First of all, structures of sub-municipal self-government are established by a statute passed by the representative body of the municipality or a city as a body formally competent to pass general and individual acts. Since members of representative bodies are quite numerus and their contact details were unavailable, the target group of the respondents was narrowed only to the presidents of the representative bodies. The other key group were executive officials (mayors and municipal prefects) who propose general and individual acts to the representative body and by doing so indirectly influence its decisions. The total number of respondents in both categories was 148. The third category of respondents were council members of the sub-municipal committees and town districts. They are directly chosen citizens` representatives within their local unit who should have the best insight in the current state of the sub-municipal self-government in the two observed counties. Due to the number of the established structures of sub-municipal self-government, the potential number of respondents in this category is 809 which makes a total number of respondents in this research 957. For the purposes of the research, a questionnaire was prepared that was available for use on LimeSurvey service from November 15th to December 24th, 2022. The link was sent to respondents per email.[38] There were 33 questions in the questionnaire: 11 questions referred to general information about the respondents (age, gender, education, political orientation, length of political activity, political function, length of political function, length of residence in ULG), 4 questions were directed at the type of the ULG the respondent comes from, 17 questions referred to personal opinions and attitudes of the respondent regarding the sub-municipal self-government and the last question was an open-ended question allowing ad-

[38] An additional challenge in this research was collecting the e-mail addresses of the potential respondents. Namely, the web pages of the municipalities and towns offer only e-mail addresses of the executive officials, while any information about the e-mail addresses of the presidents of representative bodies and council members of sub-municipal committees is lacking. Heads of competent administrative departments were therefore contacted by telephone, however, not even they had the requested information, especially those for council members of sub-municipal committees. In such cases, a link for accessing the questionnaire was sent on the official e-mail addresses of municipalities or towns with a request to forward it to the respondents.

ditional comments.[39] Questions referring to personal opinions and attitudes of the respondent regarding the sub-municipal self-government were closed questions and the answers were shown through the 5-point Likert scale consisting of (1 - Strongly Disagree; 2 -Disagree; 3 - Neither Agree nor Disagree; 4 - Agree; 5 - Strongly Agree). For result analysis, in addition to the descriptive statistics, appropriate statistical methods were used. To determine the differences in attitudes of the respondents about the sub-municipal self-government based on gender (3 groups: male, female, other) and their official duty (3 groups: mayors/municipal prefects, presidents of town/municipal councils, members of sub-municipal committees/town districts) Kruskal-Wallis H test with Bonferroni test as a post-hoc test was applied. To determine the differences in attitudes depending on the ULG the respondents come from Mann Whitney U test was used (2 groups: town, municipality). The level of statistical significance is determined at $p \leq 0.05$. In order to determine the connection between the answers provided by respondents from question 16 to question 30 and independent (categorical) variables Kendall's Tau-b correlation coefficient (τb) was used. The result interpretation: +/- 0.1 very weak correlation, +/- 0.1 to 0.19 weak correlation, +/- 0.2 to 0.29 moderate correlation, +/- 0.30 and > strong correlation. For the purposes of determining how the duty of the officials influences their attitudes in statements 16 to 30, Ordinal Regression PLUM analysis was conducted, whereby the respondents` official duties and their age (Covariates(s)) was used as the independent variable (Fixed factor(s)) while the answers from the Likert scale to statements 16 to 30 were used as the dependent variable (Dependent). For assessment of assumptions regarding the implementation of ordinal regression the Test of parallel lines was used. The level of statistical significance is determined at level $p \leq 0.05$. For testing the hypothesis set in this paper, only the answers to 5 relevant questions from the questionnaire were used. Apart from the questionnaire prepared and used for the purposes of conducting empirical research, the information about the number of established structures of sub-municipal self-government, the number of council members of sub-municipal committees and the competence of sub-municipal committees were collected through a detailed analysis of publicly available data on official websites of ULGs.

4. RESULTS OF THE EMPIRICAL RESEARCH

4.1. General information about the respondents

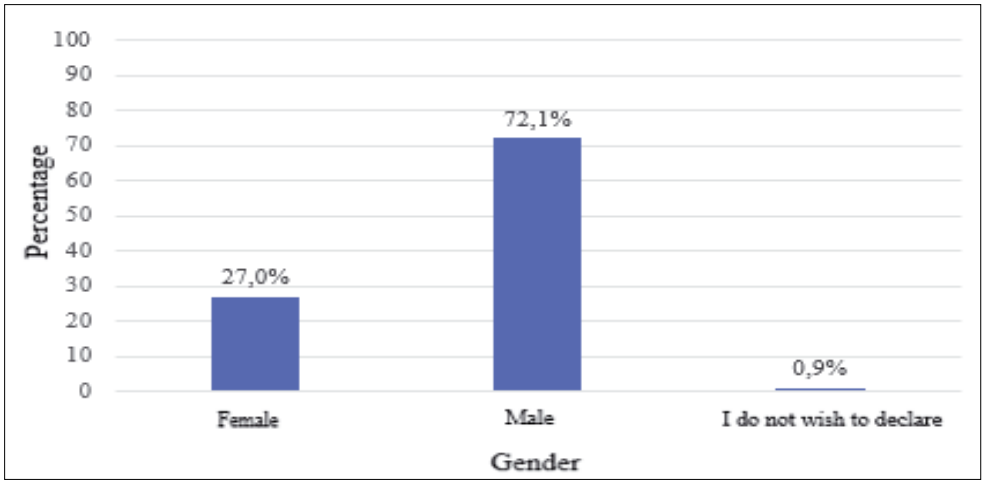
From the total number of potential respondents, 272 respondents answered the questions from the questionnaire, whereas 56 did not complete the questionnaire

[39] This research was conducted for the purposes of writing a doctoral dissertation. The paper will show only a small part of the results of the conducted research relevant for its topic.

and were therefore excluded from the analysis. The analysis of the answers was done on 216 respondents which represents 22,57% of all the potential respondents, which is a representative sample of respondents. Charts 1 to 4 show research results of the respondents for independent variables of the research (gender, age, political orientation and the size of the ULG), while other data referring to the other two independent variables are mentioned further in the text (political function and the type of the ULG the respondents come from).

Chart 1 shows that there were more male than female respondents in the research which was not unexpected considering the representation of women in politics in general,[40] but in the ULGs as well. According to the research results regarding the gender structure of council members of sub-municipal committees, there are 23,17% of women in Osijek-Baranja county, while in Vukovar-Srijem county there are 25,53%.

Chart 1 – Distribution of respondents based on gender



Source: author's interpretations

Results from previously conducted research show that people of older age are more frequently involved in politics, especially on sub-municipal levels.[41] Chart 2 illustrates the opposite. The results obtained in this research show that 58,8% of

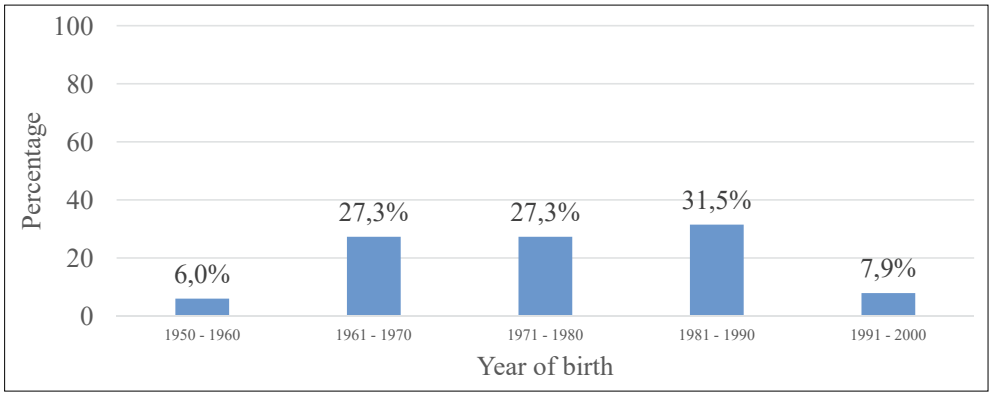
[40] Ryan, M.; Stoker, G.; John, P.; Moseley, A.; James, O.; Richardson, L.; Vannoni, M., *„How best to open up local democracy? A randomised experiment to encourage contested elections and greater representativness in England parish councils*", Local Government Studies, 2018, pp. 1-22, [https://kclpure.kcl.ac.uk/portal/files/97963135/How_best_to_open_up_RYAN_Firstonline2July2018_GREEN_AAM.pdf], Accessed 22 January 2020.

[41] See in: Hrženjak, J., *Ustrojstvo i funkcioniranje mjesne samouprave u Gradu Zagrebu*, Hrvatska i komparativna javna uprava, Vol. 11, No. 1, 2011, p. 48.; Swianiewicz, P., Chelstowska, K., *Neighbourhood*

respondents belong to the age group from 32 to 51 years of age which indicates that younger persons are actively involved in political activities in Osijek-Baranja and Vukovar-Srijem counties.

By analysing the data available on the web sites, it was established that 72,41% of council members of the sub-municipal committees/town districts in Osijek-Baranja and Vukovar-Srijem county belong to Croatian Democratic Union, while 13,96% constitute the average share of independent lists or lists of group of candidates (whereas the proportion of the number of independent candidates in Osijek-Baranja county is double (18,70%) when compared to Vukovar-Srijem county (9,22%)). From 19 ULGs in which the sub-municipal self-government had been previously established, in 14 ULGs the executive officer is the member of the Croatian Democratic Union. Similar pattern occurs when observing political orientation of presidents of representative bodies.

Chart 2 - Distribution of respondents based on the year of birth

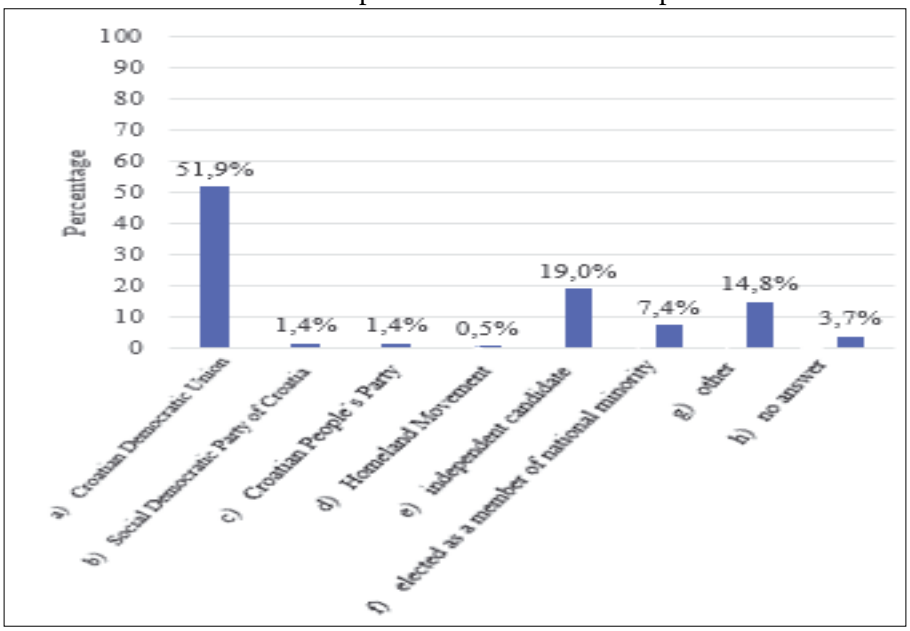


Source: author's interpretations

Chart 3 shows the distribution of respondents based on political orientation, while Table 1 illustrates the distribution of respondents based on the political orientation and political function of the respondents.

Council as a Path of Political Career Development in Poland, Polish Sociological Review, Vol. 190/2, 2015, p. 225.

Chart 3 – Distribution of the respondents based on their political orientation



Source: author's interpretations

Table 1 – Distribution of respondents based on their political orientation and political function

	Political orientation							
Political function	**CDU**	**SDP**	**CPP**	**HM**	**IC**	**NM**	**Other**	**Total**
Mayor/Municipal prefect	12	1	0	0	8	0	4	25
President of the municipal/town council	15	1	1	0	9	0	7	33
Member of council of sub-municipal committee/town district	80	1	2	1	23	16	21	144
Total	**107**	**3**	**3**	**1**	**40**	**16**	**32**	**202***

Source: author's interpretations

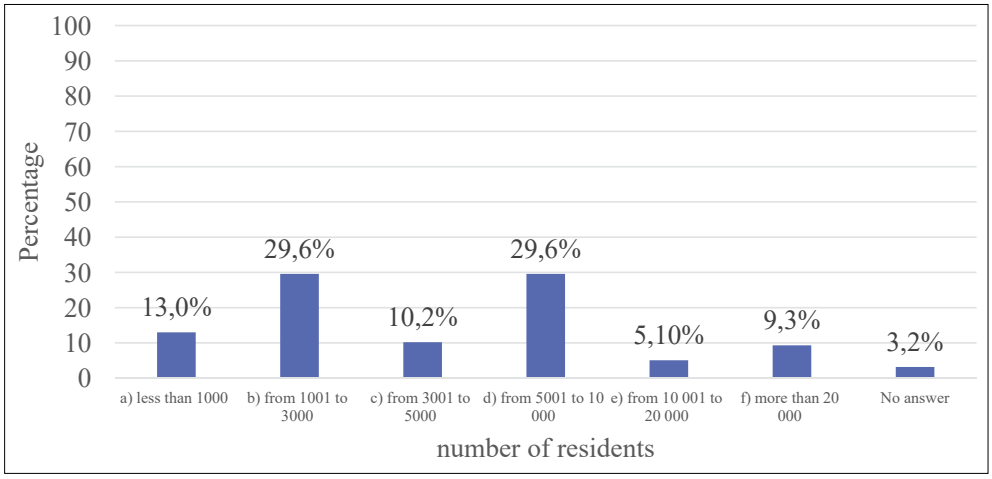
*The total number of respondents is 216, some respondents did not provide an answer to these questions. Legend: CDU – Croatian Democratic Union, SDP – Social Democratic Party of Croatia, CPP – Croatian People's Party, HM – Homeland Movement, IC – Independent Candidate, NM – National Minority.

Considering the real number of officials based on their political orientation, the provided data indicates that the local officials, candidates of independent lists, are more likely to participate in this type of research than the members of the majority political party. For the purposes of the analysis of the results, the key independent variable was the function the officials obtain. Table 1 shows that 25 executive offi-

cials (11,6% of the respondents), 33 presidents of representative bodies (15,3% of the respondents) and 144 council members of sub-municipal committees (68,1% of the respondents) completed the questionnaire. Another important variable was the type of the ULGs the respondents come from, 43,5% live in municipalities and 53,2% in towns. In the two observed counties, sub-municipal self-government was established in 9 municipalities and 10 towns. The size of the ULGs the respondents come from was also one of important variables. According to the 2021 Croatian Census, in the two observed counties there were 42 ULGs or 56,32% which belong in the category of small units with 1.001 to 3.000 residents, 11 units or 14,86% in the category of 5.001 to 10.000 residents, while only 4 towns had more than 20.000 residents. The only major discrepancy was the city of Osijek with its 96.313 residents.[42] Chart 4 shows that almost one third of the respondents live in ULGs with a small number of residents (from 1.001 to 3.000) and in ULGs that have between 5.001 and 10.000 residents.

The answers to five relevant questions from the questionnaire were chosen to test the outlined hypothesis (H1 - Local politicians do not support sub-municipal decentralization). These questions refer to expressions of respondents` personal opinions and attitudes regarding the necessity of establishing sub-municipal self-government in their ULGs and the benefits resulting from it, as well as those referring to scope of its competence and the interest of citizens for active involvement.

Chart 4 – Distribution of respondents based on the number of residents in the ULG they come from



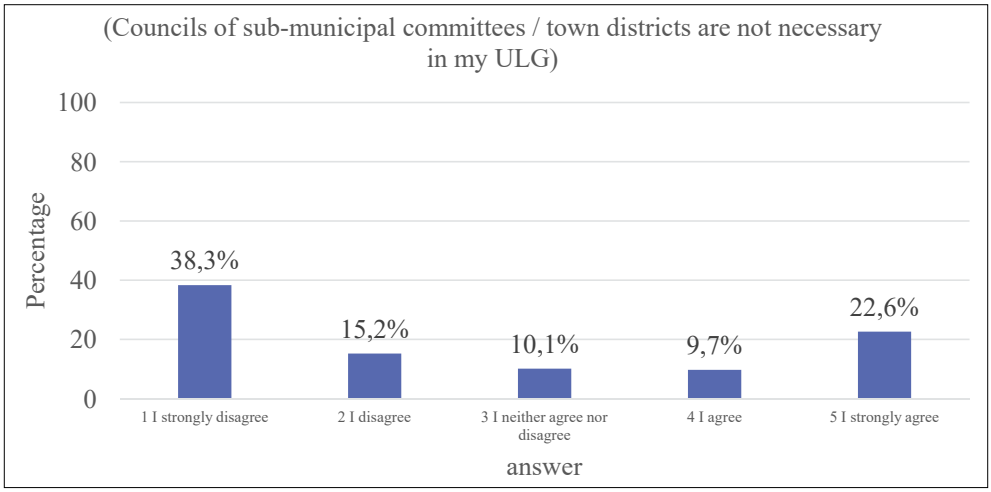
Source: author's interpretations

[42] Croatian Bureau of Statistics, [https://podaci.dzs.hr/media/bz5hplcj/gradovi-u-statistici.xlsx], Accessed 27 January 2023.

5. RESEARCH RESULTS ABOUT SUB-MUNICIPAL SELF-GOVERNMENT

Since local politicians had expressed their negative attitude about internal decentralization in previous research, the respondents were now offered a statement claiming that sub-municipal self-government is not required in their ULG. Chart 5 shows the respondents` answers from which it is evident that the majority does not support this claim. This result is expected considering that most respondents are council members of sub-municipal committees and would not therefore consider themselves redundant. However, a more significant piece of information is that 32,2% of the respondents strongly agree or agree with the statement.

Chart 5 – Distribution of answers to the statement that sub-municipal self-government is not necessary in their ULG



Source: author's interpretations

Statistical analysis shows that executive officials strongly agree with the mentioned statement, presidents of town and municipal councils agree, whereas council members of sub-municipal committees/town districts disagree. There are statistically significant differences in these attitudes, most prominent being the attitudes of mayors/municipal chiefs and council members of sub-municipal committees/ town districts (p=0.000). Regression analysis shows that mayors/municipal prefects express a different attitude regarding this statement with evident statistical significance (1.74; p=0.000) when compared to the attitudes of council members of sub-municipal committees/town districts and presidents of town/municipal council (0.86; p=0.02). Mayors/municipal prefects strongly agree with that statement, presidents of representative bodies agree, while the members disagree with it. In order to accurately illustrate the distribution of answers and to determine the

differences in respondents` attitudes based on the length of their political function, Table 2 shows their answers expressed in median values.

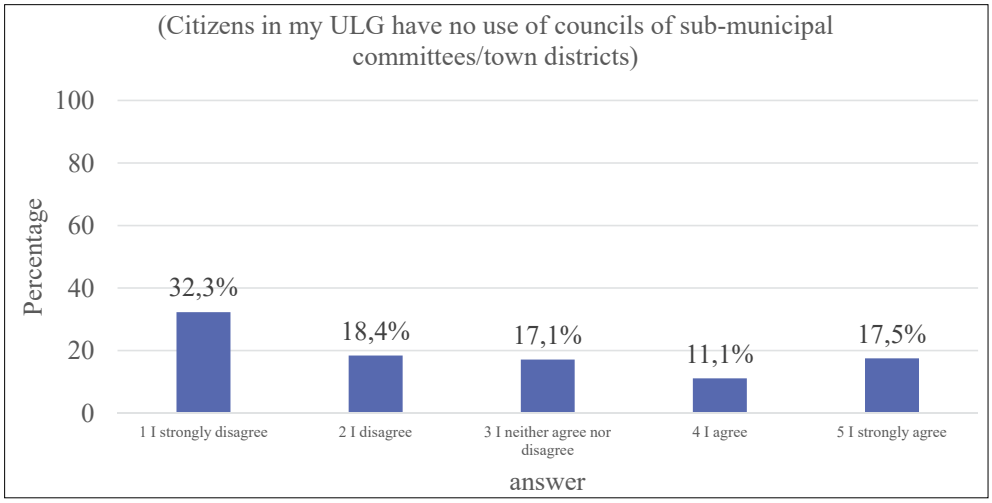
Table 2 – Distribution of answers to the statements from the chart in accordance with the 5-point Likert scale based on the length of the respondents` political functions, expressed in median values

Statement	**Chart 5**	**Chart 6**	**Chart 7**	**Chart 8**	**Chart 9**
Mayor/municipal prefect	5	5	3	4	4
President of town or municipal council	4	4	3	3	3
Member of sub-municipal committee/ town district	2	2	3	3	2

Source: author's interpretations
Legend: 1 – I strongly disagree; 2 – I disagree; 3 – I neither agree nor disagree; 4 – I agree; 5 – I strongly agree.

As was previously stated, sub-municipal self-government in Croatia does not possess any significant legally defined competence. It is therefore frequently considered an additional, and even unnecessary, level of governance. Local politicians, however, are those who can change this situation. By changing the statute, sub-municipal self-government might receive certain competence and finances. Chart 6 shows the distribution of answers regarding the statement that their ULG has no use of sub-municipal self-government. The results imply a similar distribution of answers to those from the previous statement. Executive officials strongly agree with the statement, presidents of town and municipal councils agree with it, whereas the council members of sub-municipal committees/town districts disagree. These differences in answers are statistically significant, especially those regarding councils and executive officials (p=0.000) and those from presidents of town and municipal councils and executive officials (p=0.04). The regression analysis determined that executive officials express a statistically significant difference in attitudes regarding the statement (1.96; p=0.000) when compared to the attitudes of council members of sub-municipal committees/town districts and presidents of town and municipal councils (0.73; p=0.04).

Chart 6 – Distribution of answers regarding the statement that citizens have no use of sub-municipal self-government



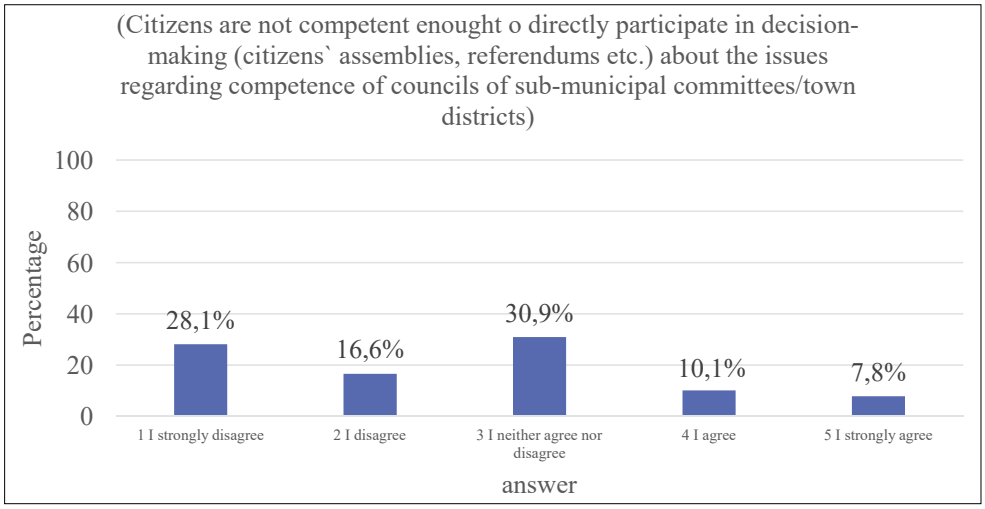
Source: author's interpretations

In addition, statistically significant differences were discovered in the answers of the respondents residing in towns and those coming from municipalities. Respondents whose ULG is a town disagree with the statement, while those coming from municipalities neither agree nor disagree (p=0.02). The attitude of the respondents where most of them strongly disagree with the statement that citizens of a ULG have no use from councils of sub-municipal committees/town districts expresses a statistically significant positive weak correlation with the political party they support (τb=0.16, p=0.02). Most of the respondents are supporters of the Croatian Democratic Union, which can be a reason of such distribution of answers.

The patronizing attitude of local political officials towards citizens as participants of local decision-making was mentioned previously in this paper. The respondents were thus offered a statement claiming that citizens are not competent enough to participate in the decision-making processes, and the distribution of answers regarding this statement is shown in Chart 7. Most of the respondents neither agree nor disagree with it, while 44,70% of the respondents disagree or strongly disagree. This is the only statement which expresses statistically significant difference based on the gender of the respondents (p=0.04). Male respondents disagree with the statement, while female respondents neither agree nor disagree with it. The regression analysis shows that executive officials express a statistically significant difference in attitudes (0.79; p=0.04) in comparison to the attitudes of council members of sub-municipal committees/town districts. However, both groups mostly stated they neither agree nor disagree with the mentioned statement. The

attitudes expressed by presidents of town/ municipal council have no statistical significance on the answers regarding the statement 26 (p=0.89).

Chart 7 – Distribution of respondents` answers regarding the statement that citizens are not competent enough to directly participate in decision-making

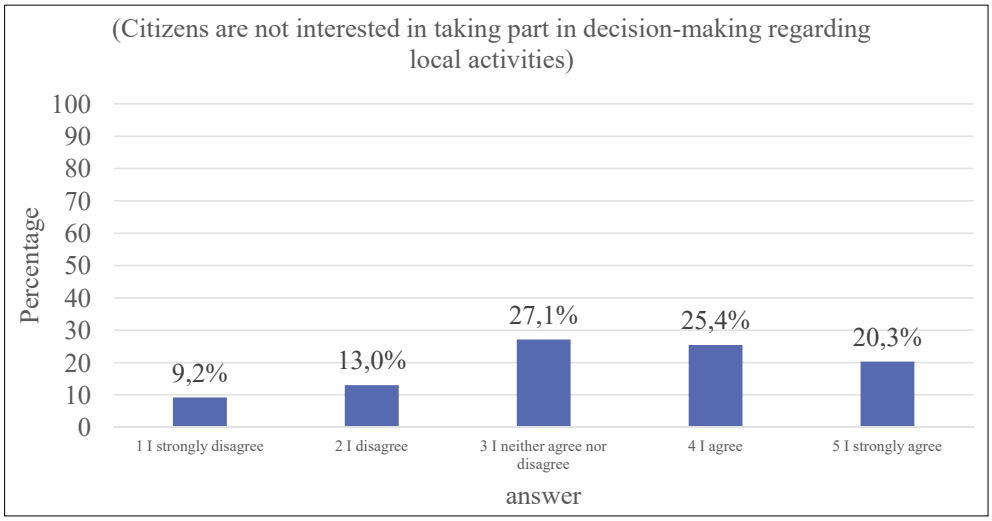


Source: author's interpretations

Another common stereotype in political life is that the citizens lack interest and do not wish to participate at all. This argument is frequently used precisely by politicians, which was the reason why the statement regarding the personal attitudes and opinions of the respondents about the level of citizens` interest in political decision-making was included in the questionnaire.

Distribution of answers is shown in Chart 8 and indicates that most of the respondents are indifferent to this statement (neither agree nor disagree), while 45,70% of the respondents agree or strongly agree with it. This result can also be illustrated in a different way: only 22,2% of the respondents disagrees with the statement. In addition, this is the only statement which shows no statistically significant differences or correlations between individual categories of participants.

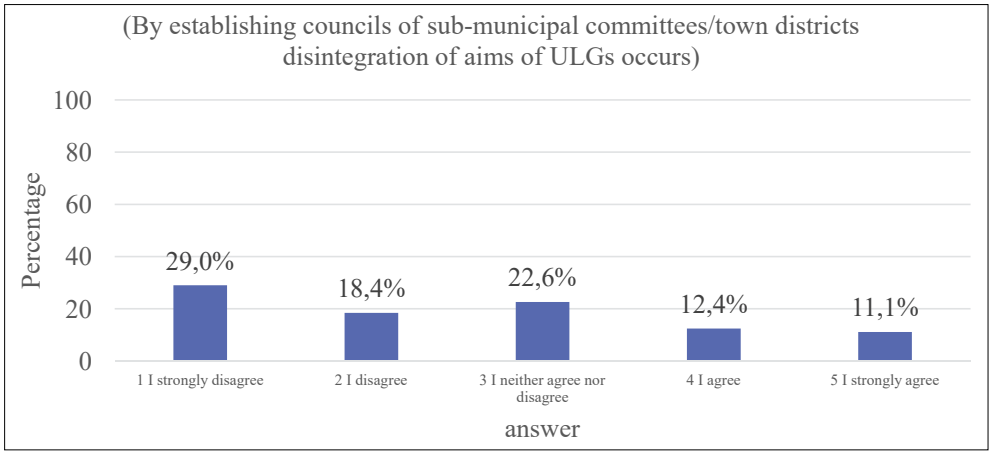
Chart 8 – Distribution of answers regarding the statement about lack of citizens` interest



Source: author's interpretations

It has previously been mentioned that there are certain objections to how internal decentralization leads to disintegration of governance within the ULGs. Another level of authority is being implemented, the focus on sub-municipal bodies is partly the centre of interest, a proportion of financial means from the total budget is being allocated to ULGs, all of which can sometimes result in negative effects. Chart 9 illustrates the distribution of answers regarding the statement that by establishing sub-municipal bodies, the aims of the ULGs are being divided. As is evident, most of the respondents disagree with this statement. However, statistically significant differences were noticed referring to the attitudes of executive officials and council members of sub-municipal committees/town districts about this statement ($p=0.01$), in addition to statistically significant weak and negative correlation between the answers and the function of the respondents ($\tau b=-0.15$). Executive officials mostly agree with this statement, presidents of town and municipal council neither agree nor disagree, whereas council members of sub-municipal committees/town districts mostly disagree with it. The regression analysis shows that executive officials express a statistically significant difference in attitudes (1.05; $p=0.007$) regarding this statement when compared to the attitudes of council members of sub-municipal committees/town districts. They mainly agree with the statement unlike council members of sub-municipal committees/town districts, who disagree with it. There is no statistical significance if the respondents obtain the function of presidents of town/municipal council when it comes to this statement ($p=0.59$).

Chart 9 – Distribution of answers regarding the statement that sub-municipal self-government is an element of disintegration of ULGs



Source: author's interpretations

6. DISCUSSION AND CONCLUSION

After having presented the analysis of the research results, several conclusions can be drawn. Had the analysis of the answers of the respondents with the aim of testing the hypothesis been conducted only by descriptive statistics, the research results would not have been entirely correct. The fact that the number of respondents in individual categories is not the same significantly disrupts the results of descriptive analysis. The number of respondents in the category council members of sub-municipal committees/town districts is several times higher than the number of respondents in the other two categories. The results of the descriptive statistics thus show that the hypothesis (H1 - Local politicians do not support sub-municipal decentralization) is not confirmed. Most of the respondents (council members of sub-municipal committees/town districts) find the sub-municipal self-government necessary and useful for citizens and that it does not lead to disintegration of ULGs. Moreover, they think citizens are not incompetent to participate in decision-making while a significant part of them also believe they are willing and eager to take part in the decision-making processes. There is a logical explanation for these results: council members believe in their work, find themselves useful and will therefore not express any attitudes which can be harmful to them (possibly lead to cancelling of sub-municipal self-government). The results obtained by descriptive statistics for the purposes of testing the hypothesis should not be entirely trusted. However, these results are not useless, they simply need to be interpreted together with the statistically significant correlation determined between the answers to statement about the necessity and usefulness of

sub-municipal self-government (Charts 5 and 6) and political orientation of the respondents. Since most of the respondents (from all three categories) support the Croatian Democratic Union, sub-municipal councillors could and should encourage the strengthening of the role of sub-municipal self-government among their colleagues from the political party by asking for more competence and finances for the activities and work of sub-municipal bodies. The same political orientation might be used as a means for strengthening the role of sub-municipal self-government while simultaneously strengthening the role of citizens in local decision-making.

Further statistical analysis of the obtained answers established statistically significant differences among the attitudes of the respondents from different categories, as well as statistically significant correlation of the answers with the political function of the respondents. There are statistically significant differences present in all five statements, whereby executive officials have diametrically opposite (negative) attitudes compared with the attitudes of sub-municipal councillors. The attitudes of presidents of representative bodies are also statistically different from the attitudes of the other two categories but are approximately in the middle between positive and negative attitude. The difference in attitudes of individual categories is most obvious when the results are expressed by median (Table 2). Even the statement about the competence of citizens for involvement (the median of the answer is 3) expresses a statistically significant difference, which means that executive officials support the statement, while sub-municipal councillors disagree with it.

Statistically significant differences in attitudes are also found in connection with different types of ULGs the respondents come from. The respondents from towns express more positive attitudes of usefulness and significance of sub-municipal self-government when compared to the attitudes of respondents coming from municipalities. This can be explained by the fact that towns are in general larger units with more residents so the necessity for internal decentralisation is there greater.

Considering the extremely negative attitude of executive officials towards sub-municipal self-government and citizen involvement (sub-municipal self-government is unnecessary, citizens have no use of it, it leads to disintegration of ULGs, citizens are not competent for or interested in decision-making) and the prevailing negative attitude of the presidents of representative bodies regarding the same statements, it can be concluded that the hypothesis (H1 - Local politicians do not support sub-municipal decentralization) is confirmed for these two categories of respondents. An additional argument for supporting the hypothesis is provided by the data regarding the rapid decrease of the number of ULGs with established

sub-municipal self-government. Executive officials and presidents of local representative bodies are precisely those who decide about these matters.

Even though the results of the research are limited to Osijek-Baranja and Vukovar-Srijem counties, they specify a particular behavioural pattern of local officials and can be used as a foundation for a more far-reaching research. The Republic of Croatia accepted the European Charter of Local Self-Government and all its principles, including the principle of subsidiarity and involvement of citizens in decision-making. It is therefore necessary to take certain measures through which the local political officials would be educated and made aware of the significance, well-being and necessity of real acceptance of the principle of involvement of citizens in decision-making. Adequate normative solutions would prove effective in strengthening the role of sub-municipal self-government and starting an intense campaign for active citizens` involvement as a necessary prerequisite for a more democratic, efficient and quality local decision-making. Promotional activities should be focused on all the levels of authority, including citizens themselves. It is necessary to present the positive effects of citizens` involvement in decision-making on local levels clearly and unambiguously. Conclusively, the paradigm of citizens` involvement should be accepted as a key prerequisite for strengthening democracy, openness and transparency of local self-government and a guarantee for a better future.

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Review article

CHALLENGES OF PERSONAL DATA PROTECTION ON THE INTERNET -IMPACT ON DEMOCRACY, PUBLIC ADMINISTRATION AND THE RULE OF LAW IN THE EU

Mirko Klarić, PhD, Full Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21 000 Split, Croatia
mirko.klaric@pravst.hr

Maja Proso, PhD, Associate Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21 000 Split, Croatia
maja.proso@gmail.com

ABSTRACT

Rapid development of information and communication technologies brings many challenges and risks for the protection of personal data since the internet has become enormously influential in virtually every aspect of daily life. Privacy and data protection are interrelated since data protection is a legal mechanism that ensures privacy of the subject on the Internet. Privacy is a fundamental human right, recognized in many international and regional human rights documents. The misuse of technologies has just recently shed some light on the meaning and importance of this subjective right in contemporary societies, and has also pointed to the problem of defining its content in context of informational and technological development. Digital transformation also affects the way how companies analyse consumer preferences in order to create personalized ads. The paper examines the right to privacy of personal data, existing legal framework for the protection of privacy and personal data and its impact on the rule of law in the EU, focusing on the examining of existing rules on processing personal data on the Internet, particularly legal regulation and challenges of processing personal data for the purpose of profiling and behavioral advertising on the Internet, using cookies. By processing data, companies on the Internet aim to develop new advertisements, products, and services specified to the particular consumer needs. Recent landmark decision of the Court of Justice of the European Union C – 252/21, (Meta Platforms and Others v. Bundeskartellamt) is analyzed as well, because it clarifies several points of data protection law, namely GDPR, regarding personalized use of

consumers' personal data for behavioral advertising on social network platforms. The Court of Justice of the European Union made it clear that the personalization of advertising financed by the Internet social network Facebook cannot justify the processing of (sensitive) data if there is no consent given by the data subject. According to development of legislation of the European Council and the European Parliament and legal practice of the Court of Justice in digital transformation development, personal data protection became more significant and important part of regulatory framework the European Single Market. This regulation specific influences on approach and acting of public institutions, governmental bodies and private entities in personal data protection. This paper will analyze how challenges of personal data protection can influence on public institutions activity and citizens' rights in two fields of regulation: access to personal data and possibility of collecting, using and manipulation of personal data with role of public institutions in personal data protection.

***Keywords**: Court of Justice of the European Union, personal data protection, Internet, the rule of law, public institutions*

1. INTRODUCTION

The age in which we live is predominantly digital, informational and communicative in nature. The Internet transmits information on a global scale, therefore information security plays an important role. Technological devices used for communication and Internet access leave virtual traces through which the user can be identified and his/her personal data can be used illegally. Today, social networks are possibly the biggest transmitters of information (therefore personal data) today. By collecting users' personal data and monitoring their activities, the owners of social networks profile use them for the purpose of targeted advertising or, alternatively, forward their personal data to third parties, without permission. The increasing availability of personal data and the possibility that, due to technological development, data is exchanged and used globally carries with it the risk of its unauthorized collection, processing and transfer. This seriously jeopardizes the individual's informational personality.[1] It implies that the individual decides whether, when, to whom, how much and how to communicate his/her personal data. Thus, the German Constitutional Court in 1983 accepted the concept of information personality as an individual's right to independently decide when and to what extent information about his/her private life can be disclosed to others. Of course, such authorization is not unlimited, given that the right to protect personal data is subject to limitations in cases of public interest and (cumulatively) when

[1] The concept of information personality was defined by Alan Westin in 1970. as "the requirement of individuals, groups or institutions to independently decide when, how and what information about themselves will be given to others „, Westin, A., *Privacy and Freedom*, New York, Atheneum, 1970., p. 7 in: Brezak, M., Pravo na osobnost, Pravna zaštita osobnih podataka od zlouporabe, Zagreb, Nakladni zavod Matice Hrvatske, 1998, p. 22.

the stated limitations are prescribed by law, clear and proportionate.[2] The right to protection of personal data is recognized as a fundamental right in Article 8 of the Charter of Fundamental Rights of the European Union (further: Charter).[3] The Charter confirms the right to the protection of personal data and the fundamental values associated with this right are presented. It establishes that the processing of personal data must be fair, that it must be carried out for established purposes and be based on the consent of the person in question or on a legitimate basis established by law. Individuals must have the right to access their personal data and the right to correct it, and the observance of this right must be subject to the supervision of an independent body. The right to protect personal data exists precisely with the aim of enabling an easier flow of information, while protecting the personal data of individuals.

The protection of personal data aims to achieve the transparency of all other non-private data.[4] The protection of personal data is considered a modern and active right[5] which establishes a system of checks and controls in order to protect individuals during each processing of their data.

2. INSTITUTIONAL FRAMEWORK OF PERSONAL DATA PROTECTION WITH MAIN PRINCIPLES

Democratic advantages of personal data protection are an important part in the development of information security for citizens not only on the Internet, but also in other aspects of daily life.[6] A significant number of citizens are concerned about their privacy and protection of their private life. This trend depends on development in various aspects of information technologies, where the possibilities of interactive communications are growing, according to technological solutions.[7] The

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2 Kiss, A.; Szoke, G. L., *Evolution or Revolution? Steps Forward to a New Generation of Data Protection Regulation*, in: Gutwirth, S.; Leenes, R.; de Hert, P., (eds.), Reforming European Data Protection Law, Springer International Publishing AG, 2015, pp. 314-315.

3 European Union Charter of Fundamental Rights, Official Journal of the European Union, C 326.

4 Bosco, F., *et al., Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and perspectives from European Data Protection Authorities*, in: Gutwirth, S.; Leenes, R.; de Hert, P., (eds.), Reforming European Data Protection Law, Springer International Publishing AG, 2015, p. 17.

5 Independent lawyer Sharpston stated that the case involves two separate rights: the "classic" right to privacy protection and the "more modern" right to data protection. Joined Cases C-92/09 and C-93/02, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, Opinion of Independent Counsel Sharpston, 17 June 2010, p. 71.

6 Fuster, G. G., *The emergence of personal data protection as a fundamental right of the EU*, Springer International Publishing Switzerland, 2014, pp. 185 – 204.

7 Kulhari, S., *Builduing-Blocks of a Dana Protection Revolution: The Uneasy Case for Blockchain Technology to Secure Privacy and Identity*, Nomos Verlagsgesellschaft mbH, Baden-Baden, 2018, pp. 23–37.

development of social media and social networks with the creation of interactive connections between various data basis and relatively simple publication of data makes users vulnerable from possible abuse of information technologies.[8] Personal data are more accessible and available according to modern technological tools which enable immediate publication and dissemination in the public space. The development of AI technology solutions brings new possibilities in accessibility, processing, storage and manipulation of personal data. Relatively simple AI technological tools available on the Internet enable the processing and analysis of data available through social networks, which can potentially threaten the privacy of the citizens as one of the fundamental human rights. The principles for the control of personal data sharing and dissemination have been developed to protect people from the consequences of uncontrolled data publishing with personal elements.[9] Those principles have universal characteristics focused on various aspects of personal data protection: potential availability, possibility of access, processing and manipulation of personal data, dissemination and protection of special, vulnerable categories of personal data. Every aspect of personal data use is important in developing the main principles of data protection and their division from other types of data, which are not of a personal character.

There are several principles created from the public policy approach, according to the restrictions of personal data access: the principle of data personalization, the principle of protection of personal data dissemination, the principle of diversification of personal data protection, the principle of limited access to personalized data and the principle of special protection of vulnerable categories of personalized data.[10]

The principle of data personalization includes the approach to specific and certain information which identifies or can identify some person. This principle tries to harmonize two main requests: firstly, the right of the public to have access to all information connected with activities with public dimension, and secondly, a

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8 Custers, B., *et al., Introduction*, in Custers, B., *et.al.*, *EU Personal Data Protection in Policy and Practice. Information Technology and Law Series*, vol 29. T.M.C. Asser Press, The Hague. 2019, Springer, pp. 1–16.

9 Roos, A., *5 Core Principles of Data Protection Law*, The Comparative and International Law Journal of Southern Africa, Vol. 30, No 1., 2006, pp. 102–130.

10 There are also division principles of personal data protection, according to the Article 5 of GDPR: principle of transparency and lawfulness, principle of accountability, principle of confidentiality, principle of data minimization, principle of accuracy, principle of storage limitation and principle of purpose limitation. These principles concretize main start points for shaping the EU regulatory framework for the protection of personal data. Another division of personal data protection principles are developed according to the main elements of the personal data protection, which are common to all legal systems, and depend on specific characteristics of personal data itself and their sensitivity.

special approach to data connected to a specific person. The first request is connected with the activity and functioning of public authorities, central and local government administration and public institutions. The second request is focused on privacy protection of the persons included in public activities in the part which does not include their public engagement. Those data, with specific informational elements which can identify certain specific personal characteristics of a concrete person, represent personal data and they are subject to special restrictions in legal transactions and their availability to the public. The importance of this principle has been growing lately, according to development of new information technologies, including artificial intelligence.[11] By implementation of the new information technologies, it is relatively simple to manipulate personal data, or abuse them, including the possibilities such as face and voice recognition and identification.[12] The development of new artificial intelligence technology solutions opens many various manipulation possibilities with personal data modification.[13] That induces development of various regulatory tools to protect citizens from possible manipulations of their personal data and intrusion into their privacy.[14] Implementation of this principle is focused on developing criteria for demarcation between data that fall into the public sphere and are subject to public criticism, from information which is, in principle, in the private sphere of individuals involved in public affairs.[15]

The principle of protection of personal data dissemination describes limits which can be set in data protection policy in order to limit access to vulnerable data which identify or can identify individual persons.[16] Personal data dissemination is the second challenge in regulation, mostly because clear differentiation between public data and personal data does not exist. It is obvious that at the same time in public data exist which can be, according to their characteristics, described as public data, and at the same time, data which can be described as personal data.

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11 Aliyev, I. A.; Rzayev, G. A.; Ibrahimova, A. N., *Artificial Intelligence and Personal Data: International and National Framework*, Peace Human Rights Governance, Vol. 5., No. 1., 2021, pp. 97–123.

12 Czerniawski, M., de Hert, P., *Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context*, International Dana Privacy Law, Vol. 6., No. 3., 2016, pp. 230 –243.

13 Humerick, M., *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence Comments*, Santa Clara High Technology Law Journal, Vol. 34, No. 1., 2018, pp. 393–418.

14 Elvy, S. A., *Paying for Privacy and Personal Dana Economy*, Columbia Law Review, Vol. 117, No. 6., 2017, pp. 1369–1459.

15 Žliobaitė, I.; Custers, B., *Using sensitive personal data may be necessary for avoiding discrimination in data-driven decision models*, Artificial Intelligence and Law, Vol. 24, No. 2, 2016, pp. 183–201.

16 Belanger, F., Crossler, R. E., Privacy in the Digital Age: A Review of Information Privacy Research in Information Systems, MIS Quarterly, Vol. 35., No. 4., 2011, pp. 1017. – 1041.

By implementation of modern information technologies, possibilities of data dissemination are huge and difficult to control, and after dissemination it is impossible to stop using that information. To implement the principle of personal data dissemination one needs to prepare and develop criteria for differentiation between public and personal data, for the protection of spreading personal data in the public space.[17] Implementation of criteria for the protection of personal data dissemination is an important previous step that ensures the full application of the principle of publicity and control of the public, while simultaneously protecting the right to privacy of citizens as one of the fundamental human rights. The only way for efficient limitation of dissemination of personal data is a regulative framework with incorporated consistent and implementable criteria for division between public and personal data. It is especially important in situations where personal data has public influence and affects social and political relations in the community. In that case, it is important to evaluate in which occasions it is necessary to limit access to data which include personal and public elements and how to divide public from personal in daily data politics. The principle of diversification of personal data protection includes development of various regulatory tools to increase personal data protection. The tools important for personal data protection include three types of potential measures: penal, misdemeanor and material. Penal measures include the possibility of criminal prosecution, misdemeanor includes a milder form of responsibility than criminal liability, but sanctions which are mostly financial penalties, and the third type of measures is focused on liability for damage caused by potential abuse of personal data protection.

The principle of limited access to personalized data is focused on developing criteria for access to personal data. Some of the personal data are mostly connected with the private life of the identifying person, and they are separated from the public, social, economic or political position of the person in society.[18] Other types of personalized data, which are accessible in the public sector can identify a certain person in a specific social role, such as economic or political status, public position and influence social relations and community movements, etc. Those data are mostly related to the public sphere and can be important because of the principles of openness and transparency in the activity of public bodies and institutions. It is necessary to describe procedure mechanisms to divide public elements from private elements in personalized data according to the principles which guarantee

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17 Custers, B., *et al., A comparison of data protection legislation and policies across the EU*, Computer Law & Security Review, Vol. 34., No. 2., 2018, pp. 234 –243.

18 Hallinan, D.; Friedewald, M.; McCarthy, P., *Citizens' perceptions of data protection and privacy in Europe*, Computer Law & Security Review, Vol. 28., No. 3., 2012, pp. 263–272.

the open and transparent work of public authorities. Those procedures assure the implementation of the right to access information held by public authorities.

The principle of special protection of vulnerable categories of personalized data is focused on personal data types with specific characteristics such as gender, race, ethnic origin, religious affiliation, ideological or political orientation and health conditions, etc. According to the specific characteristics of data, limitation of data access and specific conditions in data collecting and processing is provided.[19] These conditions are important to especially protect vulnerable categories of personal data of abuse or malicious use, which is important in order to protect the dignity and self-respect of addressed people. The principle of special protection of vulnerable categories besides its interest dimension has also the technical dimension, which describes procedures important for special protection of data. The interest dimension of protection defines which type of personalized data can be identified as vulnerable, with a specific approach to their protection. The technical dimension of vulnerable categories personalized data protection includes specific legal measures, which are needed to protect access, manipulation and dissemination in their daily manipulation. This protection is at the focus of special interest, in order to promote and improve human rights in contemporary society.[20]

3. LEGAL FRAMEWORK OF PERSONAL DATA PROTECTION

With the development of information technology, the need for legal protection by regulations to protect the personal data of individuals grew as well.[21] Article 12 of the General Declaration on Human Rights[22] on respect for private and family life meant that for the first time an international legal instrument established the right of an individual to protect his/her private sphere from the interference of others, especially the state. Although by its nature it is a non-binding legal act, the Declaration influenced the further development of legal protection of human rights in Europe. The right to protection of personal data is part of the rights protected by Article 8 of the European Convention on Human Rights (further: the Conven-

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19 Hall, L. B.; Clapton, W., *Programming the machine: Gender, race, sexuality, AI, and the construction of credibility and deceit at the border*, Internet Policy Review, Alexander von Humboldt Institute for Internet and Society, Berlin, Vol. 10, No. 4, 2021, pp. 1–23.

20 Van Dijk, N., *et al., Right engineering? The redesign of privacy and personal data protection, International Review of Law*, Computers & Technology, Vol. 32, No. 2 – 3., 2018, pp. 230–256.

21 The European Court of Justice has expanded the definition of personal data to include dynamic IP addresses. See: Case C-582/14 *Breyer v Bundesrepublik Deutschland* ECLI:EU:C:2016:779., [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0582], Accessed 24 May 2024.

22 United Nations (UN), Universal Declaration of Human Rights, December 10, 1948.

tion[23]) which guarantees the right to respect private and family life, home and correspondence, and prescribes the conditions under which limitations of this right are allowed. In the mid-70s, the Committee of Ministers of the Council of Europe passed several resolutions on the protection of personal data, referring to Article 8 of the Convention.[24] Convention on the Protection of Individuals in the Automatic Processing of Personal Data (further: Convention No. 108)[25] up to this day remains the only legally binding international instrument in the field of data protection[26]. Convention no. 108 applies to all data processing in the private and public sector, including processing in the judiciary and processing performed by bodies responsible for the execution of legislation. The convention protects individuals from misuse when processing personal data and at the same time seeks to regulate cross-border transfers of personal data. With regard to the processing of personal data, the principles from the Convention particularly concern the fair and lawful collection and automatic processing of data for certain legitimate purposes.[27] The Charter of the European Union on Fundamental Rights of 2000 with the enforcement of the Treaty of Lisbon in 2009 became legally binding as primary EU law. Adoption of the Treaty of Lisbon is a turning point in the development of legislation on data protection, not only because of the elevation of the Charter to the level of a legally binding document of primary law, but also because of ensuring the right to the protection of personal data. This right is expressly established in Article 16 of the TFEU, in the part of the Treaty dedicated to the general principles of the EU. Article 16 also creates a new legal basis that gives the EU the competence to pass laws on data protection issues. This is important because EU data protection regulations, especially the Data Protection Directive, were originally based on the legal basis of the internal market and the need to harmonize national laws so that the free movement of data in the EU would not be restricted.[28] >From 1995 to 2018, the legal instrument of the EU in relation to data protection was Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free flow of such data (further: Data Protec-

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23 The European Council, European Convention on Human Rights, CETS br. 005, 1950.

24 Council of Europe, Committee of Ministers (1973), Resolution (73) 22 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector, 26 September 1973; Council of Europe, Committee of Ministers (1974), Resolution (74) 29 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Public Sector, 20 September 1974.

25 Council of Europe, Convention on the Protection of Individuals with Automatic Processing of Personal Data, CETS br. 108, 1981.

26 *Handbook on European Data Protection Legislation*, Luxembourg: Publications Office of the European Union, 2020, p. 26.

27 *Ibid.*

28 *Handbook on European Data Protection Legislation*, *op.cit.*, note 10, p. 30.

tion Directive).[29] The data protection directive established a detailed and comprehensive data protection system in the EU. The directives are transposed into national legislation, which in practice has resulted in a mismatch of legal rules for the protection of personal data at the EU level. This fact, along with the constant and rapid development of information technologies, led to the need to reform legislation on data protection in the EU. The reform resulted in the adoption of Regulation (EU) 2016/679 on the protection of individuals in relation to the processing of personal data and on the free movement of such data and on the repeal of Directive 95/46/EC.[30] Unlike the Directive, the Regulation is a horizontal source of personal data protection rights, which means that it is fully binding and directly applicable in all member states. The way in which the territorial scope of application of the Regulation is arranged results in the potential global effect of its provisions, especially for issues of online business where the subject of processing is the personal data of EU citizens.[31] The material area of application of the General Regulation includes processing of personal data that is fully automated and non-automated processing of personal data that are part of the storage system or are intended to be part of the storage system.[32] The GDPR Regulation contains definitions of terms important for the interpretation of its field of application. It thus defines personal data as all data relating to an individual whose identity has been determined or can be determined, i.e. a person who can be identified directly or indirectly, especially with the help of identifiers such as name, identification number, location data, network identifier or with the help of one or more factors inherent in the physical, physiological, genetic, mental, economic, cultural or social identity of that individual.[33] Some of the novelties brought by the GDPR Regulation are the introduction of the term network identifier into the definition of personal data and, for the first time, in the following text, the legal definition and regulation of genetic and biometric data as personal data.[34] In the field of electronic communication, the possibility of unjustified interference in the user's personal sphere has increased due to the advanced possibilities of eavesdropping and

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29 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free flow of such data, OJ 1995 L 281.

30 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals in connection with the processing of personal data and on the free movement of such data and on the repeal of Directive 95/46/EC (further: Regulation GDPR), OJ L 119/1.

31 Gumzej, N., *Uredba o zaštiti osobnih podataka*, 2017, Projekt "Novi hrvatski pravni sustav" Pravnog fakulteta Sveučilišta u Zagrebu, p. 2.

32 Art. 2. par. 1. GDPR.

33 Art. 2. par. 1. GDPR .

34 Čizmić, J.; Boban, M., *Učinak nove EU Uredbe 2016/679 (GDPR) na zaštitu osobnih podataka u Republici Hrvatskoj*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, br. 1, 377-410, 2018, p. 382.

monitoring of communication. For this reason, it was considered that special regulations on data protection are necessary in order to eliminate certain risks to which users of communication services are exposed.[35] As part of the EU legal framework, in order to complement and adapt the provisions of the former Directive on data protection in the telecommunications sector, the Privacy and Electronic Communications Directive (hereinafter: the e-Privacy Directive) was adopted in 2002 and amended in 2009.[36] The e-Privacy Directive applies to communication services in public electronic networks. In the e-Privacy Directive, three main categories of data generated during communication are distinguished. These are: data that make up the content of messages sent during communication, data necessary for the establishment and maintenance of communication, so-called metadata, which in the Directive is called "traffic data", such as information about the people who communicate, the time and duration of communication, and metadata includes data specifically related to the location of the communication device, so-called location data - this data is also data on the location of the user of the communication device, especially when it comes to users of mobile communication devices.[37] In January 2017, the European Commission adopted a new Proposal for a regulation on e-privacy[38] which replaced the e-Privacy Directive. The main goal of the proposed regulation is the protection of the fundamental rights and freedoms of natural and legal persons in the provision and use of electronic communication services, especially the right to respect private life and communication and the protection of natural persons in regard to the processing of personal data. The proposed regulation simultaneously ensured the free movement of electronic communication data and electronic communication services within the Union. While the GDPR regulation primarily refers to Article 8 of the EU Charter of Fundamental Rights, the proposed regulation seeks to incorporate Article 7 of the Charter into the secondary law of the Union. The proposed regulation also adapts to new technologies and the market with the aim of building a

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35 *Handbook on European Data Protection Legislation*, *op.cit.*, note 10, p. 332.

36 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the field of electronic communications, SL 2002 L 201 (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and the Council of November 25, 2009 amending Directive 2002/22/EC on universal services and user rights with regard to electronic communications networks and services, Directive 2002/58/EC on the processing of personal data and protection of privacy in the electronic communications sector (further: Universal Services Directive) and Regulation (EC) no. 2006/2004 on cooperation between national authorities responsible for the implementation of laws on consumer protection, OJ 2009 L 337.

37 *Handbook on European Data Protection*, *op.cit.*, note 10, p. 334.

38 Proposal for a regulation of the European Parliament and the Council on respect for private life and protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on privacy and electronic communications) (COM(2017) 10 final), Art. 1.

comprehensive and consistent legal framework. The e-Privacy Regulation would therefore be the *lex specialis* in relation to the GDPR Regulation. The e-Privacy Regulation covers the processing of "electronic communications data", including the content of electronic communications and metadata that are not of a personal nature. The scope is limited to the EU, including cases where data collected in the EU is processed outside the EU and extends to the so-called OTT communication providers (over the top). These are service providers that deliver content, services or applications over the Internet without the direct involvement of a network operator or internet service provider. Examples of such service providers are globally known Skype, WhatsApp, Google, Spotify and Netflix. The implementation mechanisms of the GDPR Regulation would also apply to the new Regulation.[39]

4. CHALLENGES OF PROCESSING PERSONAL DATA FOR THE PURPOSE OF PROFILING AND PERSONALIZED ADVERTISING ON THE INTERNET

Along with the development of digital marketing and personalized advertising, the concern of users about their privacy on the Internet also grew. The collection of data on the Internet had to be legally regulated so that users would have additional security.

4.1. Processing of personal data through cookies

The term "cookies" refers to a text file that certain internet servers save on a computer or mobile phone when visiting web pages. "Cookies" are managed by the Internet browser. Cookies are small text files that websites place on your device while you are browsing. They are processed and stored by your web browser. In and of themselves, cookies are harmless and serve crucial functions for websites. Cookies can also generally be easily viewed and deleted. However, cookies can store a wealth of data, enough to potentially identify you without your consent. Cookies are the primary tool that advertisers use to track your online activity so that they can target you with highly specific ads. Given the amount of data that cookies can contain, they can be considered personal data in certain circumstances. When people complain about the privacy risks presented by cookies, they are generally speaking about third-party, persistent, marketing cookies. These cookies can contain significant amounts of information about your online activity, preferences, and location. The chain of responsibility (who can access cookies' data) for a third-party cookie can get complicated as well, only heightening their potential

[39] *Handbook on European Data Protection*, *op.cit.,* note 10, p. 336.

for abuse. GDPR is the most comprehensive data protection legislation that has been passed by any governing body to this point. However, it only mentions cookies directly once, in Recital 30.[40] The processing of personal data through cookies in the legislative framework of the European Union is prescribed by the Directive on e-Privacy and the Directive on Universal Services. In the Republic of Croatia, the directives were implemented in the Electronic Communications Act (further: ZEK).[41]. By provision of Article Art. 43, paragraph 4 of the ZEK it is stipulated that the use of electronic communication networks for data storage or for access to already stored data in the terminal equipment of subscribers or service users is allowed only in the event that the subscriber or service user has given his/her consent, after receiving clear and complete notification in accordance with special regulations on the protection of personal data, particularly on the purposes of data processing. This cannot prevent the technical storage of data or access to data solely for the purpose of transmitting communications via an electronic communications network, or, if necessary, for the purpose of providing information society services at the express request of subscribers or service users. The legal basis for the collection of personal data using cookies, which are stored on the user's computer/terminal equipment, is the user's consent, which should be in compliance with the provisions of the GDPR, Article 4, Paragraph 1, Point 11, which defines consent as any voluntary, in particular, informed and unequivocal expression of the wishes of the subject by which s/he consents to the processing of personal data relating to him/her by a statement or a clear affirmative action. In the judgment of the Court of the European Union in case C-637/17[42] the court established guidelines for consent that are considered valid and a pre-selected checkbox on a website does not constitute valid consent. Thus, the consent must be active and explicit, given for each of the separate purposes, so that it should not be interpreted differently depending on whether it is personal or non-personal data and it cannot be implied that the consent was given by undertaking some other activities. Direct marketing and tracking consumer behavior (profiling) are key tools that a company can use to sell its product or service.

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40 „Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them."

41 Official Gazette no. 76/22.

42 Court of Justice of the European Union, Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v. Planet49 GmbH, Case C-673/17, para. 66-71. [https://eur-lex.europa.eu/legal-content/hr/TXT/?uri=CELEX:62017CC0673] Accessed 2 February 2024.

4.2. Profiling

Technological development in the field of electronic communications and information and communication technologies has made it possible to identify, monitor and analyze user behavior by storing data generated by the use of electronic communications and communication services.[43] The GDPR defines profiling as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects related to an individual, in particular to analyze or predict aspects related to work performance, economic condition, health, personal preferences, interests, reliability, behavior, location or movement of that individual.[44] Network identifiers on user devices leave traces of user activity on the Internet which, especially in combination with unique identifiers and other information received by servers, can be used to create profiles of individuals and identify them. The most common form of profiling is based on the so-called "tracking cookie" technology, where the cookie is stored on the user's terminal equipment. The first step in profiling is data collection using tracking technologies.[45] The second step of profiling is creating a user profile. Collected data is analyzed using statistical correlation software that creates profiles by combining these data through the analysis of specific patterns of behavior.[46] Using cookies, user behavior is monitored (for example, which internet content the user prefers), with the aim of creating marketing ads that would be interesting and attractive to a certain user.

4.3. Personalized (targeted) advertising

The emergence of the Internet enabled more efficient and cheaper advertising to a wide range of users. Marketing, as a process of continuous activity that constantly adapts to economic, socio-economic, ecological, political and other trends, takes on new forms in its development, one of which is direct marketing, which was created as a result of a new approach to market business focused on the individual who wants his/her personality to be respected.[47] For successful targeted advertising, it is important to collect data about potential and current consumers in order to create a quality database and use it for a successful targeted advertising

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43 Gumzej, N., *Challenges of the digital environment for personal data privacy and security*, Društvo i tehnologija 2014., p. 707.

44 Article 4., par. 4. GDPR.

45 Kamara, I.; Kosta, E., *Do Not Track initiatives: regaining the lost user control*, International Data Privacy Law, vol. 6., Issue 4, 2016, p. 6.

46 Kamara,; Kosta, *op.cit.*, note 29, p. 7.

47 Sudar, Kulčar, M., *Zaštita privatnosti i sigurnosti pohranjenih podataka s osvrtom na izravni (direktni) marketing,* Politička misao, vol. XLII, 2005., no. 4, p.105.

campaign.[48] Their behavior whether captured during a sales call , or measured at-scale by an activity like a web site visit, represents an incredible moment of insight for the marketer savy enough to listen closely and act on that information.[49] An example of targeted advertising is a situation when an advertiser requests from a social network to display an ad to respondents who meet certain criteria (age, gender, place of residence) at a specific time of day. The social network uses the personal data of its users to develop criteria that allow the advertiser to direct the ad to potential users.

4.4. Legal regulation of cookies for processing personal data for the purpose of profiling and behavioral advertising

The use of cookies is regulated in the EU by the provisions of The e-Privacy Directive from 2002, which, as mentioned earlier, was significantly amended in 2009. The provisions of both Directives were transposed into the national legislation of the Republic of Croatia via ZEK. That's how the so-called cookie rule contained in the provision of the article. 43, paragraph 4 of the ZEK.[50] Installing cookies and reading already stored information about an individual on the terminal equipment may only be done with consent and prior clear information that the data will be collected and for what purpose, and in accordance with regulations on personal data protection. Only cookies that are technically necessary for the development of communication between the user's terminal equipment and the Internet site he visits or for the provision of a service at the user's request are exempt from consent.[51] Cookies exempt from consent are mainly "user input" cookies, authentication cookies, security cookies, media player session cookies, load balancing session cookies, and cookies for sharing user content on social networks via social network plugins[52]. Installing cookies and reading already stored information about an individual on the terminal equipment may only be done with his/her consent and

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48 *Ibid.*

49 Walters, D., *Behavioral Marketing: Delivering Personalized Experiences at Scale*, New Jersey, 2015, p. 3.

50 "The use of electronic communication networks to store data or to access data already stored in the terminal equipment of the end user or users is permitted only in the case when that end user or user has given his consent, after receiving clear and complete notification in accordance with the regulations on protection of personal data, especially on the purposes of data processing. This cannot prevent the technical storage of data or access to data solely for the purpose of carrying out the transmission of communications via an electronic communication network, or, if necessary, for the purpose of providing information society services at the express request of the end user or users."

51 *A cookie guide for micro, small and medium-sized businesses*, Agency for the Protection of Personal Data (AZOP), 2022, p. 4. [https://azop.hr/wp-content/uploads/2022/01/Vodic-za-kolacice.pdf], Accessed 3 February 2024.

52 *Ibid.*

prior clear information that the data will be collected and for what purpose, and in accordance with the regulations on personal data protection. Only cookies that are technically necessary for the development of communication between the user's terminal equipment and the Internet site they visit or the provision of services on the Internet site at the user's request are exempt from consent.[53] Pursuant to the provisions of The e-Privacy Directive and ZEK, if a cookie from a group of cookies for which consent is not requested [54] processes personal data, it is necessary to provide the user/respondent with information about the processing of personal data in accordance with the principle of "legality, fairness and transparency" of the GDPR.[55] According to Recital 47 of the GDPR, the processing of personal data for direct marketing purposes may fall under clause of legitimate interest.[56] Likewise, in Case C-131/12[57], the European Court of Justice took for granted that economic interests are legitimate interests[58]. GDPR stipulates that consent must meet all the conditions stipulated in Article 7 of the GDPR and, among other things, it must not be conditional. It must be explained to the user in clear and simple language what scope of personal data will be collected and for what purpose, and enable him/her to decide for him/herself whether s/he consents to the processing of that scope of data or not. According to the GDPR, consent should be given for each type of cookie according to their functionality separately, i.e. consent cannot be unified for all types of cookies.[59] The user has the right to withdraw the given consent in the same (simple) way.[60] The user also has the right to object to the processing of personal data by submitting an objection,[61] especially if the profiling is done for the purpose of direct marketing.[62] The user, therefore, cannot object to profiling when the legal basis for the processing of consent is the

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53 *Ibid.*

54 Cookies that are technically necessary for the communication between the user's terminal equipment and the Internet site he visits or the provision of a service on the Internet site at the user's request do not require consent, such as "User input" cookies, authentication cookies, user-oriented security cookies, multimedia player session cookies, load balancing session cookies, cookies for sharing user content on social networks via social network plugins.

55 A cookie guide for micro, small and medium-sized businesses, *op.cit.*, note 35, p.7.

56 Recital 47. GDPR: „The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest. "

57 Case C-131/12, Google Spain,13 May 2014, ECLI:EU:C:2014:317, [https://curia.europa.eu/juris/document/document.jsf;jsessionid=70B5FAE5A59EBF9E4D3284E3D55099C9?text=&docid=138782&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=543544]3,Accessed 25 May 2024.

58 Case C-131/12, para. 81.

59 A cookie guide for micro, small and medium-sized businesses, *op.cit.,* note 35, p.8.

60 Art. 7. par 3. GDPR.

61 Art. 21. GDPR.

62 Art. 21., par 2. GDPR.

execution of a contract or another basis, which excludes a significant number of cases of profiling.[63] Unlike profiling, it is possible to object to data processing for the purpose of direct advertising regardless of the legal basis of data processing.[64] If the respondent lodges an objection, personal data may no longer be processed for this purpose.[65]

5. CASE *META PLATFORMS AND OTHERS V. BUNDESKARTELLAMT*

Probably the most famous and most used social network today, Facebook, which is managed by the Meta concern, also provides an online advertising service and is thus financed. It is about targeted advertising that is adapted to individual users of the social network with regard to their consumer habits, interests, age, gender or some other personal characteristics, data about which is collected through cookies, text records that the terminal equipment of Internet users, in this case social network Facebook leaves you access to the specified network each time. The collected data enable the automated creation of detailed profiles of network users (profiling). In addition to the data that users directly provide during registration, the Meta concern also collects other data about said users and their devices, not only within Facebook but also outside of it, and then connects them to Meta's various user accounts. Insight into the huge amount of data collected in this way makes it possible to draw conclusions about the user's preferences and interests. The legal basis for this way of collecting user data was the usage contract with which users access the Facebook social network. Namely, when registering, which is necessary for using the Facebook social network, the user accepted the terms of use regarding the use of data and cookies. Meta has for years collected and processed data on user activities outside of Facebook, for example, visits to other websites and applications that are connected to Facebook, or owned by Meta, such as, for example, WhatsApp[66]. The German Federal Office for the Protection of Market Competition[67] in 2019 prohibited Meta from collecting and processing "off Facebook" data of Facebook users residing in the territory of the Federal Republic of Germany without consent. An adjustment of the general conditions of use was

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63 Kramar, Kosta, *op.cit*., note 29, p. 20.

64 Mišćenić, E., *et al., Europsko privatno pravo - posebni dio*, Školska knjiga, Zagreb, 2021, p. 321.

65 Art. 21, par.3. GDPR.

66 Case C-252/21 Meta Platforms *et al.*. (general terms of use of the social network) ECLI:EU:C:2023:537 7, paras. 27. and 28.

67 German Federal Office for the Protection of Market Competition (Bundeskartellamt), an independent higher federal authority, based in Bonn, assigned to the Federal Ministry for Economic Affairs and Climate Action. The authority's task is to protect competition in Germany.

also requested so that it clearly follows from them that the specified off Facebook data will not be collected, linked to the user's Facebook accounts or used without consent. The German Federal Office for the Protection of Market Competition considered that the user's consent is not valid if giving it is a condition of using the social network. Meta's data processing practice, according to the German Federal Office for the Protection of Market Competition, represents an abuse of the dominant position of the Meta concern in the market of online social networks. Meta's data processing practice, according to the German Federal Office for the Protection of Market Competition, represents an abuse of the dominant position of the Meta concern in the market of online social networks. Companies within the Meta concern filed a lawsuit with the German High Land Court in Dusseldorf, refuting the conclusions of the German Office for the Protection of Market Competition. The High Land Court has sent a request to the European Court of Justice for a preliminary ruling with a number of questions concerning the interpretation of the GDPR. Regarding the question whether the national competition protection authority can supervise the compliance of data processing with GDPR requirements, the European Court of Justice gave an affirmative answer, however, the decision of the competition protection authority is limited only to the needs of determining the abuse of a dominant position and imposing measures to stop this abuse in accordance with the rules of competition law.[68] Regarding the protection of personal data and Facebook's collection and processing practices, the Court of Justice of the European Union clarified that the fact that the user visits websites or uses applications in no way means that the user gives consent to the collection of a category of special data in the sense of the GDPR.[69] The same applies when the user enters data on these pages or in these applications or when he selects the options contained on these pages or these applications, unless s/he has previously expressly expressed his/her choice that the data relating to him be publicly available to an unlimited number of people.[70]. When it comes to non-sensitive data, the Court of Justice of the European Union examined whether the collection of data is covered by the justifications provided for by the GDPR, which enable their processing without the consent of the data subject. Such a practice can only be justified under the condition that data processing is objectively necessary.[71] Thus, the Court of Justice of the European Union made it clear in its judgment that the

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68 Sudar, Kulčar, *op.cit*, note 47, para. 62.

69 Art. 9. GDPR: "The processing of personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership is prohibited, as well as the processing of genetic data, biometric data for the purpose of unique identification of an individual, data related to health or data about sex life or sexual orientation of the individual."

70 *Op.cit.*, note 47, par. 84.

71 *Op.cit.*, note 47, par. 125.

personalization of advertising financed by Facebook cannot justify the processing of data if there is no valid and voluntary consent of the subject.[72] Consortium Meta, in accordance with the judgment of the European Court, at the end of 2023 introduced a new subscription model in accordance with GDPR rules. So from October 2023, Facebook and Instagram users have the option to choose a paid version of the subscription or continue using Facebook for free on the condition that their personal data is used, as before, for personalized advertising created by profiling based on the habits of Facebook users. Shortly after the introduction of the new subscription model, the European Union of Consumers (BEUC), the umbrella association of consumer protection organizations at the European Union level, and the non-profit organization European Center for Digital Rights filed separate complaints with the European Commission, Consumer Protection Cooperation Network and with the Austrian data protection authority[73] dissatisfied with the actions of the Meta consortium. They believe that Meta's new subscription model is in violation of GDPR rules because the choice made by users cannot be considered free. Also, Meta is breaching EU consumer law by using unfair, deceptive and aggressive practices, including partially blocking consumers from using the services to force them to take a decision quickly, and providing misleading and incomplete information in the process.[74] In accordance with Article 7 of the GDPR, the processing of personal data is based on consent. Consent must be given freely and voluntarily. [75] When assessing the voluntariness of consent, it is taken into account whether the performance of the contract, including the provision of the service, is conditioned by consent for the processing of personal data that is not necessary for the performance of that contract.[76]

6. CONCLUSION

Today we live in a 'disclosure society' characterized by 'a new political and social condition of radical interpersonal relations and a new virtual transparency that is

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72 *Op.cit.*, note 47, par. 154.

73 Austria: NOYB files complaint against Meta over 'pay or okay' subscription model, [https://www.dataguidance.com/news/austria-noyb-files-complaint-against-meta-over-pay-or], Accessed 14 February 2024.

74 Consumer groups file complaint against Meta's unfair pay-or-consent model [https://www.beuc.eu/press-releases/consumer-groups-file-complaint-against-metas-unfair-pay-or-consent-model] Accessed 14.02.2024.

75 Art. 7. par. 2. GDPR: „If the respondent gives consent in the form of a written statement that also refers to other issues, the request for consent must be presented in such a way that it can be clearly distinguished from other issues, in an understandable and easily accessible form using clear and simple language. Any part of such a statement that constitutes a violation of this Regulation is not binding."

76 Art. 7. par. 4. GDPR.

redesigning our social landscape and transforming the notion of privacy.[77] The increasingly rapid development of digital technologies and new possibilities for processing and using personal data are the reasons why more and more users are expressing concern about the privacy of their personal data. A special concern for the security and privacy of users' personal data arises when the widespread practice of collecting personal data of users of social networks for the purpose of profiling and behavioral advertising. However, as pointed out, in the user's behavior we can very easily see the 'so-called the privacy paradox, i.e. the discrepancy between the declared expression of a high concern for privacy and the simultaneous manifestation of behavior that shows lack of concern for privacy, especially on the Internet and social networks.[78] In an increasingly digitally interconnected world, social media platforms will continue to have a profound impact on the private and public lives of their users, wielding such a significant and complex species of "digital dominance".[79] The social network Facebook has 3 billion monthly users, while Instagram has 2 billion.[80] Meta current changes to its service in the EU which require Facebook and Instagram users to either consent to the processing of their data for advertising purposes by the company or pay in order not to be shown advertisements, is unfair and illegal. The millions of European users of Facebook and Instagram deserve far better than this. Meta is, allegedly, breaching EU consumer law by using unfair, deceptive and aggressive practices, including partially blocking consumers from using the services to force them to make a decision quickly, and provide misleading and incomplete information in the process. Consumer protection authorities in the EU should spring into action and force the tech giant to stop this practice. The company's approach also raises concerns regarding voluntary user consent according to GDPR rules.[81] In our opinion, a data protection friendly online environment in the context of data collection for profiling and targeting purposes, should consist of, at least, the available and easily accessible no data collection choice. Moreover, such an option should be made preselected. It should also be possible, we believe, to have this choice recorded,

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77 Pavuna, A., *Paradoks privatnosti: empirijska provjera fenomena*, Politička misao, god. 56, no. 1, 2019., p. 154.

78 Pavuna., *op.cit*., note 59, p. 132.

79 Burton, O.; Ding, J. T., *Digital Dominance and Social Media Platforms: Are Competition Authorities Up to the Task?* International Review of Intellectual Property and Competition Law, Volume 54, pp. 527–572., 2023, p. 565.

80 Rodriguez, S., *Instagram surpasses 2 billion monthly users while powering through a year of turmoil*, [https://www.cnbc.com/2021/12/14/instagram-surpasses-2-billion-monthly-users.html], Accessed 3 February 2024.

81 Consumer groups file complaint against Meta's unfair pay-or-consent model, [https://www.beuc.eu/press-releases/consumer-groups-file-complaint-against-metas-unfair-pay-or-consent-model], Accessed 15 February 2024.

so that users do not need to repeat their choice selection every time they access the website. The majority of users online do not have the needed competence, or patience and enough time to understand data protection options to make the choice that would fit their preferred level of data protection online. If the law only provides broad principles about consent being informed and free, it will only continue to favor powerful data controllers, who rely on legal interpretations and technological solutions that only fit particular interests. In our opinion, more specific regulation in this particular field is required. Normative regulation of personal data protection will be more challenging with the development of artificial intelligence, which will set new technical frontiers and legal challenges and uncertainties. In that sense, development of the legal framework for personal data protection with implementation of the main legal principles for access, collection and personal data processing need to be adjusted to implementation of new AI technology solutions. The processing and analyzing of personal data, which will be powered by AI technological solutions, are becoming an additional legal challenge in the European regulation of personal data protection. The possibility of implementation AI technological solutions in collecting, processing and analyzing data are huge. That opens up the need for additional regulation of the personal data protection framework and appropriate implementation of the main principles for AI technological solutions, according to the risk based approach regulated by the Artificial Intelligence Act.

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THE RULE OF LAW IN SPATIAL PLANNING AND BUILDING

Mateja Held, PhD, Associate Professor
University of Zagreb Faculty of Law
Trg Republike Hrvatske 3, 10000 Zagreb
mateja.held@pravo.unizg.hr

ABSTRACT

As stated in the Venice Commission Report, the rule of law embraces several aspects, such as legality, legal certainty, prevention of abuse (misuse of powers), equality before the law and non-discrimination, and access to justice. Stability and consistency of law and legitimate expectations as a part of legal certainty are key factors in every democratic country. However, even for countries where democratic standards are highly developed, achievement of all aspects of the rule of law can be a challenge.

Areas such as spatial planning and building are very dynamic in their core. However, this should not be an obstacle for stable and long-term regulation. Western democracies are characterized by the long-lasting acts and other regulation in building and spatial planning. Croatia, however, has constant changes in the basic regulation covering mentioned areas. For example, in issuing a building permit, the procedure can be so long lasting that all the relevant regulation may change in the meantime. This affects the investor, the owner of the property and possibly infringes their constitutional rights. Since the issuing of a building permit is in the area of administrative law, the aim of this paper is to analyse which constitutional rights may be affected during frequent changes of basic regulation. The other aim is to research and analyse whether national bodies and courts protect constitutional guarantees in administrative proceedings, and if not, what are the reasons for such practice.

This paper is divided into five sections: background and regulatory framework, the rule of law in spatial planning and building, right to a fair trial, protection of property in administrative matters, and conclusion.

Methodology used in this paper is normative, comparative, teleological and deductive. The research includes relevant regulation and available domestic and case law of the European Court on Human Rights. Paper is based on domestic and international documentation issued by relevant bodies, such as European Commission Reports, Venice Commission Report, etc. Teleological method is used for interpretation of the regulation and deductive method for the conclusion. Teleological method is used also for recommendations regarding a better application of the principle of the rule of law.

Keywords: *administrative law, building, protection of property, rule of law, spatial planning*

1. BACKGROUND AND REGULATORY FRAMEWORK

All democratic states, institutions, as well as international organizations and European Union are directing their procedures in compliance with the rule of law. European Commission Report on the Rule of Law in its introduction refers to the basic values of the European Union, such as human rights, democracy, and the rule of law.[1] The rule of law is a *"bedrock of the Union's identity, and a core factor in Europe's political stability and economic prosperity"*.[2]

On the international level, the Venice Commission[3] established few criteria as a checklist for the compliance with the rule of law, and those are: legality, legal certainty, the prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law.[4]

During the 1990-ies, Croatia established regulatory framework in physical planning and building. Since then, regulatory framework was changed several times[5] by enactment of new acts. Physical planning and building were in the period from 2007 to 2013 regulated in one single act. Since 2013, Croatia has normatively separated those areas by adoption of the Physical Planning Act as well as the Building Act (hereinafter: BA). All mentioned acts have one thing in common - they were amended more than once. On the 1st of January 2023, Croatia also adopted the

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1 European Commission Report on the Rule of Law, 2021, available at: [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52021DC0700&from=EN], Accessed on 3 April 2024.

2 European Commission Report on the Rule of Law, 2023, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0800], Accessed on 3 April 2024. The 2023 Rule of Law report examines rule of law developments in Member States under four pillars: justice, anti-corruption, media freedom and pluralism, and broader institutional issues related to checks and balances.

3 European Commission for Democracy through Law (Venice Commission) is the Council of Europe's advisory body on constitutional matters. It provides legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. The Commission has 61 member states: 46 Council of Europe member states and 15 other non-European members. More on Venice Commission available at: [https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN], Accessed 5 April 2024.

4 Council of Europe, Parliamentary Assembly, Venice Commissions „Rule of Law Checklist", available at: [http://www.europeanrights.eu/public/atti/Resolution_2187_ENG.pdf], Accessed on 3 April 2024.

5 The first Physical Planning Act was enacted in 1994 (Official Gazette No. 30/1994, 68/1998, 35/1999, 61/2000, 32/2002, 100/2004). Next Physical Planning and Construction Act was adopted in 2007 (Official Gazette No. 76/2007, 38/2009, 55/2011, 90/2011, 50/2012, 55/2012). Current Physical Planning act was adopted in 2013 (Official Gazette, No. 153/13, 65/17, 114/18, 39/19, 98/19, 67/23). Current Building Act was adopted in 2013 (Official Gazette, No. 153/13, 20/17, 39/19, 125/19). It is important that those acts are legal basis for the by-laws in physical planning and building. By-laws were also changed. Overview of the adoption of physical planning and building regulatory framework see: Held, M.; Perkov, K., *Spatial Planning in the EU and Croatia under the Influence of COVID-19 Pandemic,* EU and Comparative Law Issues nd Challenges Series (Eclic) – Issue 6, Osijek, 2021, pp. 599-601.

Ordinance on Spatial Plans.[6] Ordinance on Spatial Plans introduces a new feature in spatial planning, whereby all spatial plans should be created in a so-called *ePlan* module. The aim of the mentioned module is "to facilitate, modernize, unify and digitalize the procedures for creating spatial plans in Croatia, to enable the establishment of platforms and digital infrastructure services to improve the provision of electronic public services, and to reduce the burden on citizens, business entities and investors".[7] Also, there is a new obligation for all local self-government units in Croatia, whereby they are obliged to register into the module and use it for the procedure of the adoption of spatial plans.[8]

Spatial plans in Croatia are not only strategic documents, but also the implementing regulations. The term 'implementing regulations' means that they are a basis for issuing of building permits, location permits, and other individual acts in spatial planning and building area.[9]

2. THE RULE OF LAW IN SPATIAL PLANNING AND BUILDING

In the relevant literature on the rule of law and spatial planning, authors from the common law jurisdictions examine whether the area of spatial planning should be regulated by law and in which way. In one paper, one of the basic research question was: "*in what ways law is indeed fundamental to the exercise of planning and what the rule of law might actually mean for those of us engaged in envisioning the future of our cities*".[10] In the context of this paper an important difference between documents on spatial planning in common law and continental jurisdictions may be emphasised: in continental legal systems, spatial plans are legal documents and they „*could be challenged at law in a way that British local plans could not be*."[11] Authors in continental jurisdictions examine how to achieve better regulation of the spatial planning and building due to its interdisciplinarity, vertical and horizontal compliance of norms.

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6 Ordinance on Spatial Plans, Official Gazette, No. 152/2023. The possibility for enactment of ordinance on Spatial Plans existed in Physical Plans since 2013 Article 56/3, Official Gazette, No. 153/13). It took 10 years for its enactment.

7 See more on the following website: [https://mpgi.gov.hr/UserDocsImages/17365], Accessed 8 April 2024.

8 Those plans are so called „the new generation spatial plans". See article 3 and 48 of the Ordinance on Spatial Plans.

9 According to Žagar, the most frequent act issued by local units is location permit (Žagar, A., *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, No. 1, 2018., p. 688. See also Article 114/2 of the Physical Planning Act).

10 Booth, P., *Planning and the Rule of Law*, Planning Theory and Practice, Vol. 17, No. 3,1-17, p. 1. Available at: [https://www.researchgate.net/publication/303596922_Planning_and_the_rule_of_law], Accessed 3 April 2024.

11 *Ibid.,* p. 2.

Although various aspects may be considered under the concept of the rule of law, they have one thing in common: "*belief that the rule of law is fundamental to ensuring that the rights of citizens are respected and that the good order of society as a whole is maintained.* "[12] In the common law jurisdictions flexibility prevails, while in continental legal systems much more attention is given to legal certainty. Of course, both flexibility and legal certainty is present to a degree in both groups of legal systems.[13]

In continental legal systems, spatial planning and building as interdisciplinary areas should be regulated by one basic law. In most European countries, spatial plans are established on three levels.[14] Although there is an exigence to comply with the requirements of the rule of law, one should bear in mind that it is impossible to regulate every situation in society.[15] Therefore, educated civil servants are of a great importance for the well-functioning of the whole physical planning system. Civil servants are implementing basic laws in the area of spatial planning and building. Since the procedures of the implementation of spatial plans are in the first place administrative procedures,[16] civil servants and officials working in local govern-

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12 *Ibid*., p. 4.

13 Buitelaar, E.; Sorel, N., *Between the rule of law and the quest for control: Legal certainty in the Dutch planning system*, Land Use Policy, Vol. 27, Iss. 3, July 2010, pp. 983-989.

14 In most European countries, there are three levels of spatial planning, state, regional, and local level (Nadin, V., *et. al.*, *Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe*, (COMPASS), final report, 2018, p. 17, [https://www.espon.eu/sites/default/files/attachments/1.%20COMPASS_Final_Report.pdf], Accessed 26 March 2024.
In certain European countries, acts regulating spatial plans have divided function – strategic or implementing. According to Physical Planning Act in Croatia, spatial plans comprise both functions. Božić suggests that spatial plans of state and regional level should have strategic function, while implementing function should be assigned to local spatial plans. Otherwise, regional plans regulate space in too much details, while local plans such as urbanist plans, are too general (Božić, N., *Dobar zakonodavni okvir preduvjet je održivog i uređenog prostora*, Mjera, Vol. 3, No. 4, p. 34-35).

15 For example, in the Republic of Croatia, there is a total of 555 units of local self-government, namely 428 municipalities and 127 cities and 20 units of regional self-government, i.e. counties. The city of Zagreb, as the capital of the Republic of Croatia, has the special status of a city and county, so all together there is a total of 576 units of local and regional self-government in the Republic of Croatia (data available at the official website of the Ministry of Justice and Administration of the Republic of Croatia: [https://mpu.gov.hr/o-ministarstvu/ustrojstvo/uprava-za-politicki-sustav-i-opcu-upravu/lokalna-i-podrucna-regionalna-samouprava/popis-zupanija-gradova-i-opcina/22319], Accessed 5 April 2024.
All local units are authorised for spatial and urban planning (Article 19 of the Local Self-government Act, Official Gazette, No 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20, hereinafter: LSGA). However, only large cities have in its jurisdiction the issuing of building and location permits and other acts connected with building and implementation of the documents of the physical planning for the area of a county outside the area of a large city (Article 19a of the LSGA).

16 Physical planning is a part of administrative law that could affect property rights of the citizens. See in Žagar, A., *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, p. 688.

ment units, in sections entitled for physical planning and building, have to be educated in the area of the administrative law. They have to understand the basic rules in administrative procedure and other institutions of the administrative law, such as: the principle of legality, the rule of law, hierarchy of norms, etc. Additionally, it is desirable, and perhaps even necessary in the constantly evolving area of spatial planning and building, that civil servants have an additional education in the mentioned area.[17] They need to respect the constitution and relevant international legislation, such as European Convention on Human Rights (hereinafter: ECHR),[18] regardless of the fact if there is an exclusive provision in the Physical planning or building act to protect, for example, the right to a property in the administrative procedures or not.[19]

Analysis of the courts' practice shows that the disputes in the area of spatial planning and building are mostly focused on the protection of two basic rights – *a right to a fair trial* and on *the protection of property*. For the purpose of this paper, the analysis embraced the case law of the administrative courts, Constitutional Court of the Republic of Croatia, and case law of the European Court on Human Rights (hereinafter: ECtHR).

3. RIGHT TO A FAIR TRIAL

3.1. General Remarks on the Situation in Croatia

Building permit is an administrative act regulated in articles 106 – 127 of the Building Act. The principle of legality in spatial planning and building procedures is guaranteed in the administrative acts,[20] according to which it has to be delivered on basis of the law, other regulations and general (normative) by-laws.[21] According

[17] On the importance of the additional education of civil servants see in: Vukojičić Tomić, T.; Lopižić, I., *Usavršavanje službenika u Hrvatskoj i odabranim zemljama – novi trendovi*, in: Marčetić, G.; Vukojičić Tomić, T.; Lopižić, I. (eds.)., Normalizacija statusa javnih službenika- rješenje ili zamka? Zagreb: Institut za javnu upravu, 2019, pp. 69-100.

[18] European Convention on Human Rights, Offical Gazette – International Agreements, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17.

[19] On professionalism in administration and other factors affecting level of quality of public servants see for example in: Koprić, I.; Marčetić. G., *Obrazovanje upravnog osoblja: iskustva i izazovi*, Hrvatska javna uprava, vol. 4, No. 3-4, 2002, pp. 515-566; Giljević, T., *Upravni kapacitet hrvatskih ministarstava: između profesionalizacije i politizacije,* Zagrebačka pravna revija, Vol. 4, No.1, 2015, pp. 207-229.

[20] Regarding the problem of legal interest in the procedures of issuing of building permits more in: Josipović, T., *Zaštita vlasništva u postupku izdavanja lokacijske dozvole i građevinske dozvole*. in: Galić, A. (ed.) Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, 2022, pp. 105 - 111.

[21] Article 5/1 of the General Administrative Procedure Act, Official Gazette, No. 47/09, 110/21.

to the Building Act, illegal building exists when there is no final building permit, or at least a building permit with executive effect.[22,23]

The building permit is also an implementing act.[24] It is issued and based on spatial plans, which according to the provision of Article 58/1 of the Physical Planning Act (hereinafter: PPA), are secondary legal regulations. The spatial plans have to be in accordance with the PPA. Spatial plans contain a textual part, a graphic part, and an explanation, including the purpose of the space, the designation of a construction land and land on which construction is not permitted.[25]

Spatial plans in the Republic of Croatia, as in most European countries, are divided into three levels: state, regional and local. However, in Croatia there is also a large number different types of spatial plans at each individual level, and that distinguishes Croatia from most other European countries.[26] Large number of spatial plans at each individual level led to a particular regulations of this issue articles 61 and 123 of the PPA.

Furthermore, at the beginning of 2023, the Ordinance on Spatial Plans entered into the force,[27] and it was added into the range[28] of acts with which the implementing acts should comply. Although the question of complexity of the process of adopting spatial plans is beyond the scope of this paper, it is necessary, for the sake of an overall context, to note that the time dimension of the validity of spatial plans is also very important.[29] Time dimension arises especially when the issue of compliance of the building permit with the spatial plan is at stake. Case law dif-

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22 'Final' permit refers to the moment in the procedure when it becomes impossible to challenge the building permit with regular legal remedies (an appeal) in administrative procedure before a higher administrative body. (See article 13 of the GAPA). Building permit with executive effect can be challenged through an appeal before higher administrative body. It presents a legal basis for the administrative body for the execution of the obligation towards the party in the administrative procedure (Articles 133-139 of the GAPA).

23 Article 106/1 of the Building Act, Official Gazette, No. 153/13, 20/17, 39/19, 125/19 (hereinafter: BA).

24 See Article 114 of the Physical Planning Act, Official Gazette, No. 153/13, provisional translation in English available: [https://mpgi.gov.hr/UserDocsImages/dokumenti/Propisi/Physical_Planning_Act.pdf], Accessed on 26 March 2024.

25 Article 54 of the PPA.

26 See in: Krtalić, V., *Sustavi planiranja razvoja države, regionalnog i lokalnog planiranja - usporedba hrvatskoga i njemačkoga, odnosno bavarskoga sustava*, Hrvatski inženjerski savez, 2021, pp. 36-40.

27 Ordinance on Spatial plans, Official Gazette, No. 152/2023.

28 At this point it is difficult to talk only about the hierarchical structure of acts in the field of spatial planning and construction. This term seems more appropriate to express the range of acts with which the implementing acts should be harmonized.

29 Regarding time dimension of physical planning see more in: Elgendy, H., *Development and Implementation of Planning Information Systems in collaborative spatial planning processes*, Dissertation, 2003, pp. 34-35.

fered regarding the issue of whether the building permit should be in accordance with the spatial plan that was in force at the time of the application, or with the spatial plan that was valid at the time when the building permit was delivered to the party and began to produce legal effects. These doubts should be resolved by amendments to the PPA in Article 122/4. Analysis of time dimension and its effects towards the principle of the rule of law is discussed later in the paper.

3.1.1. Some Reasons for Long Lasting Procedures as a Violation of the Access to Justice

Long lasting procedures and uneven practice regarding the issuing of building permits represent an obstacle to the achievement of the principle of legality and the rule of law.[30] For example, problems in Croatia arise from the interpretation and determination of the moment for the beginning of the procedure for issuing a building permit: during inspection procedures[31] or during the procedures of the legalization of the buildings.[32] Other issues arose in practice as well.[33]

When implementing the procedure for issuing building permits, public bodies are obliged to comply with the GAPA. However, certain problems can arise due to the different interpretation of the Article 42 of the GAPA.[34] For example, the question can arise regarding the determination of the precise moment of beginning of the procedure for issuing a building permit - so the question is does administrative procedure begin on the day the proper request is submitted to the public body, or does it begin when the public body initiates the procedure.[35] If the exact moment

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30 Regarding the violation of the proper length of the proceedings for the issuing of building permits see, for example, the ECtHR Judgement *Hellborg v. Sweden*, application No. 47473/99, 2006, paragraphs 57-60.

31 For example, Decision of the Constitutional Court U-IIIA-2877/09 from the 23rd of May 2012, regarding a violation of the reasonable time guaranteed in the article 29/1 of the Constitution of the Republic of Croatia, Official Gazette, No. NN 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

32 For example, Decision of the Constitutional Court U-IIIA-1258/2017 from 27th June 2017.

33 The Constitutional Court of the Republic of Croatia changed its practice regarding the reasonable length of the administrative procedure in its Decision U-IIIA-4885/2005 from the 20th of June 2007. Before the mentioned decision, the Constitutional Court considered only the reasonableness of the duration of the court proceedings before the Administrative Court and did not take into account the duration of the previous administrative proceedings. Today, the duration of the administrative dispute should be taken into account together with the duration of the previous administrative procedure in the same administrative matter, since the length should be counted from the day when the "dispute" in the sense of Article 6, paragraph 1 of the Convention arose, meaning after the appeal to the second instance administrative body (see paragraph 4 of the U-IIIA-4885/2005 from the 20th of June 2007).

34 GAPA is a *lex generalis* in all administrative procedures, including the issuing of the building permit.

35 The question also arises in practice, regarding the question how a proper request looks like. According to the procedure described on the website of the Ministry of Physical Planning, Construction and State

is not correctly determined, problems associated with the calculation of many important deadlines may arise.

The GAPA unequivocally stipulates that the procedure is initiated at the moment of submission of the proper request to the public law body.[36] The process of issuing a building permit itself is a complex process since it includes the *eConference* module.[37] Through it, requirements related to the determination of special terms and conditions of connection are unified. Thereby the investors are released from the obligation to collect individual consents, and this entire procedure is performed by a public body. It should last a maximum of 15 or 30 days. Although the deadline for issuing a building permit is not prescribed by BA, according to the GAPA, it can last a maximum of 30 or 60 days.[38] The procedure for issuing a building permit should not last longer than 60 days from the date of submission of the proper request, regardless of way the request was sent, through the *ePermit* system, or as a classic paper request.[39]

Property (hereinafter: MPGI), following phases of the construction permit issuing procedure are prescribed, p. 71, [https://dozvola.mgipu.hr:9444/pdf/edozvola_upute.pdf], , Accessed: February 14, 2024.
I. Review of the regularity of the request - in this phase, it is confirmed whether the request is regular, meaning it fulfilled all conditions prescribed by the law.
II. Location conditions and inspection
III. eConference
IV. Assessment after the procedure
V. Administrative fee
VI. Issuing of the final act.

36 Article 40/2 of the GAPA.

37 The *eConference* is a module of the Information system of physical planning, regulated in articles 31, 32 and 33 of the PPA (herinafter: ISPU system, https://ispu.mgipu.hr/#/, accessed: 14 February 2024). More on the ISPU system and in general on digitalization in the spatial planning and building see in: Held, M., *Digitalization of procedures in spatial planning and construction law in Croatia,* EU and comparative law issues and challenges series, Digitalization and Green Transformation of the EU, Vol. 7, 2023. The *eConference* module was introduced by amendments to the Spatial Planning Act and the Construction Act from 2019, and through it, it is possible to submit, collect and process the documentation necessary for issuing building permits [https://mpgi.gov.hr/eu-sufinanciranja/ispu-i-razvoj-e-usluga/13752], Accessed 14 February 2024.

38 See Article 101 of the GAPA.

39 However, in practice, there are examples where public law bodies (despite explicit legal provisions) after the deadline for holding the *eConference* state that they did not give their consent, i.e. confirmation of the main project, which entails the illegality of the building permit. For example, in a survey conducted by the Croatian Chamber of Architects, it was stated that public law bodies do not respond to the eConference and do not respect the legal procedure (see the most common problems in the operation of the system 2, in: Architects' satisfaction with the ePermit system, survey research 2020, [https://www.arhitekti-hka.hr/files/file/pdf/2020/Zadovodstvo%20arhitekata%20sustavom%20e-dozvola.pdf], Accessed 14 February, 2024.

Here it is important to mention that in Croatia buildings could be legal even if there was no building permit. There is an *Ordinance on simple and other buildings and works*[40] which regulates which building does not have to have building permit, and a 'simple building' can be interpreted in many ways in practice. There is a doubt as to whether it is a building for which it is necessary to obtain a building permit, or whether it is a simple building that is regulated by the Ordinance, and whether it includes also a building in a reconstruction process.[41] For example, in a case that was conducted before the Administrative Court in Split, the court rejected the claimant's request for compensation for the costs of the dispute because she carried out a reconstruction for which a building act was not obtained.[42]

Most of the questions are about whether the construction of an object is included in those situations for which it is not necessary to obtain a building act. One decision of the Administrative Court in Split is illustrative in this regard, where the court rejected the plaintiff's claim that a building falls within the scope of the Ordinance on simple buildings and works,[43] and that it is not necessary to have a main project for it.[44]

3.2. Legal Certainty in Spatial Planning and Building

In Croatia, basic laws in spatial planning and building are changing frequently.[45] Spatial plans on the local level should change more often than basic law, and in that way they could protect legality and of the citizens' rights. It is obvious that law should respond to social changes.[46]

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40 Ordinance on simple and other buildings and works, Official Gazette, No. 112/17, 34/18, 36/19, 98/19, 31/20, 74/22, 155/23.

41 According to the Article 3, paragraph 1, point 28, 28. of the BA *the reconstruction* of a building is the performance of construction and other works on an existing building that affect the fulfilment of the basic requirements for that building or that change the compliance of that building with the location conditions in accordance with which it was built (extension, upgrading, removal of the external part of the building, performance of works to change the purpose of the building or technological process, etc.), i.e. performance of construction and other works on the ruins of the existing building.

42 Judgement of the Administrative Court in Split, 2 UsIgr-421/2020-7 from the 31st of May 2021.

43 Judgement of the Administrative Court in Split 5 UsIgr-511/15-6 from the 10th of February 2017.

44 Compare article 3 of the Ordinance which prescribes the possibility of construction without a building permit and the main project and Article 4, which prescribes the possibility of construction without a building permit, but in accordance with the main project.

45 See footnote 6 of this paper.

46 Rosidi, R.; Handayani, G. K. R.; Karjoko, L., *Legal Relationship and Social Changes and Their Impact on Legal Development*, Advances in Social Science, Education and Humanities Research, volume 2021, available at: [https://www.researchgate.net/publication/355464768_Legal_Relationship_and_Social_Changes_and_Their_Impact_on_Legal_Development/fulltext/61718c6d766c4a211c0868d3/Legal-Relationship-and-Social-Changes-and-Their-Impact-on-Legal-Development.pdf], Accessed 8 April 2024.

In practice, however, the situation is the other way around. Local plans are stable, and they do not follow requests of contemporary society, while basic laws are changing constantly. In some jurisdictions there is an obligation for the state to regulate maximum validity of plans on local level up to ten years.[47]

There is no such an obligation for local representative bodies in Croatia.[48] As a consequence, some extremely outdated local plans are completely out of touch with general demands of nowadays society, particular contemporary circumstances, and consequently with the request of principle of the legality. Of course, current structure of the system of local self-government is a problem in itself, especially when it comes to numerous local units on relatively small territory such as Croatia.[49]

Transparency of public administration is also relevant in this context. Adoption of spatial plans involves a special procedure which involves public discussion.[50] An additional problem is that there is a lot of spatial plans on the same level.[51] It is almost impossible to follow all those rules for those who are implementing spatial plans and issuing all kinds of permits. They have no other option, but to work according to the legal norm that is unresponsive to social changes and completely out of date in the context of the requests of nowadays society.

3.2.1. Stability and Foreseeability of the Law

The Venice Commission in the Report on Rule of Law on stability and consistency of law states that "Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations. "[52]

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47 For example for see Netherlands see in: Buitelaar, E., Sorel, N., *Between the rule of law and the quest for control: Legal certainty in the Dutch planning system*, Land Use Policy, Volume 27, Issue 3, July 2010, pp. 983-989.

48 Local representative bodies are authorised for the adoption of local spatial plans. See Article 73 of the LSGA Local spatial plans are general acts (by-laws). (See Article 58 of the PPA). According to the article 12/3 of the Administrative Disputes Act (Official Gazette, no. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21) High Administrative Court is entitled to control their legality.

49 Koprić, I., *Zašto i kakva reforma lokalne i regionalne samouprave,* Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration, Vol. 15, No. 4, 2015, pp. 993–998.

50 See article 94 of the PPA. On the public participation in the procedure of the adoption of spatial plan see more in: Staničić, F. *Sudjelovanje javnosti i pristup pravosuđu u procesima prostornog planiranja*, Zbornik radova Veleučilišta u Šibeniku, Vol. 11, No. 1-2, 2017, pp. 31-52.

51 Krtalić, V., *op.cit*, note 26, p. 40.

52 Venice Commission Report on the Rule of Law, p. 16.

Also, on foreseeability of the law it states: „ Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it ".[53]

In spatial planning and building, due to frequent changes of legislation and slow administration procedure, a time gap between the submission of the request of the building permit and its issuing occurs, which sometimes lasts for years. Therefore, citizens cannot be sure which spatial plan is relevant for issuing implementing acts such as building or location permit.

Nowadays, this issue is regulated in Physical planning Act in articles 114, 122 and 188.

In article 122/4 it is stated:

(4) The act for the implementation of the spatial plan is issued in accordance with the spatial plan valid on the date of submission of the application for its issuing, or in accordance with the spatial plan valid on the date of issuing of the act for the implementation of the spatial plan if the applicant so requests.

In article 188/3 it is stated:

(3) Exceptionally from paragraph 2 of this article, in procedures that are completed according to the provisions of the Spatial Planning and Construction Act ("Official Gazette", no. 76/07, 38/09, 55/11, 90/11, 50/12 and 55/12) Article 122, paragraph 4 of this Act applies.

Based on the research of the analysis of the Constitutional Court's case law, the previously mentioned time gap between the moment of the request and the moment of issuing of building permit still exists.

Citizens seek protection in cases regarding issuing of location permit[54] or building permit. In the case U-III-4588/2014 from the 13th of September 2017, an applicant requested an issuing of location permit before administrative bodies.

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53 Venice Commission Report on the Rule of Law, p. 15.

54 Issuing of location permit is in certain cases precondition for the issuing of the building permit. Previously, citizens were obliged to ask issuing of the location permit for each building. Exceptions were made only for few types of buildings in article 104 of the Act on Physical Planning and Building. There were two separated procedures prior the issuance of location permit. More on that topic in Josipović, 2022 and Žagar, 2018. In current PPA, location permit is regulated in article 125, for the certain types of interventions in the space.

Both levels of administrative bodies[55] denied it.[56] High Administrative Court accepted the complaint, but the State Attorney of the Republic of Croatia started the procedure before the Supreme Court of the Republic of the Croatia, based on the article 78 of the Administrative Disputes Act.[57] Supreme Court modified the High Administrative Court Judgment and denied the request of an applicant.[58]

The matter of the dispute was which spatial plan should be implemented[59] in certain circumstances, the plan which was valid at the moment of the request[60] or the plan which was in force at the time of the issuing of the location permit.[61] The request was submitted in 2006 while new spatial plan entered into the force in 2007. Constitutional Court in its decision U-III-4588/2014 from 13th of September 2017 repeated the guarantees of fair trial[62] which are applied also on the administrative dispute.[63] It affirmed that it is the role of the Constitutional Court to examine whether the whole procedure before administrative bodies and courts was conducted in a way that the right of a fair trial was guaranteed to an applicant.

In the settled case law of the Constitutional Court in the questions of the spatial planning and building, of relevance is the spatial planning act which was in force when the procedure ended, and the permit was issued or request was denied. This is also because new bylaws cannot be applied to circumstances which occurred prior to its entering into force.[64]

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55 On the first level, Administrative Department of Physical Planning of the Split-Dalmatian County, branch office in Trogir was entitled, and on the second level Ministry of the Environment Protection, Physical Planning and Building was entitled.

56 See paragraph 1 of the Decision U-III-4588/2014 from the 13th of September 2017 of the Constitutional Court.

57 The State Attorney, on the proposition of the parties, has a right to demand of the Supreme Court to request legality of the final judgements of the administrative courts on both levels (Article 78 of the Administrative Disputes Act). This extraordinary remedy and its more comprehensive regulation in the Articles 139 – 143 of the new Administrative Disputes Act will enter into the force on 1 of July 2024.

58 Paragraph 1 of the Decision U-III-4588/2014 from 13th of July 2017.

59 Spatial plans are implemented, among others, through building and location permit (Article 114/2 of the PPA).

60 Spatial plan from 2002.

61 Spatial plan from 2007.

62 See more on the fair trial in ECtHR practice in *Guide on Article 6 of the European Convention on Human Rights,* 2022, https://www.echr.coe.int/documents/d/echr/guide_Art_6_eng Guide, accessed on 5 April 2024.

63 The Constitutional Court refers to its Decision U-III-1001/2007 from the 7th of July 2010.

64 Decision U-III-4588/2014 from the 13th of September 2017, paragraph 12.

However, the Constitutional Court notices that regulation was changed in 2014, and that relevant spatial plan is the spatial planning act that was in force when the procedure before administrative bodies has started.[65]

4. PROTECTION OF PROPERTY IN ADMINISTRATIVE MATTERS

Spatial planning and building is an interdisciplinary area. It consists of various branches of law, in the first place administrative law and civil law.[66] Protection of property belongs to civil law, but it is also a constitutional guarantee, stipulated in the article 48/1 of the Constitution of the Republic of Croatia.[67] Such arrangement of the property protection gives citizens a right to examine the violation of the property protection before administrative bodies and administrative courts, as well as before ordinary civil courts.[68] ECHR guarantees both of the mentioned rights.[69]

4.1. Protocol 1 Article 1 of the European Convention on Human Rights

Protocol 1 Article 1 of the ECHR[70] consists of two paragraphs.[71] In this research focus is on the article 1 paragraph 2, where the state is entitled to intervene into a personal right to property if public interest to do so exists.[72] In the European Court on Human Rights (hereinafter: ECtHR) case law, special attention is given to the balance of public and private interest in cases when public authority in the

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65 Decision U-III-4588/2014 from the 13th of September 2017.

66 Nikišić, S.; Rajčić, D., *Uvod u građevinsko pravo*, Hrvatska Sveučilišna naklada, Zagreb, 2008.

67 Article 48/1 of the Constitution of the Republic of Croatia.

68 See in Ernst, H. *Posebno stvarnopravno uređenje za građevinska zemljišta*, in: Gavella, N. (ed.) Stvarno pravo – posebna stvarnopravna uređenja 2011, p. 93. See articles 26, 162, 166 and 167 of the Property Act,

69 Article 6 of the ECHR – right to a fair trial and article 1 of the Protocol 1 of the ECHR.

70 ECtHR connects legitimate expectations with the Protocol 1 - Article 1 of the ECHR (paragraph 7/4 of the Decision of the Constitutional Court, U-IIIB-1373/2009 from 7 July 2009, and paragraph 51 of the *Pine Valley* Developments ltd and others v. Ireland, application no. 12742/87).

71 1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Article 1 of the Protocol 1 of the ECHR).

72 While deciding whether there was a violation of Article 1 of the Protocol 1of the ECHR, Court had examined following questions: firstly, lawfulness and purpose of the interference and then proportionality of the interference (paragraphs 57-59 of the *Pine Valley Developments ltd and others v. Ireland*, application no. 12742/87).

procedure of spatial planning intervenes into the property rights. Even before ECtHR was established as a single body, it was giving a special attention to a balance of public and private interest.[73]

In connection with the spatial or 'land' planning,[74] European Court on Human Rights, ECtHR was deciding on violation of the Protocol 1 Article 1 of the ECHR in certain cases. General conclusion of the ECtHR on cases regarding Protocol 1 Article 1 in connection with urban and spatial planning was that state has wider margin of appreciation than in situations where only civil rights of the citizens are included.[75] That is in accordance with the prevailing relevance of the public interest in those cases. Another conclusion is that building on the one's land can be submitted to various building restrictions.

However, the ECtHR emphasized that the public authorities in cases concerning spatial planning and property rights have an important role in the preservation of the rule of law in a certain country. Their obligation is to comply with the judgments of the national courts.[76] If administrative bodies fail in this task, "the guarantees enjoyed under Article 6 by a litigant during the judicial phase of the proceedings are rendered devoid of purpose ".[77]

In certain cases, applications were declared inadmissible, even where absolute prohibition of building existed.[78] In some cases, the ECtHR declared objections on violation of the Protocol 1 Article 2 inadmissible, since applicants invoked violation on the Protocol too early, and when there were no legal presumptions in connection to the right to property which entitled them to do so.[79]

The ECtHR noticed: "difficulties in enacting a comprehensive legal framework in the area of urban planning constitute part of the process of transition from a

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73 For example (although not in the area of spatial planning and building, in case *AGOSI vs United Kingdom i*n paragraph 52 on application of the Protocol 1, ECtHR stated: „The Court must determine whether a fair balance has been struck between the general interest in this respect and the interest of the individual or individuals" Judgement *AGOSI vs United Kingdom*, application No. 9118/80, 1986).

74 See paragraph I. called 'Land Planning' in the Guide on Article 1 of Protocol No. 1 – Protection of property, p. 70.

75 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70, available at: [https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG], Accessed on 29 March 2024.

76 Paragraph 71 of the Judgement *Gorraiz Lizarraga and Others v Spain*, application No. 62543/00, 2004.

77 Paragraph 71 of the Judgement *Gorraiz Lizarraga and Others v Spain*, application No. 62543/00, 2004.

78 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70.

79 See paragraph 76 of the Decision *Gurdulić and Others vs Croatia*, application No. 5076/09, 2014, paragraph 68 of the Judgement *Štokalo v Croatia*, application no. 15233/05, 2008.

socialist legal order and its property regime to one **compatible with the rule of law**[80] and the market economy – a process which, by the very nature of things, is fraught with difficulties. However, these difficulties and the enormity of the tasks facing legislators having to deal with all the complex issues involved in such a transition do not exempt the Member States from the obligations stemming from the Convention or its Protocols".[81]

In cases of spatial planning and building, the ECtHR examines whether public bodies violated property rights. In a wider context, expropriation can be considered as a part of urban or spatial planning. For example, the state may have plans for some other use of certain land, in public interest, but contrary to its current use.[82] Of course, in such cases citizens have right to compensation.

In that context, ECtHR is following certain rules when deciding whether there was violation of the Protocol 1 Article 1 of the ECHR: "*As the Court has reiterated on a number of occasions, Article 1 of Protocol No. 1 contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest."*[83]

4.2. Protection of Property as a Constitutional Right in Administrative Dispute in Croatia

Importance of balancing between public and private interest is emphasised on the national level as well. In Croatia, Physical Planning Act contains the principle[84] of achieving and protection of public and individual interest.[85] According to the case

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80 Emphasized by the author.

81 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70. See for example Judgement *Schirmer v Poland*, application No. 68880/01, 2004.

82 See article 50 of the Constitution of the Republic of Croatia.

83 Judgement, *Scordino v. Italy*, application no. 36813/97, 2006, p. 78.

84 See article 7, p. 4. of the PPA. See also Article 6 of the GAPA.

85 Principle of achieving and protection of public and individual interest is in connection with the article 7, p. Article 11 of the PPA:
(1) In order to achieve the goals of spatial planning, competent state administration bodies, bodies and persons designated by special regulations and bodies of local and regional (regional) self-government units judge and coordinate with each other the public interest and individual interests that they must respect in the performance of spatial planning tasks, whereby individual interests must not harm the public interest.

law of the Constitutional Court of the Republic of Croatia, in accordance with the mentioned principle, the location and position of the building must be determined in such a way that, within the framework of valid spatial planning documentation, a fair balance is achieved between the requirements of the general interest of the community and the requirements for the protection of individual rights."[86]

When it comes to the area of spatial planning and building, namely annulment of the final building permit, it is important to mention the Decision of Constitutional Court of the Republic of Croatia U-IIIB-1373/2009 from the 7th of July 2009. Constitutional Court in this Decision provides guidelines for all administrative bodies and legal remedies in administrative procedures when legal certainty as a part of the rule of law is at stake: „ …there is also the necessity of respecting the rights that the parties have acquired after the administrative procedure in which an administrative act was adopted recognizing those rights. Respecting, or guaranteeing the realization of these rights, is an expression of the principle of legal certainty, as an integral part of the broader principle of the rule of law, and the basis of every democratic legal order."[87]

Josipović mentions "confrontation of the public and private interest is very often in spatial planning and building area, i.e. spatial planning interests are confronted to private rights and interests of landowners and holders of other rights on land".[88]

Before 2019, administrative bodies and administrative courts were not dealing, at least not in the most suitable way, with the protection of the property in the spatial planning and building. When citizens objected that right to a property was violated, administrative bodies and administrative courts were addressing citizens to seek protection before civil courts.[89] One of the possible reasons for such practice was interpretation of the regulation of some basic institutes and the view that certain institute does not have effect on a right of property.[90]

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(2) The public interest is protected by demarcating space for public purposes by applying appropriate spatial norms and spatial standards from other spaces, considering that all users, as far as possible, bear the burden of demarcation equally.

86 Paragraph 10.1 of the Ruling of the Constitutional Court U-I-1957/2019 from the 20th of October 2020.

87 Paragraph 11.3/3 of the Decision of Constitutional Court of the Republic of Croatia U-IIIB-1373/2009 from the 7th of July 2009.

88 Josipović, T., *Usklađenost javnog interesa i privatnih interesa u postupcima prostornog uređenja,* paper about to be published in a volume by the Croatian Academy of Sciences and Arts, 2024.

89 See also Josipović, T., *Usklađenost javnog interesa i privatnih interesa u postupcima prostornog uređenja,* paper in the procedure of publishment in Croatian Academy of Sciences and Arts, 2024.

90 *The decision on determining the building plot has no legal effects on ownership and other real rights on the real estate for which it was issued* (article 158/3 of the PPA, Official Gazette, No. 153/13, 65/17, 114/18, 39/19, 98/19, 67/23).

For example, article 107/2 of the BA regulates effects of building permit in this way:

Building permit does not have legal effects on the property[91] and other real rights on the real estate for which is issued, and it does not present legal basis for entrance into the possession of the real estate.

Since the Constitutional Court of the Republic of Croatia issued its decision U-III-5095/2017 on the 3rd of December 2019, the situation has changed. The Constitutional Court emphasized that arguments presented by the competent authorities disregarded Article 3 of the Constitution of the Republic of Croatia. Administrative bodies and administrative courts are obliged to examine whether there was violation of the constitutional right to property.

Even prior to 2019, the Constitutional Court established a test[92] which all courts and bodies involved in decisions on human rights should follow. The test includes a consideration of the following questions:

1. The competent authority/court should examine whether an asset in question falls within the reach of the protection of the guarantee of ownership rights prescribed in Article 48, paragraph 1 of the Constitution;
2. the competent authority/court should examine whether the interference with the guarantee of property rights is based on law;
3. The competent authority/court should examine whether the requested interference tends to achieve a legitimate goal;

Decision on legalisation does not have effects on property and other real rights on the building for which is issued and land where the building was built (article 32 of the Act on Legalization of the Illegal Buildings, Official Gazette, No. 86/12, 143/13, 65/17, 14/19).

91 Emphasized by the author.

92 The Constitution contains three separate rules related to the constitutional regulation of ownership:
- the first rule, in Article 48, Paragraph 1 of the Constitution, is of a general nature and prescribes the guarantee of ownership rights;
- the second rule, contained in Article 50, Paragraph 1 of the Constitution, governs confiscation or limitation of ownership, which will not be considered constitutionally impermissible if it is prescribed by law, if it is in the interest of the Republic of Croatia and if compensation for such confiscation or limited ownership is ensured and paid in the market value of confiscated or restricted assets;
- the third rule, contained in Article 50, Paragraph 2 of the Constitution, recognizes the legislator's authority to limit ownership rights (and entrepreneurial freedoms) by law in order to protect certain constitutional values or protected constitutional goods that the constitution maker considers so important that he subsumes them under state or general interests community (protection of interests and security of the Republic of Croatia, nature, human environment and people's health), without the obligation to pay any compensation (Decision of the Constitutional Court U-IIIB-1373/2009, Official Gazette, No. 89/09)

4. The competent authority/court should examine whether the goal being achieved is proportionate to the proposed interference.

The Constitutional Court concluded that administrative bodies and administrative courts, by not considering the relevance and importance of the raised complaint about the right of ownership of part of the disputed building plot, and due to the fact they rejected objection as unimportant for the matter in question, violated property right guaranteed by Article 48, paragraph 1 of the Constitution in connection with the right to a fair trial guaranteed by Article 29, paragraph 1 of the Constitution (the right to ownership in its procedural aspect).[93]

Violation of property was at stake also in other Constitutional Court's case law, where it concluded that there was no violation of property rights. For example, in the Decision U-III-3128/2019 from the 8th of December 2022, the applicant had a problem with the water runoff from the neighbouring land. In the procedure of issuing of building permit there were no irregularities. The administrative court stated that "when issuing a building permit, in accordance with the aforementioned provisions of the Act, it is determined whether the main project was created in accordance with the conditions for the implementation of interventions in the area". The High Administrative Court referred applicants to protect their right to property through the building inspection procedure. On the first sight, that is an understandable solution. However, it should be noted that applicants as the first neighbours of the land in question do not have a right to be a party in the procedure of building inspection. They can initiate procedure before the building inspection, but they do not have the position of a party in the administrative procedure.[94] This provision thus excludes, for example, the right to appeal, as well as other important procedural rights of the parties in the administrative procedure. However, applicants highlighted there was violation of their property.

In other words, obligation of the administrative bodies and administrative courts is to examine the objection of the constitutional right to property guaranteed in article 48/1.

5. CONCLUSION

The rule of law is emphasized in relevant documents at national, international level, and in the European Union as the highest value in every democratic society. The basic requirements of the principle of legality demand that laws are in ac-

[93] Decision of the Constitutional Court of the Republic of Croatia, U-III-5095//2017 on the 3rd of December 2019, paragraph 39.

[94] See article 105 of the State Inspectorate Act, Official Gazzete, no. 115/18, 117/21, 67/23, 155/23.

cordance with the constitution, and all other acts should be in accordance with the constitution and the law. Regulatory framework guarantees individual rights to the citizens. However, it could also impose certain restrictions which should be regulated by the law. This is particularly evident in spatial planning and building, as a discipline where public interest and private interest are confronted. The task of the public administrative bodies and administrative courts is to find a balance between public and private interest, in each individual case.

Research has shown that, in the area of spatial planning and building, ECtHR emphasizes the balance of public and private interest mostly in its case law regarding the Protocol 1 Article 1 of the ECHR. In those cases, applicants pointed out the violation of the property in procedures regarding land planning. ECtHR in the land planning area gives explanation that state authorities have greater margin of appreciation when land planning is at stake, in comparison to the cases in which courts decide on the violation on the right to property where there is no public interest included.

Based on the research, certain suggestions can be given for improvement and the greater achievement of the rule of law in Croatia. On the first place, administrative bodies should harmonize certain procedural questions such as the beginning of the procedure of the issuance of the building permit. In that way, a party in administrative procedure could be certain when procedure starts, which positively effects on the domestic and foreign investments in Croatia. Altogether will create the environment of legal certainty which is an aspect of the rule of law.

Another suggestion refers to foreseeability of the law through more stable spatial plans on state level. Various kind of experts should be included in the process of the preparation of spatial plans. Additional suggestion is to consider setting maximum time duration of local plans up to five or maximum ten years. In that way, state level spatial plans will be more stable, and investors will be able to plan in which moment they can ask for building permit without getting into the time gap of the validity of 'old' and 'new' local spatial plans.

Another important way of achieving the principle of the rule of law is education of civil servants. If there is an objection regarding the right to property, they should not ignore it. They have to be in touch with the constant changes of the evolutive rights of owners[95] in spatial planning and building, and to stay open for additional education in the area of administrative law and spatial planning. Civil servants should be open for new challenges such as digitalization and application of the artificial intelligence in spatial planning and building.

[95] See Guide on the Article 1 of Protocol No. 1of the ECHR.

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